



TO: Members of the Troy City Council
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DATE: October 1, 2010
SUBJECT: 2010 Third Quarter Litigation Report

The following is the quarterly report of pending litigation and other matters of interest. **Developments during the THIRD quarter of 2010 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.

No pending cases during 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.

ROCHESTER ROAD IMPROVEMENT PROJECT

1. *City of Troy v RCU Independence Inc and Sentry Inc.* The City filed this condemnation action to acquire property located at 3688 Rochester Road in connection with the Rochester Road Improvement Project. The case was assigned to Judge Bowman of the Oakland County Circuit Court. Defendants filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction. In this Motion, they argued that the City did not engage in sufficient negotiations after making the written good faith offer for the property. The City argued that it was in compliance with all the statutory requirements. After oral argument, the Court dismissed the case, relying on the alleged lack of jurisdiction. The City filed an Appeal with the Michigan Court of Appeals, which is pending. (first case) In the meantime, the City filed a second condemnation complaint after additional discussions with the attorney representing the property owner. On July 29, 2009, the Court entered an Order for Payment of Estimated Compensation and Surrender of Possession. This occurred only after the City agreed to assume the expenses for moving the car wash on the property. The second case is now in the discovery phase of the litigation on the issue of just compensation. The City is still pursuing the appeal of the dismissal of the initial case to resolve the different statutory interpretations of the parties, since this issue is likely to arise in future condemnation matters. Discovery Continues. Case Evaluation has been scheduled for February 3, 2010. The Court re-scheduled case evaluation in the second case for May 5, 2010. In addition, the Defendant filed a Motion seeking a preliminary payment to cover its costs for moving the car wash buildings and equipment. Pursuant to a negotiated order entered on January 27, 2010, the City has placed an estimated amount in an escrow account, and will use this account to reimburse Defendant for its necessary relocation costs. As to the first case in the Michigan Court of Appeals, all appellate briefs have been timely filed, and the parties are waiting for the Court to schedule oral argument. The parties are waiting for the Michigan Court of Appeals to set a date for oral argument in the first case. A consent judgment, entered on June 23, 2010, has concluded the second case. **Oral argument on the first case is scheduled for October 5, 2010, before the Court of Appeals in Detroit.**
2. *City of Troy v Sentry Inc. and RCU Independence.* The City filed this condemnation action to acquire property located at 3785 Rochester Road in connection with the Rochester Road Improvement Project. The case was assigned to Judge Grant of the Oakland County Circuit Court. Defendants filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction on the basis of alleged insufficient negotiations after the written good faith offer was made. The City argued it was in compliance with all statutory requirements. After oral argument, the Court dismissed the case, relying on the alleged lack of jurisdiction. The City

filed a Motion for Reconsideration, which is still pending with the Court. In the meantime, the City filed a second condemnation complaint after additional discussions with the attorney representing the property owner. The parties stipulated to an Order for Payment of Estimated Compensation and Surrender of Possession that was entered on July 29, 2009, after the City agreed to assume expenses for moving the car wash on the property. The only issue remaining is the final amount of just compensation. Discovery continues as it relates to that issue. The Defendant filed a Motion seeking a preliminary payment to cover its costs for moving the car wash buildings and equipment. Pursuant to a negotiated order entered on January 27, 2010, the City has placed an estimated amount in an escrow account, and will use this account to reimburse Defendant for its necessary relocation costs. Discovery continues. Trial is currently scheduled for December 6, 2010. **This case is now in the trial preparation stage.**

3. *City of Troy v William H. Price (Price Funeral Home)*. The City filed this condemnation action in connection with the Rochester Road Improvement project. This property is at 3725 Rochester Road, and the City has now acquired title to the property that was required for the road construction project. The case will continue to allow a jury to determine the value of the property that was acquired by the City. The case is now in the discovery phase. Discovery is continuing. Case evaluation is scheduled for May 5, 2010. The Court re-scheduled case evaluation for July 7, 2010. **All parties accepted the case evaluation award, and approved the consent judgment. This case is now concluded.**
4. *City of Troy v William H. Price (Property Adjoining Funeral Home)*. The City filed this condemnation action in connection with the Rochester Road Improvement project. This property is addressed at 3725 Rochester Road, and the City has now acquired title to the property that was required for the road construction project. The case will continue to allow a jury to determine the value of the property that was acquired by the City. The case is now in the discovery phase. Discovery is continuing. Case evaluation is scheduled for May 5, 2010. The Court re-scheduled case evaluation for July 7, 2010. **All parties accepted the case evaluation award, and approved the consent judgment. This case is now concluded.**
5. *City of Troy v. Ida Rudack Trust, et. al.* The City filed this condemnation action in connection with the Rochester Road Improvement project. This property is at 3615 Rochester Road, and the City has now acquired title to the property that was required for the road construction project. The case will continue to allow a jury to determine the value of the property that was acquired by the City. The case is now in the discovery phase. Case evaluation is March 3, 2010. The jury trial is scheduled for May 17, 2010. The case evaluation was postponed until May 5, 2010. Jury trial is scheduled for August 16, 2010. Both parties rejected the case evaluation award. The Defendant subsequently filed a Motion for

Summary Disposition, arguing that the City has actually effected a total take, instead of a partial take, based on the setback ordinances. The City has filed its response to this motion, and will appear at the oral argument, which is scheduled for July 14, 2010. **The Court entertained oral arguments, and will issue a written opinion. Jury trial is currently scheduled for October 18, 2010.**

6. City of Troy v BG's L.L.C. After obtaining a possession and use agreement, the City was unable to voluntarily purchase this property for the Rochester Road Improvement Project, and therefore a condemnation lawsuit was filed on January 19, 2010. The property is at 3545 Rochester Road, and the City has already acquired title to the subject property. The only remaining issue is the amount of just compensation to be paid. The case is now in the discovery phase. Case evaluation is scheduled for July 7, 2010. Trial is scheduled for August 30, 2012. **All parties accepted the case evaluation award, and a consent judgment was approved and entered by the Court. The case is now concluded.**
7. City of Troy v Safeway Acquisition Co. After obtaining a possession and use agreement, the City was unable to voluntarily purchase the necessary property required for the Rochester Road Improvement Project from the gas station at 3990 Rochester Road. The City therefore filed this condemnation action on January 19, 2010. The City has acquired title to the subject property and the only remaining issue is the amount of just compensation to be paid. The case is now in the discovery phase. Discovery is continuing. Case evaluation is scheduled for September 2010. Trial is scheduled for January 4, 2011. **Discovery continues.**

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. Gerald Molnar v. Janice Pokley, the City of Troy et al.- Plaintiff filed this lawsuit against the City and Troy Detective Janice Pokley, after a jury found him not guilty of the charge of Criminal Sexual Conduct in the Second Degree. Plaintiff alleges that the City and Detective Pokley violated his constitutional rights to be from an unreasonable seizure, due process, and equal protection. These constitutional violations allegedly occurred during the criminal sexual conduct investigation of Plaintiff. Plaintiff also claims that the Troy defendants conspired with other named defendants to violate his constitutional rights, and intentionally inflicted emotional distress on Plaintiff. Plaintiff is requesting an unspecified amount of compensatory, exemplar, and punitive damages. On February 27, 2007, Troy filed a motion to dismiss, or in the alternative summary judgment. Plaintiff filed his response to our motion to dismiss on May 21, 2007. On August 28, 2008, the Court listened to the oral arguments on our motion to dismiss. On

September 4, 2008, the Court issued an opinion and order granting our motion to dismiss Detective Pokely and the City. On September 10, 2008, Plaintiff filed a notice of appeal, and is seeking a reversal of this dismissal with the United States Court of Appeals for the Sixth Circuit (includes Michigan, Tennessee, Kentucky, and Ohio). After hosting a telephonic pre-trial conference, the Court will provide the briefing schedule for the parties. Plaintiff filed his appellate brief on June 18, 2009. Troy's response brief is due July 17th. The City's brief was timely filed. Oral argument was held December 3, 2009. On December 29, 2009 the Court of Appeals issued an unpublished opinion affirming the District Court's dismissal of Plaintiff's complaint. Plaintiff subsequently filed an application for hearing en banc with the Sixth Circuit Court on January 12, 2010, seeking to overturn the favorable Court of Appeals decision. The City filed its brief in response to this application. On March 17, 2010, without oral argument, the Sixth Circuit issued an order that denied Plaintiff's application. Although there is no appeal of right to the United States Supreme Court, the Plaintiff could file a writ of certiorari, asking the Supreme Court to overturn the dismissals of this case. This action must be taken on or before June 15, 2010. On June 15, 2010, Plaintiff filed a writ of certiorari with the Supreme Court. **On August 17, 2010, Troy's response to Plaintiff's petition for a writ of certiorari was filed with the U.S. Supreme Court.**

2. *Hal Stickney v David Nordstrom, City of Troy et al.* Plaintiff, who is proceeding without an attorney, has filed this action against the City of Troy and retired Troy Police Officer David Nordstrom, retired Sgt. Barry Whiteside and Captain Keith Frye, as well as several Oakland County defendants and former business associates. This case stems from the investigation and prosecution of Plaintiff on an aggravated stalking charge, where Plaintiff was ultimately acquitted. Plaintiff alleges that the City and the Troy police officers violated his constitutional rights to be free from unreasonable seizure and a violation of his constitutional due process rights. Plaintiff also claims that the Troy defendants conspired with the other named defendants to violate his constitutional rights, and intentionally inflicted emotional distress on Plaintiff. Plaintiff is requesting damages in the amount of seven million dollars. As the initial responsive pleading, the City filed a motion for dismissal. The Court scheduled the hearing on this motion for August 5, 2010. In the interim, Plaintiff filed a motion requesting a 120 day stay of proceedings. In his motion, he claims that a stay is needed to give him time to retain an attorney. **Plaintiff's motion for a stay was granted. The case is stayed until November 1, 2010.**

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. *Nancy Huntley, Legal Guardian of Carolyn Huntley, a Protected Person v. City of Troy*- This lawsuit was filed in the Oakland County Circuit Court. Plaintiff alleges that on June 29, 2007, Carolyn Huntley was walking on the sidewalk located in front of 511 Cardinal, Troy, Michigan when she tripped and fell on an elevated concrete slab. Plaintiff alleges that Troy was negligent in failing to maintain the sidewalk; to provide adequate inspections; to give notice of a dangerous condition; and to use reasonable care in the design of the sidewalk. The City filed an Answer and Affirmative Defenses and also filed a Motion for Summary Disposition, arguing that Plaintiff failed to provide notice, as required by MCL 691.1404. Plaintiff's response to this motion is due on October 7, 2009, and Judge Rudy Nichols has scheduled oral argument for October 28, 2009. The parties are waiting on the Court's decision on the motion. On March 9, 2010, the Court issued its written opinion, granting in part and denying in part our motion for summary disposition. As a result, the public nuisance and nuisance per se claims are now dismissed. The parties are conducting discovery on the alleged defective highway claim. Jury trial is scheduled for December 6, 2010. **The parties are now preparing for trial in this matter.**

2. *Raquel Chidiac v Edwin Julian and City of Troy* – This lawsuit was filed by Plaintiff Raquel Chidiac, who suffered injuries after colliding with a Troy Police Officer at Big Beaver and John R roads. Plaintiff alleges that on October 3, 2009 at around 7:00 p.m. she was traveling eastbound on Big Beaver Road when her vehicle was struck by a Troy Police vehicle. She is alleging the City is liable pursuant to the motor vehicle exception to governmental immunity, and also under the Michigan Owner Liability Act, MCL 257.401. She is alleging that she suffered serious and permanent injuries, and is seeking damages in excess of \$25,000. We filed an answer on December 8, 2009. The City filed a motion for summary disposition requesting dismissal of the individual Troy police officer. The Court has scheduled the hearing on this motion for April 28, 2010. On April 29, 2010, Circuit Court Judge Goldsmith entered an opinion and order denying the City's motion for summary disposition without prejudice, which would allow us to re-file the motion at the close of discovery. The case is now in the discovery phase. **The Court mandated case evaluation and facilitation process did not resolve this case, which is now scheduled for jury trial on October 11, 2010.**

F. MISCELLANEOUS CASES

1. Kocenda v City of Troy- David Kocenda has filed a complaint against the City of Troy, Chief Craft, Captain Murphy, Captain Mott, Lieutenant Hay, Lieutenant Pappas, and Lieutenant Rossman, alleging Defamation and Intentional Infliction of Emotional Distress. Plaintiff, a Troy police officer, claims he was offered a job as a police officer with the City of Palm Beach Gardens, Florida, but the offer was retracted because of false information provided by Troy and its officers. He contends remarks made by Troy employees constitute both Defamation and Intentional Infliction of Emotional Distress. He is seeking damages in excess of \$25,000. The lawsuit was filed in Oakland County Circuit Court and assigned to Judge Fred Mester. Troy's responsive pleading is due December 18, 2007. The City has filed a Motion for Summary Disposition, seeking a dismissal of the lawsuit against the City and its officers. The Court will set the date for the hearing on our motion. The Court granted the Motion for Summary Disposition and dismissed the case. Several months after the dismissal of his lawsuit, Kocenda filed an untimely Motion for Reconsideration. The Motion for Reconsideration was denied. Kocenda has now filed a Claim of Appeal with the Michigan Court of Appeals, seeking a reversal of the dismissal and/or the denial of the Motion for Reconsideration. The City filed a Motion to Dismiss the Claim of Appeal for lack of jurisdiction on the basis it was untimely. The Court of Appeals granted the motion and dismissed the appeal on August 27, 2008. We then filed a motion seeking costs from Kocenda and/or his attorney. This motion was pending as of the end of the quarter. The Court granted our motion for costs, and \$100.00 was paid to the City. Kocenda subsequently filed a Motion for Relief from Order in Oakland County Circuit. In that motion, he alleged there was newly discovered evidence and that the original Order Granting Summary Disposition should be set aside. The motion was denied. Kocenda filed a delayed application for leave to appeal with the Michigan Court of Appeals. On May 21, 2009, the Court of Appeals granted the delayed application for leave to appeal but limited Kocenda's appeal to whether or not Judge Mester abused his discretion in denying Kocenda's motion to amend his complaint to allege a claim for tortious interference with a business relationship. Plaintiff's appellate brief covered issues that went beyond the Court's earlier limitations. The City filed a motion to strike the matters that exceeded the Court's narrow ruling. This motion was denied by the Court, but the City was expressly authorized to address these additional issues in its responsive brief, which was timely filed. The parties are now waiting for the Court to schedule oral argument. The Michigan Court of Appeals scheduled oral argument for May 4, 2010. The Court of Appeals ruled in favor of the City and affirmed the circuit court decision. Kocenda has filed an Application for Leave to Appeal to the Michigan Supreme Court. The City's response is due by July 13, 2010. **The Michigan Supreme Court denied Kocenda's application for leave to appeal on September 9, 2010.**

2. Frank Lawrence v City of Troy – Mr. Lawrence is the brother of Thomas Lawrence who was issued two civil infraction traffic citations on October 4, 2008 for “no proof of insurance” and “failure to change address on driver's license”. Frank Lawrence filed a FOIA request with Troy Police Department asking for a number of items, including but not limited to: all video recordings, radio transmissions, records and the officer's disciplinary file (if any), and the police policy on issuing “quota’ tickets. Under Michigan Court Rule 2.303 (A)(3) discovery is not permitted in civil infraction actions.

Additionally, FOIA does not require the release of information which would constitute an unwarranted invasion of personal privacy or law enforcement information such as, but not limited to, disciplinary files of police officers, personal telephone numbers, and operational manuals. Mr. Lawrence's FOIA was denied for these reasons. Instead of filing an appeal of the FOIA denial to the City Manager, Mr. Lawrence appealed the denial to the Oakland County Circuit Court. Mr. Lawrence filed a Motion for Summary Disposition and the City responded. Without requiring oral arguments, Judge Steven Andrews denied Mr. Lawrence's Motion for Summary Disposition in an Opinion and Order dated December 1, 2008. Judge Andrews also granted Summary Disposition in the City's favor. Mr. Lawrence filed a Claim of Appeal with the Michigan Court of Appeals on December 22, 2008. The Court of Appeals in an unpublished opinion partially reversed the trial court, and remanded the matter for further proceedings including a determination by the trial court of whether or not specific documents are exempt from disclosure. The parties are waiting for the Court to schedule a court date. The Court held an evidentiary hearing on June 17, 2010, and has indicated that a written opinion will be issued. **The Court granted in part, denied in part Plaintiff's request for information. Plaintiff also filed a Motion for Reconsideration, which the Court denied. The Court is expected to enter a final order on this case.**

3. *Andrew Zurowski v City of Troy.* In this claim and delivery action, the Plaintiff is seeking a court order for the return of two rifles that were confiscated when the Troy police were dispatched to his home. Since there was a great concern that Mr. Zurowski was a danger to himself and others, the two rifles were confiscated. The case was filed in the 52-4 District Court and assigned to Judge Drury. The case was filed on December 7, 2009. The City has answered the complaint and is awaiting a court date for a pretrial or trial. The Court scheduled a pretrial for April 13, 2010. The case is scheduled for trial on July 27, 2010. **A consent judgment was entered allowing for a return of the rifles to the Plaintiff's son, with conditions that prohibit Plaintiff from being in possession of the rifles. The case is now concluded.**
4. *Sean Steven Seyler v. City of Troy and Troy Police Department.* Mr. Seyler filed this Freedom of Information Act case against the City, seeking the police report and his lab test results, which were also simultaneously requested as criminal discovery within 48 hours of Mr. Seyler's drunk driving arrest. The City has filed a Motion for Summary Disposition, arguing that the documents requested were either already provided as criminal discovery or are otherwise exempt from disclosure. The Court will issue a scheduling order setting the date for oral argument. The Court entertained oral arguments on March 24, 2010, and granted our motion for dismissal. The Plaintiff filed an application for leave to appeal with the Michigan Court of Appeals on April 14, 2010. **The parties are waiting for the Michigan Court of Appeals to schedule the date for oral argument.**
5. *William and Elaine Middlekauff v. City of Troy.* The Middlekauffs filed this lawsuit in the 52-4 District Court, alleging that a City employee told them that the City would reimburse them to have a private contractor remove City trees from their property at

2449 Oak Ridge Drive in Troy, which fell in the intense wind storm of June 8, 2008. The Middlekauffs demand \$6,103, claiming breach of contract, promissory estoppel (reliance on a promise) and fraud and misrepresentation. The City filed a motion for summary disposition, which was heard on March 4, 2010. The Court held the matter in abeyance for 60 days, and allowed Plaintiffs to obtain discovery to counter our motion for summary disposition. On May 20, 2010, Judge Bolle granted our motion in part and denied the motion in part. The claim that was not dismissed, promissory estoppel, will be decided by a jury in a trial that will be scheduled by the Court. **Jury trial is now scheduled for November 5, 2010 on the remaining count of promissory estoppel.**

6. **Liberty Investments v. City of Troy-** This case was filed against the City to recover penalties incurred when the property owner did not timely pay the water bill. In this case, Plaintiff, through its employee, argues that the late penalty was improperly assessed. The Plaintiff further challenges that Troy's ordinance fails to define what constitutes payment and receipt, and also fails to provide a method to challenge an unwarranted penalty assessment. The case was filed in the 52-4 Judicial District Court on June 18, 2010. **The City filed a Motion for Summary Disposition, which was granted by the Court on August 26, 2010. This case is now closed.**
7. **Jeffrey Abbaya v City of Troy.** This claim and delivery action was filed in the 52-4 Judicial District Court on August 24, 2010 and assigned to Judge William E. Bolle. The Plaintiff is seeking return of a pistol that was confiscated from him when he was arrested for operating while intoxicated. The City has filed an answer and is awaiting a court date for a pretrial or trial.

G. CRIMINAL 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 Gowri Rajendran.** Gowri Rajendran was involved in a traffic accident and was issued a ticket for the civil infraction of Failure to Signal and/or Observe. She challenged the ticket and a formal hearing was held before Judge Dennis C. Drury of the 52-4 Judicial District Court. At the conclusion of the formal hearing, Judge Drury found Mrs. Rajendran responsible for the civil infraction. Mrs. Rajendran then attempted to file a claim of appeal as of right with the Oakland County Circuit Court. The appeal was assigned to Judge Shalina Kumar. Ms. Rajendran scheduled a court date for September 29, 2010, but her appeal was not timely. After we informed her of the procedural defects, Mrs. Rajendran agreed to voluntarily dismiss her appeal. An order dismissing the appeal was entered with the Circuit Court on September 15, 2010.

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.**

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