



TO: MAYOR AND MEMBERS OF CITY COUNCIL
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DATE: October 25, 2005
SUBJECT: 2005 THIRD QUARTER LITIGATION REPORT

The following is the quarterly report of pending litigation and other matters of interest. **The accomplishments during the third quarter of 2005 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. Troy v. Papadelis and Papadelis v. Troy - This is a case filed by the City against Telly's Nursery, seeking to enjoin the business from using the northern parcel for commercial purposes. After a lengthy appellate history, an order was entered in the Oakland County Circuit Court, requiring compliance on or before April 29, 2002. The Papadelis family failed to comply with the court's order, and therefore a Contempt Motion was filed. Oakland County Circuit Court Judge Colleen O'Brien determined that the defendants were in contempt of court, and required them to pay \$1,000 to the City of Troy. However, the court also determined that the defendants were in compliance with the City of Troy zoning ordinances as of the date

of the court decision. The Troy City Council authorized an appeal of this decision to the Michigan Court of Appeals. It was filed on September 27, 2002. The neighbors filed an application for leave to appeal, which was denied by the Michigan Court of Appeals on 2/10/03. After receiving criminal citations from the City for expansion of the business, Papadelis filed a federal lawsuit against the City of Troy, alleging civil rights violations and seeking an injunction against the prosecution and/or further expansion. The neighboring property owners filed a Motion to Intervene, which was granted by Federal US District Court Judge Arthur Tarnow. Troy filed a counterclaim in the Federal Court case but it was dismissed by Judge Tarnow, who refused to exercise jurisdiction over the counter-complaint, since it would require him to interpret the opinion of the Oakland County Circuit Court Judge. Troy has subsequently filed two separate motions to dismiss the Papadelis complaint. One of the motions asserted the same jurisdictional claim that was raised against the counter-complaint. The Court granted Troy's motion based on jurisdictional issues and dismissed the case without prejudice. The court did not rule on the other motion, but instead, directed the Papadelises to re-file their case in state court. The Papadelis family then re-filed its lawsuit in Oakland County Circuit Court. **Troy filed an answer and a counterclaim. Troy also immediately filed a motion for summary disposition seeking dismissal of the complaint and a judgment in favor of Troy. The counterclaim seeks an order requiring the Papadelis family to remove two greenhouses and other structures that have been built upon the property without approvals that are required under the zoning ordinance. The Court scheduled an early intervention conference (settlement conference) for October 18, 2005. The Court will also be setting the hearing date for the Motion for Summary Disposition.**

2. Williams et. al v. City of Troy and Ken Freund- Some of the residents in the Middlesex Country Homesites Subdivision filed this lawsuit against the City and developer Ken Freund. The lawsuit challenges that the City of Troy improperly approved the Freund Site Condominium project without requiring an official re-plat of the property. The Troy City Council granted preliminary approval of the site condominium plan on March 3, 2003. Each of the parties filed a Motion for Summary Disposition. On 9/3/03, Judge Kuhn heard oral arguments from all parties on the Motions for Summary Disposition. On 3/24/04, the Court entered an order that holds that a re-plat is not required for site condominium developments. This resulted in the Court granting Summary Disposition in favor of the City on Counts I and II of the Plaintiffs' Complaint. However, Judge Kuhn failed to rule on Count III, a violation of substantive due process allegation. The City then filed a Supplemental Brief asking for dismissal of Count III. Judge Warren (who succeeded Judge Kuhn) granted the City's Motion for Summary Disposition and entered an Order closing the case on May 25, 2005. **The Plaintiff then filed a Claim of Appeal with the Michigan Court of Appeals. The Court of Appeals placed this matter on its new fast track**

procedure, since all issues were decided by summary disposition at the trial court level. All parties have submitted briefs to the Court of Appeals, and await the Court's scheduling of oral arguments and/or a written decision.

3. Rathka v. City of Troy – This lawsuit was filed by Roy Rathka, Jr. and concerns property he owns on Canham, a gravel drive located south of Square Lake Road and west of Livernois Road. Mr. Rathka claims he was wrongfully denied a building permit to build a duplex on Canham. The permit was denied pursuant to Section 40.10.01 of the Troy Zoning Ordinance that requires proposed building in one or two family residential districts to front on a public street that has been accepted for maintenance by the City. The City filed a motion for summary disposition, which was granted on 6/21/04. On 6/28/04, Plaintiff filed an appeal of the dismissal to the Michigan Court of Appeals. Rathka filed three motions for an extension of time to file his appellate brief. The first two motions were granted, but the last motion was denied. Rathka then filed a motion to hold the appeal in abeyance to allow him to pursue settlement negotiations with the City. The court granted the motion and held the case in abeyance for 90 days. However, the case was not resolved in that period. Rathka therefore proceeded with the appeal by filing his brief on appeal. **Troy has filed its responsive brief, and the Court will schedule a date for oral argument.**

4. Piscopo v. Troy, et al – In this lawsuit, the Plaintiffs Paul and Louise Piscopo challenge a decision made on April 19, 2005 by the Troy Board of Zoning Appeals (BZA). The BZA determined that Mr. and Mrs. Piscopo should not have been issued a permit for their 6000 square foot garage, which is located at 3129 Alpine. The BZA decision was initiated by an appeal filed by George Reed, Betty Reed, and Thomas Krent, which challenged the decision to issue a building permit for the structure. In reaching its decision, the BZA issued an interpretation of Section 04.20.01 of the zoning ordinance, holding that accessory structures, as defined by that section, must be smaller than the ground floor area of the main building. The garage on Alpine exceeds the ground floor area of the residence (the main building). Upon receiving notification of the BZA decision and the new restrictions for the structure, Mr. and Mrs. Piscopo filed this lawsuit. In addition to appealing the BZA decision, the lawsuit also seeks equitable and declaratory relief. George Reed, Betty Reed and Thomas Krent are also named as defendants. **Defendants Reed and Krent filed a motion to dismiss Piscopo's claims for equitable and declaratory relief against them (Counts II and III). The Court granted this Motion, and the case is proceeding on the appeal only (Count I). The parties have all filed briefs, and the hearing is scheduled for early 2006. Troy is requesting the Court affirm the decision of the Board of Zoning Appeals, as well order the Piscopos to revise the garage to comply with the BZA decision.**

5. **Gerback v Troy, et al** –The lawsuit stems from City Council’s denial of a requested re-zoning of a 2.74 acre parcel of property, located on the west side of Rochester Road, south of Trinway. The property is currently zoned R-1C (one family residential). Plaintiff unsuccessfully sought to re-zone the property to R-1T (one family attached residential). Plaintiff argues in his complaint that the denial of the requested re-zoning was “arbitrary and capricious,” and fails to advance a legitimate government interest. Count I of the complaint alleges a denial of substantive due process, and argues that the denial of the rezoning bears “no reasonable relationship to the health, safety and welfare of the public of Troy.” Count II asserts an equal protection claim, where Plaintiff argues that it has been treated less favorably than other owners of “similarly situated” property, since properties of greater depths have received the requested R-1T zoning. The complaint seeks an injunction that “prevents the City of Troy from interfering with Plaintiff’s proposed use of the property.” Troy has filed an answer, affirmative defenses and a motion for summary disposition, which is scheduled for November.

6. **Gerback (as a member of 300 Park Venture, L.L.C.) v Troy** – This lawsuit was filed August 25, 2005, but it was not served on Troy until September 20, 2005. The case involves a parcel consisting of .892 acres located on the northwest corner of Rochester Road and Marengo that is presently zoned R-1B, One Family Residential. Plaintiff filed an application to rezone the property to B-1 for the purpose of developing a Binson’s Home Health Care Center. The Planning Commission voted to recommend that City Council deny the rezoning. On August 1, 2005, City Council postponed the decision on the rezoning request until the first meeting in March 2006 to allow for the Planning Commission to consider amending the Future Land Use Plan in the Rochester Road Corridor between Square Lake Road and South Boulevard before making a decision on the rezoning request. In count I of the complaint, the Plaintiff contends City Council has breached a clear legal duty by refusing to act on Plaintiff’s Rezoning Request. He seeks a writ of mandamus requiring City Council to act on the rezoning request “within a reasonable time period, not to exceed twenty-one (21) days.” Counts II and III allege City Council has effectively denied the rezoning request by the postponement. He argues that such denial constitutes a violation of Plaintiff’s right to substantive due process (count II) and the right to equal protection under the law (count III). In both counts II and III, Plaintiff seeks an injunction that prevents Troy “from interfering with Plaintiff’s proposed use of the Property.”

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.

1. Parkland Acquisition (Section 36)

Troy v. Premium Construction, L.L.C. – The City has filed this lawsuit against Premium Construction, L.L.C. (John Pavone and Mukesh Mangala) to acquire property for a park in Section 36. After a prolonged discovery process, a bench trial began on February 22, 2005. The Court had to interrupt the bench trial proceedings with a number of other matters, including criminal jury trials, and had the parties on stand by and/or took limited testimony for several months. The last testimony in the lengthy bench trial was taken on June 10, 2005. After the testimony, the Judge required the parties to submit post-trial “Finding of Facts and Conclusion of Law” and a summary Memorandum, which were timely submitted by July 13, 2005. Replies to those briefs are due July 20, 2005. **The parties are now anxiously waiting for the Judge’s decision. It is unknown when the decision will be rendered.**

2. Big Beaver Improvements – Rochester to Dequindre

Troy v Saoud & Nidhal Jamo – The City obtained an Order for Possession and Payment of Just Compensation into Escrow on 1/5/05. The case was filed since the City could not otherwise get clear title, due to a dispute between the mortgage company and the former property owners. As a result, the just compensation was escrowed with the City until a further Court order concerning the disbursement. **The parties stipulated to an Order releasing escrowed funds to Ameriquest Mortgage Company. The parties did not challenge the amount of just compensation, which effectively ended the City’s involvement in the case. However, the remaining parties are still litigating issues concerning the mortgage on the property. Our office will continue to monitor the case, which is still in the discovery phase. Case Evaluation is scheduled for January 3, 2006.**

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 their civil rights were somehow violated by the City and/or the police officers of the City of Troy.

Maria Elena Hunciag v. Troy- This is an alleged employment discrimination case filed on July 1, 2003. According to the complaint, Ms. Hunciag argues that she was denied the position of Troy Museum Curator due to alleged age, gender, and/or national origin discrimination. A Motion for Summary Judgment was filed with the Court,. On January 12, 2005, Judge Victoria Roberts granted the Motion for Summary Judgment and dismissed all federal claims. Ms. Hunciag had also asserted some state law claims, which the Judge dismissed on jurisdictional grounds, since the claims should be adjudicated in state court. The Court's dismissal of the state law claims allowed Plaintiff to file a new complaint in the Oakland County Circuit Court. Ms. Hunciag filed an almost identical state court lawsuit with the Oakland County Circuit Court in April. A motion for summary disposition was filed as the first responsive pleading, based on the discovery that was conducted in the federal action. **On July 20, 2005, Judge Schnelz of the Oakland County Circuit Court dismissed all of Ms. Hunciag's state law claims, and the case is now concluded.**

F. MISCELLANEOUS CASES

1. Catherine Norris and Kathleen Livingway v. City of Troy – This lawsuit is identical to lawsuits filed in 12 other communities in the State of Michigan. The complaint asserted that the revenue paid by cable television companies, pursuant to franchise agreements, constitutes an impermissible tax that is prohibited by the Headlee Amendment. In the Troy case, a motion for summary disposition and a motion for class certification were scheduled for 4/21/04. Prior to a final decision in Troy's case, Plaintiffs filed appeals in the Michigan Court of Appeals against some of the original twelve communities who had received quicker decisions from the circuit court. Troy's suit was then stayed until these appeals were concluded. However, we have participated in a coordinated municipal defense as much as possible. **Oral argument on the appellate cases (including St. Clair Shores, Grand Rapids, Westland, Muskegon, Canton and Livonia) was July 12, 2005. On July 26, 2005, the Michigan Court of Appeals affirmed all of the dismissals in favor of the municipalities. In August, Plaintiff filed an Application for Leave to Appeal with the Michigan Supreme Court. The municipal defendants have filed a formal response to the application, requesting a denial of the application.**
2. Kent Fehribach v. City of Troy – In this lawsuit, there are two challenges to the City's political sign ordinance. Plaintiff is challenging the restriction of placing political signs in residential areas more than 30 days prior to an election and

the two sign per residence limit. Plaintiff filed a motion for a temporary restraining order, which was heard in Judge Gadola's absence by Judge Steeh. Judge Steeh temporarily restrained the City from enforcing the two provisions against the plaintiff until Judge Gadola entered a subsequent order. An Opinion and Order Granting Preliminary Injunction was entered on 10/18/04. The City has filed its answer and affirmative defenses. Meanwhile, amendment of the sign ordinance is underway. Discovery is on-going. The Plaintiff has scheduled Marlene Stuckman's deposition for July 28, 2005. **Troy filed a motion for summary judgment with the Court, arguing that the case was moot after amendments to Troy's sign ordinance. Counter motions were filed by Plaintiff, and the parties are waiting for oral argument and/or a decision from the Court.**

3. Sunset Excavating, Inc. v. MDOT - Sunset has indirectly sued the City of Troy for an alleged change order in the Big Beaver Road Project (from I-75 to Rochester Road). Sunset argues that the unexpected requirement to remove some of the existing soil and replace it with a finer grade of soil justifies an additional \$190,000 in compensation. Since the Project was partially financed with federal funds, MDOT was required to serve as the coordinator of the project, and therefore signed the contract with Sunset Excavating, Inc. As the contracting party, MDOT is actually the named defendant in this lawsuit, even though it is the City of Troy that assumes all liability for the Project. Discovery is scheduled to continue through July 1, 2005. However, Plaintiff has filed a motion seeking additional discovery. A hearing on the discovery motion is scheduled for July 6, 2005. A facilitative mediation was held on June 9, 2005, which did not resolve the case. All motions for summary disposition must be filed prior to case evaluation, which is scheduled in August 2005. If the case is not dismissed or resolved by case evaluation, a trial will be scheduled in the Michigan Court of Claims (Ingham County Circuit Court) after October 1, 2005. **All discovery issues have been resolved, and the parties agreed to extend discovery. Troy, on behalf of MDOT, filed a motion for summary disposition, which was denied by the Court. The case will now be scheduled for case evaluation.**

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