



TO: Members of the Troy City Council

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SUBJECT: 2014 Second Quarter Litigation Report

The following is the quarterly report of pending litigation and other matters of interest. **Developments during the SECOND quarter of 2014 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.

There are no pending zoning cases for this quarter.

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. Troy v. Grand Sakwa et. al.- This condemnation case was initiated on December 16, 2013, to re-acquire the 2.7 acre transit center parcel from Grand Sakwa after the Michigan Supreme Court denied Troy's application for leave to appeal. Although the City was deeded the property in 2000, and initially prevailed against developer Grand Sakwa's motion seeking a reversion of the property, this decision was reversed by the Michigan Court of Appeals on the basis that the transit center was allegedly not funded by the June 2, 2010 reversion date in the consent judgment. Since the Court of Appeals decision became final upon the Michigan Supreme Court's refusal to hear the case, the condemnation complaint requests possession dating back to June 2, 2010. The independently appraised value for the property is \$550,000, which is well below the federal appropriation set aside for the project under the Federal Transit Administration. The City filed a Motion seeking an order confirming title and possession, based on the fact that the Defendants waived the ability to challenge necessity. Defendants filed a response to this motion, seeking a dismissal of the case based on the fact that the property appraisal date was for 2010 (the date of reversion as declared by the Court of Appeals opinion). The Court entered a dismissal order on February 21, 2014, based on his conclusion that there needed to be an appraisal of the improved property as of 2014 (the date of filing the condemnation case). The City immediately requested an amended appraisal. **A new purchase offer was extended, based on the amended appraisal.**

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. Burley v. Gagacki. This is an excessive force case filed against a Troy police officer who was participating on a federal task force executing search warrants. The task force divided up and simultaneously executed search warrants on two houses located some distance from each other. Plaintiffs argue that they were injured by unidentified task force members at one of the houses. The incident report fails to specify which task force members were at Plaintiff's house and which task force members were simultaneously executing the search warrant at the other house. The Troy police officer and other task force members were initially represented by an Assistant U.S. Attorney, who obtained a dismissal of the case. Plaintiffs then successfully appealed to the Sixth Circuit Court of Appeals, which reinstated the case. The second trial is scheduled for February 2014. Due to a retirement of the Assistant U.S. Attorney and the possibility of conflicts between the task force team members, our office has assumed a more active role in the litigation, and will defend the Troy police officer task force member. The Court granted the request of one of the co-defendants to adjourn

the trial, which is now scheduled to start on June 16, 2014. The parties have been addressing procedural items and preparing for trial. **After picking a jury on June 10, 2014 and intense preparation for trial to begin on June 16, 2014, one of the Plaintiffs was hospitalized four days before the scheduled trial date. Trial has been rescheduled for October 6, 2014.**

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. **Allstate Insurance Company v. City of Troy and Troy Fire Department. This is a subrogation case, filed by Allstate Insurance Company against the City of Troy Fire Department, seeking reimbursement of Allstate's payment to its insured Rajkiran Panesar. Mr. Panesar's vehicle was damaged when he unexpectedly drove onto a fire hose that had fallen from a Troy Fire truck after dark on October 21, 2013 . The Answer and Affirmative Defenses to the Complaint are due on July 17, 2014.**

F. MISCELLANEOUS CASES

1. 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. Financial documents concerning this case are now being reviewed by an independent CPA. It is expected that the April 19, 2012 trial date will be postponed until after this review is complete. Mediation was unsuccessful in resolving this case, and therefore the Court is expected to issue an order on the pending Summary Disposition Motions. The trial date has been adjourned. On November 13, 2012, Oakland County Circuit Court Judge Shalina Kumar issued her order in favor of the City, and dismissed this case. Plaintiffs filed an appeal, which is now pending in the Michigan Court of Appeals. Appellant’s brief is expected to be filed soon. The parties timely filed their appellate briefs, and are now waiting for the Court of Appeals to schedule a date for oral argument. The Court of Appeals has not yet scheduled oral argument for this case. The parties are still waiting for a date for oral argument. Oral argument was held on March 4, 2014. On March 13, 2014, the Court of Appeals issued its opinion ruling in the City’s favor and affirming the Circuit Court’s decision dismissing the case. **On April 23, 2014, Plaintiff Home Builders filed an Application for Leave to Appeal with the Michigan Supreme Court. Troy’s response was filed on May 19, 2014.**

2. *T.R. Pieprzak 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. The City and the Plaintiff each filed Motions for Summary Disposition at the close of discovery. The Court agreed with the amount the City claimed was due on the contract and entered an Order on March 9, 2012 that dismissed Plaintiff’s claims seeking damages in excess of that amount. The Order is a final order and closes the case. T.R. Pieprzak filed a Motion for Reconsideration on March 29, 2012. The Court has not yet issued an opinion on Pieprzak’s Motion for Reconsideration. On January 17, 2013, Judge Nichols entered his Opinion and Order denying the Plaintiff’s Motion for Reconsideration. The Plaintiff has now filed a Claim of Appeal with the Michigan Court of Appeals. Plaintiff filed its appellate brief, and the City’s

brief is due July 18th. The City has filed its responsive brief and Plaintiff filed a reply brief. The case will now be scheduled for oral argument. The parties are still waiting for a date for oral argument, which could be scheduled as early as June 2014. **Oral argument was held on June 10, 2014. On June 24, 2014, the Court of Appeals issued its Opinion ruling in favor of the City and affirming the decision of the Circuit Court.**

3. *Troy Police Officers Association v. City of Troy and Act 78 Civil Service Commission.* Plaintiff TPOA Union has filed this lawsuit against the City and also the Act 78 Civil Service Commission, seeking a hearing on behalf of one of its members, Todd Michael. Mr. Michael seeks a hearing before the Civil Service Commission, where he can have the chance to establish that he was constructively discharged from the City; or in the alternative that he was improperly disciplined by the City. In addition to seeking a court order mandating a hearing for Todd Michael, Plaintiff is also seeking an order requiring the City to amend its rules to allow for hearings in similar circumstances. The Amended Complaint was filed on May 21, 2012. On September 18, 2012, Plaintiff filed a Motion for Summary Disposition, which is scheduled for hearing on November 21, 2012. On December 5, 2012, the Court granted in part, denied in part the cross motions for summary disposition. This case is now pending in the Michigan Court of Appeals. Appellant's brief has been filed with the Court of Appeals. Appellee timely filed its brief, and the City filed a reply brief in response. The parties are now waiting for the Court of Appeals to schedule a date for oral argument. The Court of Appeals has not yet scheduled oral argument on this case. The parties are still waiting for a date for oral argument, which could be scheduled as early as June 2014. **Oral argument was held on June 4, 2014. On June 12, 2014, the Michigan Court of Appeals issued an unpublished opinion, reversing the Oakland County Circuit Court and remanding the case for entry of an order granting summary disposition in favor of the City.**
4. *Todd Michael v. City of Troy et. al.* Todd Michael has filed this lawsuit against the City, the Troy Police Department and the Troy Police Chief. Through this lawsuit, Plaintiff alleges that he was discriminated against in his employment with the City, in violation of the Americans With Disabilities Act. He also alleges that he suffered retaliation for his alleged disability. He is asking to be reinstated as a Troy Police Officer. He is also asking for additional compensation, punitive damages, costs and attorney fees. The answer to the complaint and affirmative defenses were filed on September 27, 2012. The Court has issued a scheduling order in this case, and discovery is on-going. The parties are continuing in the discovery phase. The Court has extended the discovery cut off in this matter, and the parties continue to take depositions in this case. The City will be filing a Motion for Summary Judgment. A Motion for Summary Judgment was filed on October 14, 2013. Plaintiff filed its Response on November 21, 2013, and the City's reply brief was filed on December 12, 2013. The parties are still waiting for the Court to either issue an opinion or schedule a date for oral argument on the

Motion. **The Court transferred the case to newly appointed U.S. District Court Judge Judith Levy, who has scheduled oral argument on the motion for summary judgment for July 10, 2014.**

5. *Citizens United Against Corrupt Government v. Troy City Council*- This is a lawsuit filed by the Citizens Against Corrupt Government, which is a Michigan Non-Profit Corporation formed by Robert Davis. In this lawsuit, Plaintiff alleges that the City violated the Open Meetings Act in holding a closed session on August 15, 2012, as part of the City Manager Search process. Through this lawsuit, Plaintiff is seeking a declaration that the City Council violated the Open Meetings Act. Plaintiff also asked for injunctive relief, and asked for an immediate hearing. The Court, after hearing arguments from the parties, denied the request for Injunctive relief with an order dated September 13, 2012. Immediately thereafter, Plaintiff attempted to schedule depositions of individual City Council members and other members of City Administration and the search consultant. The City filed a Motion for a Protective Order on September 28, 2012. On that day, the City also filed a Motion for Summary Disposition, arguing that Plaintiff does not have a viable case against the Troy City Council. On November 21, 2012, Judge O'Brien issued her order granting the City's Motion for Summary Disposition and dismissing this case. Plaintiff appealed this decision, which is now pending in the Michigan Court of Appeals. It is anticipated that Appellant will file its legal brief in the immediate future. Plaintiff missed the deadline for filing its appellate brief, but the Court of Appeals may allow a late brief. The Court allowed Plaintiff to file a late brief, but ordered that due to the late filing Plaintiff would not be allowed to present oral argument. The City timely filed its responsive brief. The Court will schedule the case for oral argument. The parties are still waiting for a date for oral argument. Oral argument was held on February 7, 2014. **The Court of Appeals has not yet issued an opinion in this case.**
6. *Daniel E. Katayama v City of Troy*. Plaintiff filed this lawsuit under the Freedom of Information Act (FOIA) claiming that the City did not fully comply with a FOIA request he submitted on March 26, 2013. Plaintiff's FOIA request sought particular documents related to his arrest on suspicion of driving while intoxicated. The City filed an Answer to the Complaint, and the parties are conducting discovery. Discovery continues. The Court scheduled a mandatory settlement conference for March 10, 2014. The City filed a Motion for Summary Disposition on February 14, 2014. The Court scheduled oral argument on this Motion for June 5, 2014. **The Court granted in part and denied in part the City's Motion for Summary Disposition.**
7. *Helen Keats v Troy Police Department*. Plaintiff filed this claim and delivery action in the 52-4 District Court seeking the return of several firearms that were confiscated from her home when her husband was arrested for attempted murder. Her husband David Keats was convicted of Assault with Intent to Murder and sentenced to a minimum of 51 months in prison and a maximum of 20 years. Mr. Keats has appealed his conviction. Because of this conviction, the weapon used in the

commission of the crime cannot be returned. Mrs. Keats is asking for a return of the gun her husband used in the crime, as well as all other confiscated firearms. The City filed an answer to the complaint and a response to Plaintiff's interim motion for possession. On December 2, 2013, Judge Hartig agreed with the City's position, and denied Plaintiff's motion. At that time, the Court indicated that she would reconsider the motion if Mr. Keats were successful in his appeal and if Mrs. Keats could provide proof that she owns the firearms in question. The Court scheduled a pre-trial for February 3, 2014, and on that date, Plaintiff was granted a stay of the district court case so that she could pursue an appeal. **Plaintiff has not yet filed an appeal.**

8. *Mondrain Properties (Belleclair) v. City of Troy et. al.*- This is a case filed on February 26, 2014. Plaintiff is seeking a revision to the plat recorded with the Oakland County Register of Deeds. This plat revision is necessary for Plaintiffs to complete the proposed Belleclair Development at Wattles/ Rochester Road. Plat revisions are required to be filed against all public entities and utilities having an easement or other property interest, as well as any other property owner within 500 feet of the property that is proposed for redeveloped. We timely filed our answer to the complaint. **Plaintiff has been working to obtain consent to the plat revision from all property owners.**
9. *Alfred Beskangy, Sr. and Susan Beskangy v City of Troy.* **Plaintiffs filed this claim and delivery action in the 52-4 District Court seeking the return of several firearms that were confiscated when police responded to a report of an assault with a weapon and possible suicide involving the Plaintiffs' son. Plaintiff's son was convicted of felonious assault and domestic assault as a result of the incident. Because of these convictions, Plaintiff's son is prohibited from possessing the weapons. According to the police report, the Plaintiff's son is the owner of most of the firearms that were confiscated. The City filed an answer to the complaint and a response to Plaintiff's interim motion for possession. A hearing on the motion for possession was scheduled for June 19, 2014 before Judge Bolle. In order to allow time to explore a possible resolution of this case, the hearing on the motion for possession was adjourned to July 31, 2014.**
10. *Stanley John Belczak v Troy Police Department.* **Plaintiff filed this claim and delivery action in the 52-4 District Court seeking the return of a handgun that was confiscated when police were dispatched to an office building, based on Plaintiff's threat to use the gun to harm his commercial landlord. The City filed an answer to the complaint and a response to Plaintiff's interim motion for possession. A hearing is scheduled on the motion for possession on July 7, 2014, before Judge Hartig.**

G. CRIMINAL APPEALS/ DISTRICT COURT APPEALS

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

1. **People of the City of Troy v Crawford.** In this case, Troy police initiated a traffic stop when they observed the Defendant almost cause a rear end collision while talking on a cell phone. The Defendant was ultimately arrested for operating while intoxicated. The Defendant filed a motion to dismiss and/or suppress all the testimony of the arresting officer because none of the discussion that took place between the officer and the Defendant was recorded on the in car video due to a problem with the officer's microphone. Judge Hartig of the 52/4 District Court ruled that the failure to record the conversation between the Defendant and the officer denied the Defendant his right to procedural due process. Although the Court did not dismiss the case or suppress the officer's testimony, the Court did rule the Defendant was entitled a limiting jury instruction. A limiting jury instruction would advise the jury that they may infer that had the conversation been recorded, it would have provided evidence favorable to the Defendant. The effect of such an instruction is to allow the jury to infer that the officer's testimony is not credible, which will likely impact the criminal jury trial. The City filed an application for leave to appeal this decision. The appeal was assigned to Oakland County Circuit Court Judge Leo Bowman, who remanded the case on June 3, 2014, ordering the District Court to supplement the record with findings and conclusions that support the Judge's decision. Once this is done, the case will go back to Judge Bowman for a decision on the appeal.

2. **People of the City of Troy v Keller.** The Defendant in this case was charged with operating while intoxicated and with the civil infraction of refusing a preliminary breath test (PBT). Defendant filed a Motion to Dismiss, claiming there was no evidence that he "operated" a motor vehicle since the officer did not see him drive but instead found the intoxicated Defendant slumped over the steering wheel of a running vehicle with his seatbelt on, and with his foot was on the brake pedal. Judge Hartig of the 52-4 District Court agreed with the Defendant and dismissed the case. The City filed a Motion for Reconsideration, but it was denied by Judge Hartig. The City has now filed a Claim of Appeal with the Oakland County Circuit Court. The appeal was assigned to Oakland County Circuit Judge Leo Bowman.

3. **People of the City of Troy v Hussain:** Defendant was arrested for Operating Under the Influence of Drugs. At the time of his arrest, he refused to consent to a breath test, so the arresting officer sought a warrant to have Defendant's blood drawn by an EMT from Troy's independent ambulance provider, Alliance Mobile Health. The blood test results confirmed that Defendant had THC (marijuana) in his blood. Defendant filed a motion to dismiss and/or suppress the blood test. He challenged two specific aspects of the evidentiary blood draw protocol used by the City of Troy police department. The first challenge is whether the back of an ambulance meets the definition of "medical environment" as that term is used in the Michigan statute that controls drunk driving cases. (MCL 257.625a). The second challenge is whether the paramedic who performed the blood draw was acting "under the delegation of a licensed physician" in accordance with the same statute. Judge Bolle of the 52-4 District

Court denied Defendant's motion to dismiss and/or suppress; Defendant filed an application for leave to appeal to the Oakland County Circuit Court, and the matter was assigned to Judge Nanci Grant. The City of Troy filed its Response to Defendant's Application for Leave to Appeal, and the parties are awaiting the Court's decision whether to accept Defendant's application.

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. The Court is continuing to receiving status reports, with the next one due on December 19, 2012. Status reports were timely filed on January 6, 2013 and

March 22, 2013. Additional status reports were submitted on June 24 and 25, 2013. The Court issued an order on September 10, 2013, continuing to hold the matter in abeyance pending resolution of the constitutional issues. Status reports were timely filed on December 18, 2013. Administrative Law Judge Plummer issued an order on January 29, 2014, continuing the case in abeyance, and ordering quarterly status reports to be filed. **Status reports were filed as of the deadline of May 1, 2014. The case continues to be held in abeyance.**

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