



**TO:** Members of the Troy City Council

**FROM:** Lori Grigg Bluhm, City Attorney  
Allan T. Motzny, Assistant City Attorney  
Julie Quinlan Dufrane, Assistant City Attorney  
Nicole MacMillan, Assistant City Attorney

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**SUBJECT:** 2016 Second Quarter Litigation Report

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The following is the quarterly report of pending litigation and other matters of interest. **Developments during the SECOND quarter of 2016 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 Behunin, et al.– This condemnation case was initiated on December 2, 2014 to acquire needed right of way from property owned by Kathleen and Michael Behunin. The property is located on John R. Road, between Square Lake Road and South Boulevard. The case was assigned to Oakland County Circuit Court Judge Martha Anderson. A hearing is set for January 14, 2015 at which the City will request an Order of Possession. On January 14, 2015, the Court granted the City's request for an order of possession. The case will proceed on the issue of just compensation. The parties are preparing documents to facilitate discovery exchange. Discovery is ongoing. Case Evaluation is scheduled for late February 2016. The Case Evaluation that was scheduled for February was adjourned and subsequently held on March 9, 2016. **The Plaintiffs and the City both accepted the Case Evaluation award, and a Consent Judgment was entered with the Court on April 20, 2016. The City has paid just compensation for the subject property as set forth in the Consent Judgment. This case is now concluded.**

#### 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. The parties are preparing for the jury trial to begin on October 6, 2014. A week long jury trial was conducted from October 6, 2014 through October 15, 2014, in Federal District Court. After deliberating for 30 minutes, the jury returned a verdict of no cause of action, dismissing the case against the task force officers. The Judge also ordered payment of costs to all Defendants. Plaintiffs subsequently filed an appeal with the Sixth Circuit- U.S. Court of Appeals. Plaintiffs' appellate brief is due in April 2015. The Court of Appeals issued a briefing schedule in this matter. Plaintiff-Appellant's brief was filed on May 18, 2015, and the Troy Defendant-Appellee's brief is due on July 3, 2015. A timely brief on appeal was filed on behalf of the Troy police officer and the parties are waiting for the 6<sup>th</sup> Circuit Court of Appeals to schedule a date for oral argument. Defendant-Appellant's Reply Briefs were filed after numerous extensions, and the parties continue to wait for the Court of Appeals to schedule a date for oral argument. **The Court scheduled oral argument for Thursday, August 4, 2016.**

#### 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. *Wierzbicki, et. al. v. City of Troy*- This suit was filed in Oakland County Circuit Court, and assigned to Judge Denise Langford Morris. Plaintiffs are seeking an amount in excess of \$600,000 for damages resulting from a sewage back up in the Somerset North subdivision. These Plaintiffs have previously filed and settled a lawsuit against the Somerset Collection and the Capital Grille in which the City provided significant discovery related to the sewage back-up that occurred on November 9, 2013. In response to the complaint, the City filed a response and a motion for summary disposition. The parties met in front of Judge Langford Morris on November 25, 2015, where the Judge gave Plaintiffs 90 days to respond to the City's motion for summary disposition. Plaintiff filed his response to the City's motion for summary disposition, and the City filed a timely reply. The motion has been adjourned to accommodate schedules, and is now scheduled to be argued on May 4, 2016. **Shortly after oral arguments, Judge Langford Morris issued a written opinion granting the City's motion for summary disposition and dismissing the case in favor of the City. On May 25, 2016,**

**Plaintiff filed a motion for reconsideration, which was denied on June 2, 2016. On June 23, 2016, Plaintiff filed a claim of appeal with the Michigan Court of Appeals.**

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. The Michigan Supreme Court considered the application for leave to appeal and ordered that the matter be scheduled for oral argument. The Court also permitted the parties to submit supplemental briefs, which are due October 29, 2014. The City timely filed its supplemental brief with the Michigan Supreme Court. The parties are now waiting for the Court to set a date for oral argument on the application. The Michigan Supreme Court entertained oral arguments on the application for leave to appeal on March 11, 2015. On June 4, 2015, the Michigan Supreme Court reversed the decisions of the Court of Appeals and the Circuit Court and ruled there was no requirement for Plaintiffs to exhaust their administrative remedies. The case was remanded to Circuit Court for further proceedings. A status conference was held on June 18, 2015 with Judge Kumar. During the status conference, Judge Kumar scheduled a hearing for September 2, 2015, allowing the parties to address the issues that were previously raised in the motion for summary disposition but were not decided since the case was initially dismissed for failure to exhaust administrative remedies. At the hearing on September 2, 2015, Judge Kumar allowed Plaintiffs to request additional discovery within 30 days. Thereafter, both parties are allowed to file supplemental briefs. Supplemental briefs have been filed and we are awaiting a decision. On February 5, 2015, Judge Kumar issued her opinion and order ruling in favor of the City and dismissing the case. Plaintiffs filed a Claim of Appeal with the Michigan Court of Appeals on February 23, 2016. **The Plaintiffs and the City have both filed appellate briefs. Based on our request, the Michigan Municipal League Legal Defense Fund, Public Corporations Section of the State Bar of Michigan, Michigan Townships Association and also Safe Built have filed a motion asking for permission to file amicus briefs supporting the City's position. The Michigan Association of Realtors has sought permission to file an amicus brief supporting Plaintiffs' position. The Plaintiffs filed a reply brief. We are waiting for the Court of Appeals to rule on the motions for amicus briefs and to schedule a date for oral argument.**

2. *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. Plaintiff filed a Claim of Appeal in the Michigan Court of Appeals on September 3, 2014. A briefing schedule has not been issued by the Court of Appeals. A timely response brief will be filed once the date is set by the Court. Plaintiff ordered the

transcript of proceedings, and the date of the receipt of the transcript dictates the appellate briefing schedule. The parties are still waiting for the court transcript to be completed. The final transcript was filed with the Court on May 1, 2015. Plaintiff-Appellant's brief was due on May 19, 2015, but has not yet been filed. Plaintiff-Appellant's Appeal was at first dismissed by the Court of Appeals for lack of progress, however, Plaintiff-Appellant's subsequent Motion to Reinstate Appeal was granted. Plaintiff-Appellant filed a brief on appeal on July 23, 2015. The City of Troy timely filed its brief on appeal on September 24, 2015. The Michigan Court of Appeals scheduled Oral Argument for November 9, 2015. On December 10, 2015, the Michigan Court of Appeals released its order, affirming the circuit court but remanding the case.

3. *DiMario v. City of Troy, et al.* - Plaintiffs filed this case in Oakland County Circuit Court on November 5, 2014 to obtain a vacant piece of land next to Plaintiffs' home. Plaintiffs listed the City of Troy as a Defendant in the case because the City has easements on the property. The Plaintiffs also listed D&T Construction, Emerald Lakes Pointe Association, and the Oakland County Treasurer as Defendants. The City has filed an Answer to the Complaint, and is now waiting for the Court to issue a scheduling order. The Court issued its scheduling order. This case was removed from case evaluation through a stipulation of the parties. Trial is now scheduled for September 10, 2015. There is a pending Motion for Summary Disposition, and the parties are waiting for the Court's decision. In the interim, there is a scheduled trial date of January 14, 2016, which will need to be rescheduled if the Court has not rendered her decision by that time. The Court denied Plaintiff's Motion for Summary Disposition and rescheduled the trial date for April 25, 2016. In the meantime, the Court scheduled a settlement conference for February 4, 2016. At the settlement conference, the parties discussed possible resolutions of the case. The case was removed from the trial docket to allow the parties to continue to work towards a resolution. **The parties were able to successfully resolve this matter, and a consent judgment was filed on May 26, 2016. As part of the consent judgment, the City's easements on the property remain preserved. Additionally, the consent judgment clarifies title to the property. This case is now concluded.**
  
4. *International Outdoor, Inc. v City of Troy.* This is an appeal filed by International Outdoor, Inc. challenging the Building Code Board of Appeals (BCBA) denial of variances from the provisions of the Sign Ordinance. The two signs were proposed to be located at 1705/1709 Austin and 1125 Naughton. The applicant wanted to erect two 70 foot, 1608 Square foot signs that would be visible from I-75. The proposed signs exceeded the size, height, and setback provisions of the Sign Ordinance and could only be permitted if variances were granted by the BCBA. International Outdoor argues in its appeal the BCBA abused its discretion when it denied the variances and that the decision denying the variances was not supported by competent, material, and substantial evidence on the whole record. The case was assigned to Oakland County Circuit Court Judge Hala Jarbou, who will need to review all of the BCBA record to determine if there was an abuse of discretion. The City must file the Record on Appeal with the Circuit Court within 28 days of the filing of the claim of appeal. Thereafter, each

party must file an appellate brief. After the briefs are filed, the Court will schedule oral argument and will make its decision on the appeal after oral argument. We stipulated to Plaintiff's request for additional time to file the appellate brief. **Plaintiff's motion to extend the due date for filing an appellate brief was denied by the Court. On June 27, 2016, the Court entered an order deeming the appeal abandoned. On July 11, the appeal was dismissed and this case is now concluded.**

5. **Aaron Bailey v City of Troy. Plaintiff Aaron Bailey filed this claim and delivery action in the 52-4 District Court seeking return of two handguns. The firearms were confiscated from Plaintiff after he was involved in a shooting incident. Plaintiff pled no contest to a firearm charge in a separate criminal case in connection with the incident. The City filed an answer to the complaint and a response to Plaintiff's interim motion for possession. The case was assigned to Judge Maureen M. McGinnis and scheduled for a hearing. After receiving the City's answer, the Plaintiff voluntarily dismissed his complaint. This case is now concluded.**

#### 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. City of Troy v. Wesley Smith. Wesley Smith was charged with possession of marijuana. At the jury trial, held on January 14 and 15, 2016, the jury found Mr. Smith guilty as charged. Mr. Smith filed an application for leave to appeal in Oakland County Circuit Court, and also the Michigan Court of Appeals. Mr. Smith's appeal to the Court of Appeals was dismissed because he did not file all of the appropriate documents. Mr. Smith's application for leave to appeal to the Circuit Court was denied. **Mr. Smith also filed Motions to Recuse Judge Hartig, which were referred to Judge Julie Nicholson, who presides over the entire 52<sup>nd</sup> District Court. Judge Nicholson denied Mr. Smith's Motion to Recuse, and Mr. Smith appealed this decision to the Oakland County Circuit Court. Mr. Smith lost his appeal of that case. He has been sentenced in the criminal case.**
2. City of Troy v. Mark Morin. Mark Morin was charged with domestic assault and battery in March of 2014. He plead guilty as charged, and the Judge sentenced him to 12 months of probation under MCL 769.4a, where the offense would be dismissed off of Mr. Morin's criminal record if he successfully completed probation. Shortly afterwards, Mr. Morin tested positive for having alcohol in his system, in violation of the terms of his probation. Mr. Morin requested a hearing, where he contested the reliability of the alcohol tests. After a lengthy hearing, the Judge found Defendant guilty of violating his probation. The Judge sentenced Mr. Morin to 6 days in jail, and revoked Mr. Morin's deferral status, so that the conviction for domestic assault and battery would remain on Mr. Morin's criminal record. Mr. Morin filed an application for leave to appeal in Oakland County Circuit Court on December 30, 2015. The City filed a timely response, requesting the Court to deny Mr. Morin's Application on the basis that the Application was untimely. Prior to a ruling from the circuit court, Mr.

Morin filed a motion in district court, asking Judge Hartig to reissue her order, and start the time for appeal over again. **Judge Hartig allowed Mr. Morin to withdraw his plea to domestic assault and battery, and plead to disorderly conduct. Based on this resolution, Mr. Morin withdrew his appeal to Oakland County Circuit Court, with prejudice, and this case is now concluded.**

3. **City of Troy v Gappy. Defendant was arrested on an outstanding warrant after a traffic stop. Since he was the only occupant of the vehicle, it was necessary to impound the vehicle and inventory the property found in the vehicle, which included marijuana. Defendant had a valid medical marijuana card at the time of the traffic stop and under state law, he is immune from prosecution for possession of marijuana. Defendant filed a motion for return of property, specifically 22.54 grams of marijuana, which was granted by District Court Judge Hartig. The City appealed the decision to the Oakland County Circuit Court and the case has been assigned to Judge Chabot. The Court granted the City's application for leave to appeal and has entered an order establishing a briefing schedule and setting oral argument for November 23, 2016.**

#### H. 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. The Court issued an order on August 27, 2014, continuing the case in abeyance. The Court has continued to hold this case in abeyance, and has required status reports be filed on or before January 30, 2015. Status reports were timely filed. The Administrative Law Judge ordered a status conference, which was held on June 24, 2015. Since the parties could not reach an agreement, the Court scheduled an argument on motions for August 24. The Court dismissed the cases on the grounds of mootness, based on the fact that a new NPDES permit is required for the communities, and the parties are now seeking attorney fee reimbursement. The request seeking reimbursement of attorney fees was filed, and is currently pending. **The Motion for attorney fees was denied, and a Motion for Reconsideration of this decision is currently pending.**

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