



Legislative Update

VOLUME 11, ISSUE 1

WINTER 2022

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Court Rules That Injunction May be Available to Prevent Sewage-Disposal-System-Event

In *Sunrise Resort Association v. Cheboygan County Road Commission*, the Michigan Court of Appeals considered (1) when a claim accrues under the sewage-disposal-system-event exception to governmental immunity, and (2) whether injunctive relief is an available remedy. In the case, a landowner's property was damaged due to the backup of a stormwater drainage system on two occasions. The first backup occurred in 2015 and caused only minor damage. The second backup occurred in 2018 and caused significant damage. In 2020, the landowner brought suit under the sewage-disposal-system-event exception to governmental immunity related to the 2018 backup.

The statute of limitations for a claim under the sewage-disposal-system-event exception to governmental immunity is three years from the time the claim first accrues. The Court held that because the event that the landowner's

claim was based on occurred in 2018, and the landowner did not suffer harm related to that event prior to 2018, that claim accrued in 2018 and was timely filed within three years. The Court explained that the 2015 and 2018 backups were separate events, each of which caused a new claim to accrue.

In addition to monetary damages, the landowner sought an injunction to prevent future damages caused by the stormwater water drainage system. The Court held that while the remedy for "damages or physical injuries caused by a sewage disposal system event" is limited to compensatory (monetary) damages, an injunction is an available remedy to avoid damages from a future sewage-disposal event. Therefore, while injunctive relief would be inappropriate as a remedy for the 2018 event, it was available to prevent future backups.

Drain Commissioner Held to "Reasonable Diligence" Standard in Sewage-Disposal-System-Event

In *Copus v. Lenawee County Drain Commissioner*, the Michigan Court of Appeals considered the meaning of the reasonable diligence standard under the sewage-disposal-system-event exception to governmental immunity. In order to bring a successful claim under the exception, a landowner must prove, among other things, that the responsible governmental agency "knew, or in the exercise of reasonable dili-

gence should have known, about the defect" that caused damage to the landowner's property.

In the case, the Drain Commissioner upgraded the sewage system serving a home at the same time the landowner remodeled the home. Subsequently, the landowner's sewer backed up on two occasions. After the first occurrence, the

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Drain Commissioner concluded that the issue may have been due to the remodeling and was probably not caused by an electrical issue.

The second occurrence caused extensive damage, and the Drain Commissioner called a licensed electrician to determine the cause. They found damaged electrical wiring and a damaged check valve. The damage to the check valve was caused by the accumulation of a paint-like substance, which was the same color as that used in the landowner's remodeling. The cause of the damage to the wire was uncertain. The landowner brought suit under the sewer-system-event-exception to governmental immunity.

The Court determined that the Drain Commissioner had no reason to suspect a problem with the check valve prior to the second backup. The Court further determined that while the damaged wire could have been discovered prior to the second backup if a licensed electrician had been called earlier, it was unlikely that the damage would have been detected. The Court concluded that there was no proof the Drain Commissioner should have discovered the damage to either the check valve or the wiring prior to the sewer backup. Therefore, the sewer-system-event-exception to governmental immunity did not apply. Drain Commissioners should be aware that they will be held to a standard of "reasonable diligence" in similar circumstances.

In the Spotlight...

Senator Jon Bumstead for Michigan's 34th District

Senator Bumstead began his career when he opened a construction firm almost 40 years ago. In 2010, he was elected to the Michigan House of Representatives and served three consecutive terms. During that time, he served as vice chair for the House Committee on Appropriations.

In 2018, Senator Bumstead was elected to the Michigan Senate, where he represents Muskegon, Newaygo, and Oceana Counties. He chairs the Senate Natural Resources and Environmental Quality Appropriations subcommittee.

Senator Bumstead is a member of multiple Chambers of Commerce in his district and the Michigan Homebuilders Association. He previously volunteered as a firefighter. Senator Bumstead is also involved with several sportsman's groups, including the National Rifle Association and the Michigan United Conservation Corps, and was previously the president of Michigan's chapter of the Safari Club International.



No Violation of OMA or FOIA for Re-enactment of Closed Session

In *Rotta v. Miller*, the Michigan Court of Appeals interpreted both the Freedom of Information Act ("FOIA") and the Open Meetings Act ("OMA") in relation to a decision by the City Council of the City of Ludington ("Council") to enter a closed session. The Council voted to enter a closed session; however, it failed to satisfy the OMA's quorum requirement for doing so. The Council became aware of the OMA violation and reenacted the improper decision at its next meeting – this time with enough members to satisfy the quorum requirement. The closed sessions at both meetings were challenged under the OMA.

An individual also submitted a FOIA request for the meeting minutes from both closed sessions. Under the FOIA, the minutes from a closed session are generally not available to the public, and the Council denied the request. The individual argued that because the Council violated the OMA in entering each closed session, the minutes were not exempt from disclosure under the FOIA.

The Court upheld the reenactment of the procedurally defective decision to enter a closed session as a cure for the initial OMA violation. The Court also upheld the second decision to enter a closed session, which was made

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for the proper purpose of curing the initial error. Because the initial OMA violation was cured and the reenacted closed session was made for a proper purpose, the minutes from both sessions were exempt from disclosure.

Drain commissioners should familiarize themselves with both the OMA and FOIA requirements for a closed session to avoid potential violations. In the event of a suspected violation, drain commissioners should consult legal counsel to determine the best way to cure the error.

Mayor's Personal Facebook Messages Are Not Subject to Disclosure Under the FOIA

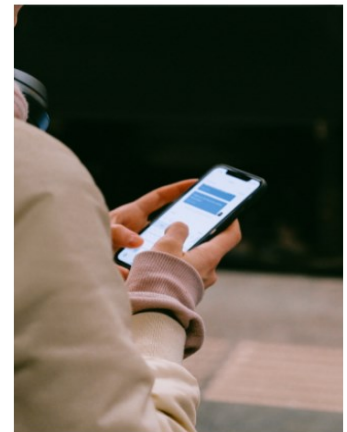
In *Blackwell v. City of Livonia*, the Michigan Court of Appeals considered whether a public official's personal Facebook messages were subject to disclosure under the Freedom of Information Act ("FOIA"). In the case, the plaintiff submitted a FOIA request to the City of Livonia ("City") for "inbox messages" sent to the personal Facebook page of the mayor. The City denied the FOIA request under the theory that City resources were not used to create or operate the Facebook page, and the City had no control over the page.

The Court upheld the City's denial of the FOIA request on the grounds that the messages were not public records and therefore were not subject to disclosure. The Court explained that only public records of a public body are subject to disclosure under the FOIA. The Court further explained that while the office of the mayor is a public body, there is a distinction between the mayor as an individual and the office of the mayor as a public body. Only records that are

retained, used, or possessed by a public body are considered public records. In this case, the mayor maintained her Facebook page for campaign purposes and not as an official page of the office of the mayor. As such, messages sent to her page were not public records.

Drain Commissioners should be aware of the distinction between their personal social media accounts and those that are used to conduct official business.

Drain Commissioners should be vigilant in maintaining this distinction in order to avoid a situation in which a personal social media account could become subject to disclosure under the FOIA.



No Inverse Condemnation in Culvert Replacement

In *Joyce v. Gogebic County Road Commission*, the Michigan Court of Appeals considered claims of inverse condemnation and environmental damage under Part 17 of the Natural Resources and Environmental Protection Act ("NREPA"). In the case, three road culverts near a lake were intentionally damaged and blocked in order to raise the lake level. The Gogebic County Road Commission ("Road Commission") became concerned that the damage would cause the road to washout and decided to replace the culverts with new but otherwise identical culverts. The Road Commission also removed the debris blocking the culverts, which caused the lake level to decrease.

The owners of property abutting the lake brought a claim of inverse condemnation, claiming that the lower lake level

caused a decrease in their property value. They also brought a claim under Part 17 of the NREPA, claiming that replacement of the culverts caused a loss of riparian rights and an increase in invasive species.

The Court held that the plaintiffs did not meet the elements of an inverse condemnation claim. A claim of inverse condemnation requires a showing that:

- 1) "the defendant's actions were a substantial cause of a decline in the value of the plaintiff's property;"
- 2) "the defendant abused its powers by engaging in affirmative conduct specifically directed toward the plaintiff's property;" and
- 3) there is a causal connection between the defendant's actions and the plaintiff's damages.

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The Court explained that the Road Commission has a statutory duty to maintain road culverts and acted pursuant to that duty in replacing them. Further, the Court emphasized that replacement of the culverts was not the cause of a decreased lake level – instead, it was the debris in the culverts that caused a higher-than-normal level. Therefore, the Road Commission's actions were not specifically directed at plain-

tiffs' properties, and it was not an abuse of authority to replace the damaged culverts.

The Court also found that the landowners did not bring an adequate claim for environmental damage under Part 17 of the NREPA. Instead, they were attempting to use the judicial process to set a legal lake level, which is a process that must take place under comprehensive scheme set forth by Part 307 of the NREPA.

Legislation of Interest

The following bills of interest to Drain Commissioners and Associate Members are currently pending before, or were recently passed by, the Legislature. Full text and up-to-date action for each bill can be found online on the Legislature's website at www.legislature.mi.gov.

HB 4284 Rep. Koleszar introduced House Bill 4284 on February 23, 2021. HB 4284 would make the candidate filing fee that may be submitted in lieu of a nominating petition for county offices, including the office of Drain Commissioner, nonrefundable. HB 4284 was passed by both the House and the Senate and assigned Public Act 146 of 2021 with immediate effect on December 15, 2021.

SB 258 Sen. Vanderwall introduced Senate Bill 258 on March 18, 2021. SB 258 affects all statutes in Michigan requiring public notice for meetings. If enacted, it would require newspapers, when publishing public notices in print newspapers, to also post the notices on their websites and on a central website. SB 258 is tie-barred with SB 259 introduced by Sen. Santana. SB 258 was passed by the Senate and is currently before the House Committee on Local Government and Municipal Finance.

HB 4729, HB 4730, HB 4731, HB 4732 House Bills 4729, 4730, 4731, and 4732 were introduced by Reps. Cherry, Calley, Manoogian, and Marino, respectively, on April 29, 2021. The bill package would revise procedures, fees, and the scope of provisions relating to accessing and copying records on file with a register of deeds or county treasurer or records prepared under the General Property Tax Act. HBs 4729, 4731, and 4732 are currently before the House Committee on Commerce and Tourism. HB 4730, with a substitute, was read a third time and postponed for the day on December 8, 2021.

SB 472 Sen. Bayer introduced Senate Bill 472 on May 20, 2021. SB 472 would amend the Seller Disclosure Act to require, among other things, that seller disclosure statements

include a statement as to whether the property is located in a flood inundation zone. SB 472 is currently before the Senate Committee on Environmental Quality.

SB 565 Sen. Bumstead introduced Senate Bill 565 on June 24, 2021. SB 565 is a \$3.3 billion supplemental with funding to address water issues, including infrastructure, dams, lead, PFAS, wastewater, drinking water, and wetlands. SB 565 was passed by the Senate with a substitute and is currently before the House Committee on Appropriations.

HB 5330 Rep. Morse introduced House Bill 5330 on September 22, 2021. HB 5330 would create a water management infrastructure fund and water management infrastructure program to provide grants and loans to political subdivisions for projects related to infrastructure for stormwater, sewage treatment, flood control, and green infrastructure. HB 5330 is currently before the House Committee on Appropriations.

HB 5661 & SB 813 Rep. Rogers introduced House Bill 5661 on December 29, 2021, and Sen. McCann introduced Senate Bill 813 on January 12, 2022. The identical bills would allow the state Department of Natural Resources to issue an emergency order if a structure or fill located on bottomlands is in imminent danger of failure or is a threat to public health, safety, welfare, property, natural resources, or the public trust. The order would require the owner of the structure to immediately repair or remove the structure or take other action required by the Department. HB 5661 is currently before the House Committee on Natural Resources and Outdoor Recreation, and SB 813 is currently before the Senate Committee on Natural Resources.

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