



TO: MAYOR AND MEMBERS OF CITY COUNCIL
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DATE: April 1, 2006
SUBJECT: 2006 FIRST QUARTER LITIGATION REPORT

The following is the quarterly report of pending litigation and other matters of interest. **The accomplishments during the FIRST quarter of 2006 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 has set the hearing date for the Motion for Summary Disposition for January 4, 2006. **Subsequent to the filing of Troy's Motion for Summary Disposition, Plaintiffs' filed a Cross Motion for Summary Disposition, and the hearing was rescheduled for January 18, 2006. On February 17, 2006, the Court entered its written Opinion and Order, dismissing the Papadelis claim for money damages and their claim for injunctive relief. However, the Court also granted Summary Disposition in favor of the Plaintiffs on their claim for declaratory relief, and held that "retail" activity was not occurring on the northern parcel, and that the "agricultural" activities on the northern parcel were protected under the Right to Farm Act. Additionally the Court ruled the Plaintiffs' were exempt from City permitting requirements under the agricultural building permit exemption of the State Construction Code Act. The Court also dismissed the City's counterclaim. Troy has filed an appeal with the Michigan Court of Appeals. Plaintiffs' have filed a cross appeal challenging the dismissal of their claims for money damages and injunctive relief.**

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. **Plaintiff subsequently filed an Application for Leave to Appeal with the Michigan Supreme Court. The City of Troy and Ken Freund both filed Responses to this Application, and the parties are now waiting for a ruling by the Supreme Court on whether leave to appeal will be granted.**

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 filed its responsive brief. The Court of Appeals has scheduled oral argument for January 5, 2006. **On January 17, 2006, the Court of Appeals issued its Opinion that affirmed the City's position, and upheld the dismissal of Rathka's lawsuit.**
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. The Court has scheduled the hearing on the BZA appeal for January 18, 2006. **The parties participated in an extensive oral argument before the Court on January 18, 2006. On January 20, 2006, the Court issued its Opinion and Order, reversing the BZA's determination that Piscopo's garage was in violation of the zoning ordinance.**

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 he 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 filed an answer, affirmative defenses and a motion for summary disposition. In November, this motion was granted in part and denied in part. Plaintiff was granted the opportunity to amend the complaint. **Plaintiff has filed an amended complaint and is essentially raising the same claims that were raised in the original complaint. Plaintiff argues that the R-1C zoning classification is arbitrary and capricious, and it denies him equal protection under the law. The amended complaint, like the original,**

seeks an injunction. The parties have completed the discovery phase, and a trial date has been set. Troy has filed a new motion for summary disposition, which argues that there are no genuine issues of material fact as to any of Plaintiff's claims. The hearing on this new motion is set for May 10, 2006.

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 0.892 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 Council would make 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." In addition to responding to the complaint, Troy also filed an immediate motion for summary disposition, arguing that the Plaintiff had failed to set forth a claim that entitled him to his requested relief. The hearing on this motion is scheduled for January 4, 2006. **After a hearing, the Court granted Troy's Motion for Summary Disposition in part, and dismissed Count I of Plaintiff's complaint that sought a writ of mandamus. As to the other two counts of the complaint, the Court determined there were issues of fact that could only be decided at a trial. The parties are now conducting discovery in preparation for trial.**

7. D & K Hannawa, LLC v Troy –The lawsuit was filed to amend the recorded plat known as Supervisor's Plat No. 23. In order to amend a recorded plat, a lawsuit must be filed and served on all property owners within 300 feet of the proposed development, as well as the state and local government and utility companies. This particular plat is proposed for amendment, since a platted private alley precludes their construction of their proposed building on Lots 1 and 2. Plaintiff D & K Hannawa, LLC is asking that the plat be amended as the first step in vacating the alley.

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 were due July 20, 2005. The parties are now anxiously waiting for the Judge’s decision. It is unknown when the decision will be rendered. After several months, Oakland County Circuit Court Judge Mark Goldsmith requested portions of the transcript of the lengthy trial proceedings. Unfortunately, this request has been unexpectedly delayed, since the transcribing court reporter broke his wrist, and is unable to complete the work himself and/or have others complete it for him. The parties continue to wait for the Court’s decision. **The Court issued his written opinion on February 3, 2006. The Defendants filed a Motion for Attorney Fees, and a hearing on that request is scheduled for April 5, 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 the City and/or police officers of the City of Troy somehow violated their civil rights.

There are no pending civil rights cases at this time.

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. Paul Weill v. City of Troy and Sanctuary Lake Golf Course – This lawsuit was filed on November 11, 2005 as a small claims action in District Court 52-4. Mr. Weill's residence is adjacent to the Sanctuary Lake Golf Course. According to the allegations, someone hit an errant golf ball on the golf course on August 29 2005. Weill alleges that the golf ball hit and damaged his truck, which was parked on his property. He argues that the City of Troy is negligent in the design and/or maintenance of Sanctuary Lake Golf Course. In order to represent the City, our office was granted the request that the case be removed from the small claim docket, and transferred to the District Court civil docket. The City then filed an immediate motion for summary disposition (failure to state a viable claim against the City), which will be heard on January 9, 2005. **At a hearing on March 6, 2006, visiting Judge Batchik granted the motion for summary disposition, and determined that the City was entitled to governmental immunity in its operation of Sanctuary Lake Golf Course. Accordingly, the case has been dismissed.**
2. Carrie Zaroni v. City of Troy, Troy Police Officer Joshua Jones and Sgt. Christopher Stout, City of Clawson, Clawson Police Officers Bigelow and Weston, and Rebecca Roose aka Rebecca Ann Renaud This lawsuit was initially filed as a auto negligence case against Rebecca Ann Roose, who struck Carrie Zaroni with her motor vehicle on Livernois and Woodslee in the City of Troy on August 17, 2003, causing very serious injuries. Plaintiff Zaroni was allowed to amend the complaint to add the City of Troy and its police officers and the City of Clawson and its police officers as co-defendants on November 25 2005. According to the amended complaint, Zaroni argues that the City of Troy and its police officers are at least partially at fault for her injuries. She argues that the officers had contact with her prior to her accident, and should have known that she would be struck by an automobile or otherwise would have been involved in an accident. She had been drinking prior to the accident, and therefore argues that the police officers were obligated to take her into custody or otherwise take some action to prevent the accident. She was not driving at the time of her contact with the Troy police officers, and was not

incapacitated. **In addition to responding to the amended complaint, the City has filed an immediate motion for summary disposition, on the basis that Plaintiff has failed to set forth a viable claim against the City of Troy and/or its police officers. The summary disposition motion will be heard on April 19, 2006.**

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. 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. **The municipal defendants continue to wait for the Michigan Supreme Court to decide if they will grant leave to appeal the cases.**
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 Struckman'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. The Court has scheduled oral argument on the cross motions for summary disposition for January 10, 2005. **In February, Judge Gadola granted Plaintiff's motion for summary disposition. He issued a judgment in favor of Plaintiffs in the amount of \$1.00. In addition, he ruled that Troy's former political sign ordinance was unconstitutional.**

Plaintiff recently filed a motion with the court requesting that the City pay his attorney fees and costs in connection with the litigation. Negotiations regarding attorney fees are ongoing.

3. Sunset Excavating, Inc. v. MDOT - Sunset indirectly sued the City of Troy for an alleged change order in the Big Beaver Road Project (from I-75 to Rochester Road). Sunset argued 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 was then scheduled for case evaluation. Case evaluation was held in November before a special panel of attorneys that specialize in construction litigation. All parties accepted the case evaluation award. Accordingly, the case has been resolved. The appropriate documentation will be prepared and a final order entered with the court dismissing the case. **The case has been settled in accordance with case evaluation. An Order to Dismiss has been entered with the Court.**

4. City of Troy v. Raymond and Linda Winter– The City filed this lawsuit requesting abatement of a nuisance and injunctive relief, after exhausting all other available remedies to get the home habitable. The home is currently posted, since the piles of debris have completely foreclosed entry into the house and into each of the rooms and the staircases in the house. The City is seeking an order to allow us to hire a contractor to open the pathways to the home and inside the home. When the City was unable to serve the Plaintiffs with a copy of the complaint, the Court ordered alternative service on December 8, which allows the City to mail a copy of the complaint by certified mail, as well as affix the Summons and Complaint to their front door. The Defendants then have 28 days to file a response to the Complaint. Defendants filed a response in February. **Council is being asked to consider a proposed consent judgment that was negotiated between our office and the attorneys representing Mr. and Mrs. Winter. Under the terms of this consent judgment, the Winters would abide by an incremental schedule to get each floor of their home in compliance with Troy’s zoning ordinances.**

5. City of Troy v. Ronald Griesmayer– The City filed this lawsuit requesting abatement of a nuisance and injunctive relief at 2766 Rhodes, in the City of Troy. The lawsuit requests injunctive relief in order to get the residence in a habitable state. The homeowner was recently discharged from probation, without making satisfactory progress on his promised clean up of the debris and litter in the home. Troy inspectors report that the unsanitary condition of the home has led to pest infestation, and therefore required the filing of a lawsuit to abate the nuisance. The City was not able to personally serve a copy of the lawsuit on the Defendant. However, the Court did grant our request for an order for alternate service, which allows the City to serve Defendant by certified mail and affix the Summons and Complaint on their front door. The Defendant now has 28 days to file a response to the Complaint. **A default was entered against Mr. Griesmayer for his failure to respond. Shortly thereafter, the property was sold, and the interior of the home has been gutted to allow for necessary improvements. A voluntary dismissal of the case was entered on March 29, 2006.**

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