



TO: MAYOR AND MEMBERS OF CITY COUNCIL
FROM: LORI GRIGG BLUHM, CITY ATTORNEY
 ROBERT F. DAVISSON, ASSISTANT CITY ATTORNEY
 CHRISTOPHER J. FORSYTH, ASSISTANT CITY ATTORNEY
 SUSAN M. LANCASTER, ASSISTANT CITY ATTORNEY
 ALLAN T. MOTZNY, ASSISTANT CITY ATTORNEY
DATE: October 9, 2006
SUBJECT: 2006 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 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. All the required briefs have been filed with the Court of Appeals, which will either schedule an oral argument or will inform the parties that the case will be decided without oral argument. Since this case was assigned to the expedited track for summary disposition appeals, a final decision on appeal is expected before the end of September of this year.

On June 16, 2006, the Building Department discovered that the Papadelis family was erecting a new, large pole barn structure on the property at 3301 John R. Road. This structure was likely in violation of local and/or state law. The Building Department followed the procedure for issuing a Stop Work Order. In addition, our office filed an emergency motion with the Court of Appeals, seeking to enjoin construction of the building pending final outcome of the appeal. On June 21, 2006, the Court of Appeals granted the motion for immediate consideration, but denied the motion to enjoin construction of the building. The denial of the motion has no bearing on the final outcome of this appeal, and if Troy ultimately prevails on appeal, the new building will have to be removed. Despite the issuance of the Stop Work Order, the construction continued on the new building. The Papadelis Family then filed a Motion to hold the City Attorney and the Director of Building and Zoning in contempt of court. In this Motion, the Papadelis family argued that the Circuit Court ruling (Judge Colleen O'Brien) allows the construction of the new building without a permit and without having to comply with the zoning ordinance provisions regulating the size and location of buildings. Judge O'Brien denied this Motion on June 28, 2006, and ruled that her earlier ruling (the ruling on appeal) was limited to the buildings on the property at the time of the ruling, and did not extend to allow for new construction on the site. **On September 19, 2006, the Court of Appeals affirmed the decisions of the Circuit Court. Thus, the Court affirmed the declaratory judgment in favor of the plaintiffs, but it also affirmed the dismissal of plaintiff's civil rights claims against the City, Mark Stimac, and Marlene Struckman.**

2. 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. **On July 10, 2006, the parties entered into a Consent Judgment, and the case is now closed.**

3. 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. Plaintiff filed a motion to amend the complaint to reinstate the mandamus claim and to add a new claim for damages based on inverse condemnation. After a hearing on the motion, the Court took the matter under advisement and indicated a written decision would be issued. On June 21, 2006, Judge Chabot issued her written opinion, denying the Plaintiff's motion to amend the complaint. Trial is scheduled for July 13, 2006. **At the request of Plaintiff, the trial has been rescheduled for October 30, 2006.**
4. 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. **On July 10, 2006, the Troy City Council approved a consent judgment, which was subsequently entered with the Court. An amended plat has also been prepared for review.**

5. **Karagiannakis and Garrett Family Ltd.Partnership v. City of Troy, et. al. –** The lawsuit was filed, seeking a Declaratory Judgment that a 43-foot easement is a “public” roadway easement under the control of the City of Troy. Garrett Family Ltd. Partnership has an option to purchase an outlot that is currently owned by Mr. and Mrs. Karagiannakis. The property would be a part of a proposed site condominium project. However, Troy’s Zoning Ordinance requires that there be public street access for all new residential development. Therefore, this lawsuit was filed to convert the 43- foot wide driveway into a “public roadway.” Our office filed an immediate Motion for Summary Disposition, arguing that there is no authority for the Court to grant the requested relief, since the Land Division Act requires a re-plat action to accomplish what the Plaintiffs propose. In a re-plat action, the Plaintiffs would file the case against all property owners within 300 feet, as well as the utilities and the units of government. Plaintiffs’ response to the City’s Motion for Summary Disposition is due on October 18, 2006. Oral arguments are scheduled for November 29, 2006.

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)

1. 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 was scheduled for April 5, 2006. The Court issued a written order on June 9, 2006 determining the amount of attorney fees. An appeal of the Court's decisions was filed with the Michigan Court of Appeals on June 30, 2006. **The Michigan Court of Appeals subsequently ordered mandatory facilitation, which is continuing. In the meantime, the parties are currently waiting for the trial court reporter to complete the transcripts of the proceedings for delivery to the Court of Appeals. The completion of this transcript will trigger the due dates for the briefs to be filed in this case.**

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.

There are no pending personal injury cases at this time.

F. MISCELLANEOUS CASES

1. In Re Hooters of Troy Inc. – Hooters has filed this lawsuit to challenge the June 19, 2006 City Council denial of their application to transfer a liquor license and entertainment permit. Hooters was seeking to re-locate their business from John R to Rochester Road, to the building that was previously occupied by the Wagon Wheel Saloon. Hooters has signed agreements with the former owners (Sign of the Beef Carver- Wagon Wheel), for the building and also the liquor license with entertainment permit. Pursuant to state law, local legislative approval is required for a transfer of Class C Liquor License and entertainment permit. In their complaint, Hooter's alleges that the City Council denial of the transfer of the liquor license violates their equal protection rights and due process rights. They are asking the Court for an order of superintending control, which means they are asking a Circuit Court Judge to overrule City Council's decision. Hooters is also asking for costs, attorney fees, and incidental damages as a result of the delay in moving its operation to Rochester Road. **Shortly after filing their complaint, Hooter's filed a motion requesting a superintending control order. On July 26, 2006 Oakland County Circuit Court Judge John McDonald, after hearing argument, denied Hooter's motion and dismissed their case. Judge McDonald in making his ruling, stated that municipalities are afforded broad discretion in review applications for new or transferred liquor licenses, and that Troy City Council exercised this discretion properly in denying Hooter's request for to transfer a Class C Liquor License and new entertainment permit. On August 4, 2006, Hooters filed a claim of appeal with the Michigan Court of Appeals. They also filed a motion for immediate consideration and motion for peremptory reversal arguing that Judge McDonald's decision was so blatantly wrong that immediate reversal is warranted. On August 16, 2006, the Court of Appeals granted Hooter's motion for immediate consideration but denied their motion for peremptory reversal. Hooter's appeal is still pending, and all the required briefs have been filed with the Court of Appeals.**

G. CRIMINAL APPEALS

1. People v Robert Toma – Mr. Toma pled guilty to being a Minor in Possession of Alcohol. However, after the sentencing, Mr. Toma filed an Application for Leave to Appeal with the Oakland County Circuit Court, arguing that his sentence exceeded the maximum sentence for this misdemeanor offense. The Appeal was denied by the Oakland County Circuit Court on July 19, 2006.

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