GOVERNMENT LAW

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I. INTRODUCTION

Very few of the reported opinions issued by the Michigan Court of Appeals or the Michigan Supreme Court in the 2009-2010 *Survey* period pertaining to local, county or state government operations and policies resulted in major changes in the law. Most of the reported opinions had direct application to only specific fact situations. Except for the demise of the trespass-nuisance exception to government immunity,[1] there were no landmark shifts in any particular topic area. The weak State of Michigan economy, which has persisted for years, may have had an impact on the number of cases filed and the number of claims eventually reaching the appellate courts. This trend may continue as local, county and state governments struggle for revenues for basic services, and the private sector has fewer resources to engage with government at all levels.

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1. Blue Harvest v. Dep't. of Transp., No. 281595, 2010 WL 1727620 (Mich. Ct. App. April 29, 2010).

II. FREEDOM OF INFORMATION ACT

The Michigan Court of Appeals issued two opinions of interest interpreting the Michigan Freedom of Information Act (FOIA)[2] during this *Survey* period. In *Howell Education Association MEA/NEA v. Howell Board of Education*[3], the court of appeals interpreted the statutory definition of "public records" subject to disclosure under the statute.[4] FOIA defines a public record as a "writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created."[5] In 2007, Howell Public Schools (HPS) and the Howell Education Association (HEA) engaged in heated negotiations over a new union contract.[6] A Howell resident submitted a series of FOIA requests to HPS requesting copies of all emails sent among three Howell teachers on the bargaining team as well as copies of emails sent to and from the local Michigan Education Association representative assisting the HEA in negotiations.[7] HEA objected to the request, arguing that to the extent the emails discussed union matters, they were not "public records" as defined under FOIA.[8] HEA requested an opinion from counsel for HPS, who noted that there was no case law "regarding whether personal emails or internal union communications maintained on the computer system of a public body were public records subject to disclosure under FOIA."[9] The parties jointly sought a declaratory judgment.[10] After reviewing over 5,500 emails and holding hearings, the circuit court ruled that "any emails generated through the Court's [sic school's] email system that are retained or stored by the district, are indeed public records subject to FOIA."[11] The union appealed.

The court of appeals noted that the HEA had specifically limited its appeal to the issue of whether the emails in question were "public records," and not to whether any statutory exemptions[12] from disclosure apply.[13] Before beginning its analysis, the panel complained that the

2. MICH. COMP. LAWS ANN. §§ 15.231-15.246 (West 2004).
3. 287 Mich. App. 228 (2010).
4. *Id.* at 231.
5. MICH. COMP. LAWS ANN. § 15.232(e) (2009).
6. *Howell Educ. Ass'n MEA/NEA*, 287 Mich. App. at 231-32.
7. *Id.* at 231.
8. *Id.* at 232.
9. *Id.*
10. *Id.*
11. *Id.* at 234.
12. MICH. COMP. LAWS ANN. § 15.243 (West 2004).
13. *Howell Educ. Ass'n MEA/NEA*, 287 Mich. App. at235.

issue is "challenging" and "best left to the Legislature" because the issue is "plainly an issue of social policy."[14] The court continued that it found itself "in the situation akin to that of a court being asked to apply the laws governing transportation adopted in a horse and buggy world to the world of automobiles and air transport."[15]

The court of appeals held that the emails in question were not public records under FOIA even though the district's internal email system captured all of them.[16] The court disagreed with the circuit court holding that the personal emails are public records simply because they are "in the possession of, or retained by" the school district.[17] The court argued that "mere possession of a record by a public body" does not render the record a public document.[18] Instead, the court stated that the analysis should focus on whether the document is used "in performance of an official function."[19]

The court noted favorably a concurring opinion in an earlier FOIA case before the Michigan Supreme Court concerning electronic data stored by a public educational institution.[20] Supreme Court Justice Ryan concurred with the lead opinion in *Kestenbaum* that the magnetic tape upon which a university stored student names and addresses was a public record because "the university could not have functioned without such a list of students."[21]In the present case, the court of appeals argued that, "defendants can function without personal emails" and noted that the district never asserted that the personal emails were essential to the functioning of the school system.[22] The court also analogized the district's email retention system to the placement of letters and notes in teachers' mailboxes in the main office.[23] The court stated that "[w]e have never held nor has it ever been suggested that during the time those letters are 'retained' in those school mailboxes that they are automatically subject to FOIA."[24] The court concluded that "absent some showing that the retention of personal email has some official function

14. *Id.* at 234.
15. *Id.* at 235.
16. *Id.* at 239-40.
17. *Id.* at 236.
18. *Id.* (citing Detroit News, Inc. v. Detroit, 204 Mich. App. 720, 724-725 (1994)).
19. *Howell Educ. Ass'n MEA/NEA*, 287 Mich. App. at 236.
20. *Id.* (citing Kestenbaum v. Mich. State Univ., 414 Mich. 510 (1982)).
21. *Id.* (citing *Kestenbaum*, 414 Mich. at 538-539).
22. *Id.* at 236-37.
23. *Id.* at 238.
24. *Howell Educ. Ass'n MEA/NEA*, 287 Mich. App. at 238.

other than the retention itself, we decline to so drastically expand the scope of FOIA."[25]

The requester of the emails argued that teachers should have no reasonable expectation that personal emails will remain private since all school personnel sign a form upon hiring that explicitly provides that all emails on the district system are subject to inspection by school personnel.[26] The court of appeals noted, however, that release of the emails to the public under a FOIA request is broader and significantly more intrusive than inspection of emails by school district personnel.[27]

While the *Howell* appeals panel took a strong anti-disclosure position on email records, a different appeals panel ruled that a public agency must disclose other records that most voters probably assume are protected from disclosure. The issue facing the court of appeals in *Practical Political Consulting v. Land*[28] was whether the court should order the disclosure of "separate records" created by each municipal clerk prior to the 2008 presidential primary.[29] Each "separate record" contained the printed name, address, voter file number, and the type of "participating political party" ballot (Democratic, Republican, or third party) selected by each voter when the voter arrived at the polls.[30] These separate records were different from the voter registration affidavit forms filed by each voter. Each clerk was required by law to maintain these separate records apart from the voter registration files.[31]

The Michigan Legislature amended Michigan election law for presidential primary elections three times over a twenty-year period. The Michigan presidential primary system evolved from a "closed" primary system in 1988,[32] to an "open" system in 1995,[33] and finally to a "semi-open" system in 2008 requiring the retention of the separate records of each voter's party preference.[34] From 1995 to 2007 under the "open" primary system, the voter's declaration of party preference was not kept in the registration affidavits kept on file in the clerks' offices.[35] The 1995 amendments which stayed in effect through 2007 prohibited the

25. *Id.*
26. *Id.* at 242.
27. *Id.*
28. 287 Mich. App. 434 (2010).
29. *Id.* at 440-41.
30. *Id.*
31. *Id.*
32. MICH. COMP. LAWS ANN. § 168.495, as amended by 1988 PA 275.
33. MICH. COMP. LAWS ANN. § 168.495, as amended by 1995 PA 87.
34. MICH. COMP. LAWS ANN. § 168.615c (West Supp. 2011).
35. *Practical Political Consulting*, 287 Mich. App. at 443.

disclosure of certain voter registration information, including the party preference of each registered voter.[36]

The 2007 amendments applicable to the 2008 primary election included the new "separate record" requirement, but also contained an explicit provision prohibiting disclosure of these records.[37] After the 2008 primary, however, a federal court held that the 2007 amendments were unconstitutional on equal protection grounds.[38] The 2007 amendments contained a non-severability clause, which meant that the federal ruling also voided the nondisclosure provisions in the 2007 amendments.[39] The 1995 amendments which then came back into effect after the federal court decision specifically prohibited from disclosure "voter registration records" and "declarations of party preference."[40] But because the "separate records" created by the Legislature in 2007 were not a part of the voter registration records, the 1995 amendments which came back into effect made no mention of a privacy protection for the separate records.[41]

The day after the 2008 primary election, plaintiff filed a FOIA request with the Michigan Secretary of State's office requesting "a copy of all vote history of the 1/15/08 presidential primary including which ballots each voter selected."[42] The Secretary denied the request, and plaintiff sued.[43] The Secretary argued that the records were exempt from disclosure under § 13(d) of FOIA which exempts "records or information specifically described and exempted from disclosure by statute."[44] The statute cited by the Secretary was the provision in the 1995 amendments which prohibited the disclosure of the "declaration of party preference" in the voter registration records.[45] The Secretary also argued that the records are exempt from disclosure under the FOIA privacy exemption.[46] The FOIA privacy exemption prohibits the disclosure of "information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy."[47] The trial

36. *Id.* at 441.

37. MICH. COMP. LAWS ANN. § 168.615c(4). The statute has been declared unconstitutional. *See* Green Party of Mich. v. Mich. Sec'y of State, 541 F. Supp. 2d 912, 924 (E.D. Mich. 2008).

38. *Id.*

39. *Practical Political Consulting*, 287 Mich. App. at 445.

40. *Id.*

41. *Id.*

42. *Id.* at 446.

43. *Id.* at 447.

44. *Id.* at 447-48.

45. *Practical Political Consulting*, 287 Mich. App. at 447-48.

46. *Id.* at 447.

47. MICH. COMP. LAWS ANN. § 15.243(1)(a) (West 2004).

court disagreed with the Secretary and ordered release of the records, but granted a stay pending appeal.[48]

The court of appeals first held that the record of a voter's choice of a particular party's ballot when the voter arrived at the polls was not a "declaration of party preference" identical to the record of the voter's party preference maintained with the registration record.[49] The court argued that since the nondisclosure provisions of the 1995 amendments did not apply to the "separate records," the separate records were not "records . . . specifically exempted from disclosure by statute."[50] The court stated that the "separate records" are "completely distinct" from the voter registration files and "these separate records have nothing whatever to do with voter registration."[51] The court also concluded that the choice-of-ballot information contained in each separate record is also not exempt from disclosure because the "information" revealed by the ballot selection is not "applicable to any other [election] (in the form of future presidential primaries)."[52] The court concluded that since the phrase "declaration of party preference" in the 1995 amendments "does not plainly and unambiguously encompass an elector's selection of a party's ballot," the separate record of the ballot selection was not protected from disclosure.[53]

The court also then held that the FOIA privacy exemption did not apply.[54] The court argued that in order to determine if the disclosure of the separate records was "clearly an unwarranted invasion of an individual's privacy," the court must "balance the public interest in disclosure against the interest the [Legislature] intended the exemption to protect."[55] The court stated that the only relevant public interest to be weighed is the "extent to which the disclosure would serve the core purposes of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government."[56] The court concluded that the disclosure was necessary "to hold government accountable for the integrity and purity of the state's elections."[57]

Since state law still protects from disclosure the declaration of party preference in each voter's registration records, the voting public is

48. *Practical Political Consulting*, 287 Mich. App. at 448.
49. *Id.* at 450-53.
50. *Id.* at 450-51.
51. *Id.*
52. *Id.* at 452-53
53. *Id.* at 454 (footnote omitted).
54. *Practical Political Consulting*, 287 Mich. App. at 466.
55. *Id.* at 462.
56. *Id.*
57. *Id.*

probably unaware that the separate record of the party ballot that they chose in the 2008 presidential primary is now public information. In analyzing proposed changes to the open primary system, the Michigan legislature found in 1995 that "[w]hat the voters of Michigan want is a return to the time-honored tradition of the secret ballot."[58] If this sentiment still prevails, the Legislature may again attempt to amend Michigan election law prior to the 2012 presidential primary to prohibit disclosure of the separate records of the partisan ballot selected by each voter at the polls.

III. ZONING AND LAND USE

As described in *Risko v. Grand Haven Charter Township Zoning Board of Appeals,*[59] owners of a lot located in a "critical dune zone" along Lake Michigan in Grand Haven Township planned to construct a home on the lot. Part 353 (Sand Dune Protection and Management) of the Michigan Natural Resources and Environmental Protection Act[60] requires the Michigan Department of Natural Resources and Environment (MDNRE) to maintain an atlas of critical dune areas[61] within the state and to notify local governments and owners of property within the critical dune areas of the designation.[62] The statute further provides that a local government may adopt a zoning ordinance to regulate and review site plans for construction within the critical dune zone.[63] In the absence of a local regulation, the MDNRE regulates use of the critical dune zone under a model zoning plan.[64]

The Grand Haven Township zoning ordinance requires a 50-foot setback from the dunes.[65] The design of the lot owner's home included an attached two-car garage which would encroach into the setback area.[66] The property owners obtained approval from the Michigan Department of Environmental Quality (MDEQ) (now MDNRE) to build in the critical dune zone[67] and applied for a zoning variance from the setback requirement.[68]

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58. *Id.* at 468 (Kelly, J. dissenting).
59. 284 Mich. App. 454 (2009).
60. MICH. COMP. LAWS ANN. §§ 324.35301-35325 (West 1999).
61. MICH. COMP. LAWS ANN. § 324.35301(c).
62. MICH. COMP. LAWS ANN. §§ 324.35303(1).
63. MICH. COMP. LAWS ANN. §§ 324.35312-35321.
64. MICH. COMP. LAWS ANN. §§ 324.35301(f).
65. *Risko*, 284 Mich. App. at 454.
66. *Id.* at 455.
67. MICH. COMP. LAWS ANN. § 324.35304(1)(a) (West 1999).
68. *Risko*, 284 Mich. App. at 455.

The Township Zoning Board of Appeals (ZBA) denied the variance on the basis that the property owners could relocate and change the garage design to a side-entry garage so that no variance was necessary.[69] On appeal to the circuit court, the property owners argued that altering their plans to relocate the garage to the side would require significant additional expense and delay including a revised application to MDNRE.[70] The circuit court reversed, holding that the requirement to resurvey, redesign, and resubmit the design to the state "does impose practical difficulties."[71] The ZBA appealed.

Petitioners had claimed in their variance application that based upon the variance standards in the zoning ordinance, the use of a two-car garage was a "substantial property right."[72] The court of appeals reversed the circuit court and held that the construction of a particular design is not a "substantial property right."[73] Finding no definition of "substantial property right" in either the zoning ordinance or Michigan case law, the court looked to dictionary definitions to conclude that "substantial property right" is "reasonably defined in plain, ordinary language as the right or privilege to possess, use, and enjoy the aspects of one's land that are of considerable value and importance."[74] The court also analyzed Michigan cases which considered whether government action, such as eminent domain proceedings, deprived a property owner of a "substantial property right."[75] In the context of these cases, the court of appeals found that the phrase should be "narrowly" construed subject to land use regulations that advance a legitimate governmental interest.[76] The court cited cases which found a "substantial property interest" in egress and ingress from a property,[77] in the right to enforce restrictive covenants,[78] in riparian rights,[79] and in the right to exclude others from the property[80] as "substantial" and "an essential part of land ownership."[81] The court argued that the right to build a particular design was not as "substantial"

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69. *Id.* at 456-57.
70. *Id.* at 457.
71. *Id.* at 458.
72. *Id.* at 456.
73. *Id.* at 460.
74. *Risko,* 284 Mich. App. at 460.
75. *Id.* at 461.
76. *Id.* at 463.
77. *Id.* at 461. (citing Forster v. City of Pontiac, 56 Mich. App. 415, 417, 420 (1974)).
78. *Id.* (citing Indian Village Ass'n v. Barton, 312 Mich. 541, 549 (1945)).
79. *Id.* at 461 (citing Bino v. City of Hurley, 273 Wisc. 10, 19-21 (1956)).
80. *Risko,* 284 Mich. App. at 461 (citing Woodland v. Mich. Citizens Lobby, 423 Mich. 188, 247 (1985)).
81. *Id.* at 464

as all of these other rights.[82] The court concluded that while the right to build a garage on property regulated for residential use is a "substantial property right," the right does not encompass the right to build according to a "preferred design."[83]

IV. MUNICIPAL REGULATORY POLICIES

In 2006, the City of Saginaw approved an ordinance that requires secondhand merchants to electronically report all of their purchases of used goods to the chief of police within forty-eight hours and to pay a $2 per transaction fee.[84] The reports must contain the name of the seller of the secondhand merchandise and a list of all the property received.[85] The ordinance also requires all secondhand merchants to install within six weeks any equipment necessary to electronically transmit the reports to the police department.[86] Two of the three secondhand merchants in the city filed suit alleging that the ordinance was preempted by the Michigan Secondhand Dealers and Junk Dealers Act.[87] The trial court upheld the ordinance, and the merchants appealed.[88]

The Legislature amended the secondhand dealer statute twice during the pendency of the litigation.[89] By the time the case reached the court of appeals, the state statute required that secondhand dealers report each transaction on either "a legible and correct paper or electronic copy, in the English language, from the book or other written or electronic record."[90] The secondhand dealers argued that the city prohibition on paper filings conflicts with the statute, which allows the merchant the choice of reporting the transactions on paper as long as the merchant delivers the report on time and in English.[91] The plaintiffs also argued that the $2 per transaction fee is an unlawful "tax" that violates the Headlee Amendment to the Michigan Constitution.[92] Headlee prohibits a "local government from levying any tax not authorized by law or charter without voter approval."[93] The trial court agreed with the city that the

82. *Id.* at 463-64.
83. *Id.* at 464.
84. USA Cash #1, Inc. v. City of Saginaw, 285 Mich. App. 262, 264 (2009).
85. *Id.* at 269.
86. *Id.*
87. *Id.* at 264 (citing MICH. COMP. LAWS ANN. §§ 445.401-445.408 (West 2002)).
88. *USA Cash #1*, 285 Mich. App. at 265.
89. *Id.* at 269.
90. *Id.* at 272.
91. *Id.* at 273-76.
92. *Id.* at 279.
93. MICH. CONST. of 1963, art. IX, § 31.

secondhand dealer statute did not preempt the ordinance.[94] The court also held that the fee is a user fee, not a tax.[95] The merchants appealed.

The court of appeals agreed with the city and the trial court that the state statute does not preempt the ordinance.[96] The court argued that even though the city ordinance "contains more specific regulations than the state law regulating the same area, the laws are not contradictory in the sense that they cannot 'coexist and be effective.'"[97] The court cited an earlier case, which held that a city ordinance which imposed more stringent requirements for the storage of fireworks did not conflict with the state statute regulating retail sales of fireworks that was silent on the issue of storage.[98] The court of appeals concluded that the Saginaw ordinance similarly added additional reporting requirements for secondhand merchants, but did not conflict with the state statute's regulatory scheme.[99]

The court also held that the transaction fee collected by the city was a "valid user fee" and not a tax prohibited by the Headlee Amendment.[100] The court acknowledged that there is no "bright-line distinction between a valid user fee and a tax" that violates Headlee.[101] Citing the 1998 case which established the test for distinguishing the two, the court stated that there are "three primary criteria to be considered when distinguishing between a fee and a tax."[102] The fee must first "serve a regulatory purpose" which confers a benefit upon the particular people who pay the fee.[103] The fee must also be "proportionate to the necessary costs of the service or the benefit rendered."[104] Finally, the fee must be "voluntary in nature, meaning that the payer of the fee must be able to refuse or limit its use of the service or benefit."[105] The Supreme Court in *Bolt* added that the three criteria "must be considered in their totality rather than in isolation."[106] In applying the *Bolt* test to the Saginaw ordinance, the court of appeals first held that the local regulation serves a regulatory

94. *USA Cash #1*, 285 Mich. App. at 273-74.
95. *Id.* at 279.
96. *Id.* at 272.
97. *Id.* at 276 (citing Rental Prop. Owners Ass'n of Kent Co. v. Grand Rapids, 455 Mich. 246, 262 (1997)).
98. *USA Cash #1*, 285 Mich. App. at 277 (citing Detroit v. Qualls, 434 Mich. 340, 345, 363-64 (1990)).
99. *Id.* at 276.
100. *Id.* at 279.
101. *Id.* at 280.
102. *Id.* at 280 (quoting Bolt v. City of Lansing, 459 Mich. 152, 161 (1998)).
103. Bolt v. City of Lansing, 459 Mich. 152, 161 (1998).
104. *Id.* at 161-62.
105. *Id.* at 162.
106. *Id.* at 167 n.16.

purpose and benefits the secondhand dealer who pays the fee "by ensuring that the merchant is not unknowingly trafficking in stolen property . . . and protecting the merchant from extending money in exchange for property that later may be confiscated by police."[107] As to the proportionality prong of the test, the court calculated the amount of revenue that the fee would generate in a year and found that it was roughly equivalent to the salary of the clerical worker who would review the merchant's reports submitted to the police department.[108] As to the third "voluntariness" prong of the test, the court noted that the electronic reporting requirement and the $2 fee only applies to merchants who engage in more than ten transactions in a 90-day period.[109] The court favorably cited the trial court conclusion that the "decision to engage in secondhand transactions at all, and the number of transactions in which to engage, is a purely voluntary decision within the complete control of an individual business."[110] Even though the court acknowledged that for secondhand merchants, "reducing the number of their transactions or relocating their business is impracticable,"[111] it concluded that "[c]onsidering the three criteria together," the transaction fee is a user fee and not a tax enacted in violation of the Headlee Amendment.[112]

A different court of appeals panel applied the same *Bolt* criteria in a challenge to a new solid waste inspection fee charged by the City of Detroit to certain commercial and industrial properties.[113] Prior to the enactment of the new trash collection ordinance in 2006, the city provided free residential trash service and collected trash from some commercial and industrial properties through a fee schedule.[114] The revenue for all trash collection came from a 3-mill tax levied on commercial businesses and on apartment buildings with more than five units.[115] When the 3-mill tax proved to be inadequate to cover the trash collection costs, the city discontinued its reliance on the 3-mill tax and switched to a new residential collection fee, updated the commercial and industrial collection fees for city collection, and added a new "solid waste inspection fee" for all commercial and industrial properties.[116] The City Council stated that the purpose of the solid waste inspection fee was

107. *USA Cash #1*, 285 Mich. App. at 281.
108. *Id.* at 281-82.
109. *Id.* at 282-83.
110. *Id.* at 282.
111. *Id.* at 283.
112. *Id.* at 283.
113. Wolf v. City of Detroit, 287 Mich. App. 184 (2010).
114. *Id.* at 187-88.
115. *Id.*
116. *Id.* at 189.

to insure that the property owners "have made arrangements for trash disposal service, whether it is a private contractor or the City."[117] The city budget director did a cost analysis of the inspection fee program and developed a fee schedule to cover every business based upon the square foot size of the business.[118] Ultimately, the city opted to collect the inspection fee only from those businesses which did not contract with the city for trash collection but instead used licensed private waste collectors for collection and disposal.[119]

An owner of multiple properties in the city subject to the new inspection fee filed an action for a declaratory judgment with the court of appeals.[120] The plaintiff claimed that the inspection fee was a hidden tax prohibited by the Headlee Amendment because it had no relation to any service or benefit actually received by the taxpayer or to the cost to the city in performing the service, and it was not voluntary.[121] The owner also claimed that the inspection fee was nothing more than a mechanism to generate revenue.[122] The plaintiff provided evidence that the city failed to inspect over two thousand taxable properties, failed to identify all of the potentially taxable properties, and never completed supplying an accurate list of the properties subject to the inspection fee to the appropriate department for inspections.[123]

The court of appeals relied on the *Bolt* three-factor test to hold that the inspection fee is a user fee serving a regulatory purpose, not a tax prohibited by Headlee.[124] The court acknowledged that the inspection process conducted in the first year was chaotic and a reflection of "institutional lethargy" in identifying the properties requiring inspection.[125] After reviewing supplemental information in discovery, however, the court concluded that the city's failure to complete each and every required inspection was an indication that the city "launched the inspection program before it had worked out the details of the process."[126] "Such an inference does not, however, support a conclusion that the City intended the Solid Waste Inspection Fee solely to generate revenue."[127] The court also reviewed the city's analysis of the inspection

117. *Id.*
118. *Id.* at 190-91.
119. *Wolf*, 287 Mich. App. at 190-91.
120. *Id.* at 195.
121. *Id.*
122. *Id.* at 197.
123. *Id.* at 202-03.
124. *Id.* at 199.
125. *Wolf*, 287 Mich. App. at 203.
126. *Id.* at 206.
127. *Id.*

fee schedule compared to the cost of providing the inspection service and concluded that the relationship of cost to the size of the fee was comparable.[128] Despite the chaotic implementation of the program, the court concluded that "the city's lack of preparedness to implement the solid waste disposal inspection process and resulting inept launching of the inspection process" did not cause any "disproportionality" in the application of the fee schedule.[129] The court's conclusion was undoubtedly bolstered by the City's timely "revamp" of the program under a new administration to ensure that the department now completes the inspections in a regular and systematic manner.[130]

These two cases illustrate a growing trend among municipalities as local budget problems become critical. State shared revenues, which account for up to a third of most municipalities' annual revenue, have been cut drastically in an effort to balance the state budget.[131] Property tax revenues, the primary source of revenue for local governments, have fallen precipitously as the real estate market struggles and property values fall. The Michigan State Tax Commission calculates that the inflation rate multiplier for property tax purposes for fiscal year 2010 is 0.3 percent, the lowest in its history.[132] Since the Headlee Amendment prohibits municipalities from raising most millage rates without a vote of the electorate,[133] many Michigan municipalities are struggling to keep pace with expenses. Imposing new fees for certain services is a tempting option that does not usually require voter approval. The *Bolt* decision and its requirement that the fee be comparable to the service provided places limitations on the types of fees a municipality can justify. As the sour Michigan economy continues, more legal challenges to fees for certain municipal services are probably inevitable.

V. TORT LIABILITY AND GOVERNMENTAL IMMUNITY

A. Trespass Nuisance

Michigan law provides that, "[e]xcept as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a

128. *Id.* at 207.
129. *Id.* at 209.
130. *Id.* at 204.
131. OFFICE OF REVENUE AND TAX ANALYSIS, MICHIGAN DEPARTMENT OF TREASURY, REVENUE SHARING: COMPARISON FY 2009 TO FY 2010, MAY CONSENSUS (May 21, 2010), http://www.michigan.gov/documents/treasury/RevenueSharingFY2010vsFY2009.
132. Michigan State Tax Commission, Bulletin No. 10 of 2009, October 13, 2009.
133. MICH. CONST. of 1963, art. IX, § 31.

governmental function."[134] The statute further provides that there are specifically delineated exceptions to governmental immunity: failure to maintain highways;[135] public building defects;[136] negligent operation of government vehicles;[137] performance of a proprietary function;[138] ownership and operation of a government hospital;[139] and "sewage-disposal-system events."[140] Much litigation and judicial interpretation has explored the precise meaning and the scope of each exception.

As recently as 2004, Michigan courts have also recognized a non-statutory, common law exception to immunity for the tort of trespass nuisance.[141] Michigan courts generally have defined trespass nuisance as the interference with the use or enjoyment of land by way of a physical intrusion that the government sets in motion resulting in personal or property damage.[142] The Michigan Supreme Court confirmed the existence of this exception in 1988 in *Hadfield v. Oakland County Drain Commissioner*.[143] The *Hadfield* court relied on section 691.1407(1) of the immunity statute, which states, "this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965 [the date the Legislature enacted the immunity statute], which immunity is affirmed."[144] Since Michigan courts had recognized a common law trespass nuisance exception prior to that date, the *Hadfield* court held that a limited trespass-nuisance exception still existed at the time of the lawsuit.[145]

The Michigan Supreme Court later overruled *Hadfield*, but only as to claims against municipalities.[146] The *Pohutski* court concluded that since MCL 691.1407(1) only mentions "state" and not any other government agency, the "plain language" of the statute does not create a trespass-nuisance exception for cities.[147] The *Pohutski* court declined to explore

134. MICH. COMP. LAWS ANN. § 691.1407(1).
135. MICH. COMP. LAWS ANN. § 691.1402(1).
136. MICH. COMP. LAWS ANN. § 691.1406.
137. MICH. COMP. LAWS ANN. § 691.1405.
138. MICH. COMP. LAWS ANN. § 691.1413.
139. MICH. COMP. LAWS ANN. § 691.1407(4).
140. MICH. COMP. LAWS ANN. §§ 691.1416-.1419.
141. McDowell v. Detroit, 264 Mich. App. 337, 352 (2004), *rev'd on other grounds*, McDowell v. Detroit, 477 Mich. 1079 (2007).
142. *Id.* at 353 (citing Hadfield v. Oakland Co. Drain Comm'r, 430 Mich. 139, 169 (1988)).
143. 430 Mich. 139 (1988)
144. MICH. COMP. LAWS ANN. § 691.1407(1).
145. *Hadfield*, 430 Mich. at 169.
146. Pohutski v. City of Allen Park, 465 Mich. 675 (2005).
147. *Id.* at 689.

whether the language in MCL 691.1407(1) extends common law immunity to the state.[148]

The court of appeals addressed the issue this term in *Blue Harvest v. Department of Transportation.*[149] Plaintiffs in the case were blueberry farmers who argued that the spray from road salt applied to state highways by the Michigan Department of Transportation (MDOT) damaged their blueberry bushes, resulting in decreased production.[150] The farmers claimed trespass nuisance and inverse condemnation.[151] The trial court granted the state's motion for summary disposition on the inverse condemnation claim, but held that the plaintiffs established the elements of trespass nuisance on the basis of *Hadfield.*[152] The state appealed.

The court of appeals found that there is "no basis to conclude that a trespass-nuisance exception exists for claims against the state."[153] The court of appeals rejected the trial court's reliance on *Hadfield* and other cases cited by the *Hadfield* court because none of the cases address "sovereign immunity."[154] The court noted that an earlier Michigan Supreme Court case adopted a very narrow definition of sovereign immunity as a "specific term limited in its application to the *State* and to the departments, commissions, boards, institutions and instrumentalities of the *State.*"[155]

The court of appeals also noted that the Michigan Supreme Court discussed sovereign immunity in the context of MCL 691.1407(1) in *Ross v. Consumers Power Co.*[156] The *Ross* court stated that "at the time § 7 was enacted, the state was immune from tort liability when it was engaged in the exercise or discharge of a governmental function, unless a statutory exception was applicable. This same immunity is reiterated by the first and second sentences of § 7. . . ."[157] The *Ross* court concluded that the statutory scheme created when the Legislature enacted § 7 was intended to "create uniform standards of liability for state and non-sovereign governmental agencies."[158] Because "*Ross* clearly indicates

148. *Id.*
149. *Blue Harvest*, 2010 WL 1727620, at *2.
150. *Id.* at *1.
151. *Id.*
152. *Id.* at *2.
153. *Id.* at *3.
154. *Id.*
155. *Blue Harvest*, 2010 WL 1727620, at *3 (citing Myers v. Genesee Co. Auditor, 375 Mich. 1, 6 (1965)) (emphasis added).
156. *Id.* at *4 (discussing Ross v. Consumers Power Co., 420 Mich. 567 (1984)).
157. *Id.* (citing Ross v. Consumers Power Co., 420 Mich. 567, 605-08 (1984)).
158. *Ross*, 420 Mich. at 605-08.

that exceptions to sovereign immunity must be granted by the Legislature," the *Blue Harvest* panel concluded that the immunity statute must delineate any exception to immunity for the state.[159] Since "the Legislature has not provided such an exception for trespass nuisance claims," MDOT was entitled to summary disposition on the farmers' claim.[160] Unless the Michigan Supreme Court overrules the court of appeals, or the Legislature amends the statute to add this exception, the *Blue Harvest* case effectively ends the trespass nuisance exception to governmental immunity in Michigan for all government entities.

B. Highway Exception

Three cases pertaining to the highway exception to immunity are worth mentioning in this article. In *Robinson v. City of Lansing*,[161] plaintiff fell and was injured on the depressed area of a sidewalk adjacent to a state trunk line highway maintained by the City of Lansing.[162] The parties did not dispute that the depth of the depression in the sidewalk was less than two inches.[163] The defendant city moved for summary disposition of the claim, arguing that the statutory "two-inch rule" applied in this case since the sidewalk depression was less than two inches.[164]

The government immunity statute provides that a "municipal corporation has no duty to repair or maintain, and is not liable for injuries arising from, a portion of a county highway outside of the improved portion of the highway designed for vehicular travel, including a sidewalk. . . ."[165] The statute further provides in a subsequent subsection that a "discontinuity defect of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk . . . or other installation outside of the improved portion of the highway in reasonable repair."[166] Defendant city and the court of appeals agreed that because the legislature did not expressly use the word "county" in the subsection describing the duty to repair and maintain, the word "county" cannot be read as a limitation into the subsequent subsection creating the rebuttable inference.[167] Both concluded that municipalities enjoy this

159. *Blue Harvest*, 2010 WL 1727620, at *4 (Mich. Ct. App. April 29, 2010).
160. *Id.*
161. 486 Mich. 1 (2010).
162. *Id.* at *3-4.
163. *Id.* at *4.
164. *Id.*
165. MICH. COMP. LAWS ANN. § 691.1401(e).
166. MICH. COMP. LAWS ANN. § 691.1402a(2).
167. *Robinson*, 486 Mich. at 4.

rebuttable inference for all sidewalks, even those adjacent to local streets and state highways.[168]

The Michigan Supreme Court disagreed and held that the rebuttable inference that arises when the discontinuity is less than two inches "only applies in cases in which the effective sidewalk is adjacent to a *county* highway."[169] The court argued that subsection (2) "cannot be read in isolation" but must be read in the "context" of the entire section "read as a whole."[170] The court further argued that the Legislature is not required to "repetitively restate 'county' through the entire statutory provision."[171] The court called the method of wording and organizing this section of the statute a "fully rational and coherent legislative scheme" that "sets forth in clear terms the general rule regarding a municipality's liability for defective sidewalks."[172] The court reinstated the trial court's order striking the rule as an affirmative defense and remanded the case for further proceedings.[173]

This case marks a shift in statutory interpretation for government immunity cases. Earlier Supreme Court decisions relied upon the "plain language" of the statute to "narrowly tailor" exceptions to immunity.[174] The *Robinson* holding significantly broadens the area of potential claims against municipalities. Local governments can no longer rely on the two inch rule to shield them from liability for damage and injuries that occur on any sidewalk where there is a discontinuity of less than two inches. This ruling will undoubtedly cause a number of municipalities to reassess the condition of the sidewalks that they maintain and the amount of revenue they allocate to sidewalk repair and maintenance. The City of Royal Oak in Oakland County, for example, has jurisdiction over 200 miles of city streets, most of which include sidewalks on both sides of the neighborhood street. Since funds for infrastructure expenses are extremely limited, the Michigan legislature may be asked to amend the statute to extend the liability protection of the two-inch rule to all municipal sidewalks other than those adjacent to county highways.

In another case defining the limits of the highway exception, a motorist was injured when a piece of concrete fell from the fascia of a freeway overpass in the City of Detroit and crashed through the car windshield as the motorist drove under a bridge.[175] The Michigan

168. *Id.*
169. *Id.* at 13.
170. *Id.* at 15-16.
171. *Id.* at 16.
172. *Robinson,* 481 Mich. at 22.
173. *Id.* at 22-23.
174. *See* Renny v. Dep't of Transp., 478 Mich. 490 (2007).
175. Moser v. City of Detroit, 284 Mich. App. 536, 537 (2009).

Department of Transportation (MDOT) had a contractual obligation to maintain and repair all of the freeway bridges in the city.[176] MDOT argued in seeking summary disposition of the motorist's claim that section 691.1402(1) of the liability statute only imposes liability for failing to maintain and repair the "improved portion" of the highway upon which vehicles directly travelled.[177] MDOT further argued that the fascia of the bridge is not a part of the improved portion.[178] The circuit court disagreed and denied MDOT's motion; MDOT appealed.[179]

The court of appeals held that the fascia is an improved portion of the highway.[180] The court acknowledged that the Michigan Supreme Court in an earlier opinion held that the "highway exception to immunity is narrowly construed."[181] The *Grimes* opinion found that "only the travel lanes of a highway are subject to the duty of repair and maintenance" and concluded that the shoulder of the road is outside the scope of the duty.[182]

In the case involving the fallen bridge fascia, the court of appeals relied on *Nawrocki v. Macomb County Road Commission*[183] to conclude that the improved portion of the highway includes not only the road surface but also the "actual physical structure of the road bed surface."[184] The court argued that since integrity of the road surface is dependent upon the condition of the "construction components found underneath the surface," the fascia of the bridge is a component of the travelled portion of the roadway.[185] The court of appeals cited favorably trial testimony from an MDOT bridge inspector who explained that the deck of a bridge is the travelled portion and includes an interrelated top, bottom, and sides, or fascia.[186] The court argued that if the sides are allowed to deteriorate, "the highway is just as subject to collapse or other dangers, as it would be if the surface were allowed to deteriorate (perhaps even more so)."[187] The court concluded that MDOT's failure to maintain the bridge fascia "created an unsafe condition on the travelled

176. *Id.*
177. *Id.* at 538.
178. *Id.*
179. *Id.*
180. *Id.* at 542.
181. *Moser*, 284 Mich. App. at 539 (citing Grimes v. Dep't of Transp., 475 Mich. 72, 78 (2006)).
182. *Grimes*, 475 Mich. at 91.
183. *Moser*, 284 Mich. App. at 540-41 (citing Nawrocki v. Macomb Cnty. Rd. Comm'n., 463 Mich. 143, 162 (2000)).
184. *Id.* at 541 (citing *Nawrocki*, 463 Mich. at 183).
185. *Id.*
186. *Id.* at 541-42.
187. *Id.* at 542.

portion of the roadbed designed for vehicular travel" which rendered the improved portion of the freeway "unfit for public travel."[188]

The third case pertaining to the highway exception involved adequacy of the plaintiff's notice of his claim to the governmental agency with jurisdiction over the road.[189] The accident in *Plunkett v. Department of Transportation* occurred on a state highway during a hard rain when the car driven by plaintiff's wife hydroplaned on pooled water, left the roadway, and struck a tree alongside the road, killing the driver.[190] The notice requirement under a claim of a highway defect requires the claimant to file a notice with the agency "of the occurrence of the injury and the defect" in the court of claims[191] within 120 days.[192] The notice shall also "specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant." [193]

Plaintiff filed a pre-suit notice with MDOT approximately three and a half months after the accident.[194] The notice described the location as "at or near Bailey Road" and stated that the standing or "pooled water on the roadway was caused by excessive and uneven wear, and/or lack of drainage due to uneven or unreasonable wear, and/or failure to maintain the roadway in a reasonably safe manner."[195] The notice attached a police report which included a more detailed description of the specific location of the accident in relation to guardrails, bridges, curves, and other features on or near the roadway at the accident scene.[196]

In the subsequent complaint, plaintiff claimed that the road fell into disrepair "which caused the roadbed's surface to thereafter contain substantially dangerous and defective conditions."[197] Plaintiff also alleged that improper maintenance altered the crown of the roadbed resulting in improper drainage and that "excessive wheel track rutting" contributed to the problem.[198] MDOT filed three motions for summary disposition, the third of which claimed among other issues that plaintiff's notice was improper for failing to include a "strictly accurate or correct description of the alleged defective condition" which the plaintiff alleged

188. *Moser,* 284 Mich. App. at 542.
189. Plunkett v. Dep't. of Transp., 286 Mich. App. 168 (2009).
190. *Id.* at 171.
191. MICH. COMP. LAWS ANN. § 691.1404(2) (West 2000).
192. MICH. COMP. LAWS ANN. § 691.1404(1).
193. *Id.*
194. *Plunkett,* 286 Mich. App. at 171.
195. *Id.* at 175.
196. *Id.*
197. *Id.* at 172.
198. *Id.* at 172-173.

in his complaint.[199] The trial court denied the motion, and MDOT appealed.[200]

The court of appeals held that the plaintiff's notice complied with the statutory requirements.[201] The court noted that when a private citizen is required to provide notice to a government agency, "it need only be understandable and sufficient to bring the important facts to the government entity's attention."[202] The notice requirement is to be construed liberally "to avoid penalizing an inexpert layman for some technical defect."[203] A notice will be adequate as long as it is in "substantial compliance" with the statutory requirements.[204] The court held that the plaintiff's notice along with the attached police report was "sufficient to bring the defect to MDOT's attention."[205] In affirming the trial court's denial of the motion, the court stated, "[i]ndeed, this Court has upheld even less detailed descriptions."[206]

C. Proprietary Function

The government tort liability statute provides that government activity is subject to a claim of injury or damage if the government entity is performing a "proprietary function."[207] "Proprietary function" is defined as "any activity which is conducted primarily for the purpose of producing a pecuniary profit for the government agency, excluding, however, any activity normally supported by taxes or fees."[208] The Michigan Supreme Court has held that there is a two-pronged proprietary function test: "(1) [t]he activity must be conducted primarily for the purpose of producing a pecuniary profit and (2) [t]he activity cannot normally be supported by taxes or fees."[209] The activity is not proprietary if it generates a profit unless the profit is the "primary" motive for the activity.[210]

Two opinions issued by the court of appeals during this *Survey* period provide additional examples of the proprietary function exception.

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199. *Id.* at 177.
200. *Plunkett,* 286 Mich. App. at 174.
201. *Id.* at 179.
202. *Id.* at 176 (citing Brown v. City of Owosso, 126 Mich. 91, 94-95 (1901)).
203. *Id.* (citing Meredith v. City of Melvindale, 381 Mich. 572, 579 (1969)).
204. *Id.* (citing Hussey v. Muskegon Hts., 36 Mich. App. 264, 269 (1971)).
205. *Id.* at 179.
206. *Plunkett,* 286 Mich. App. at 179.
207. MICH. COMP. LAWS ANN. § 691.1413.
208. *Id.*
209. Coleman v. Kootsillas, 456 Mich. 615, 621 (1998).
210. Harris v. Univ. of Mich. Bd. of Regents, 219 Mich. App. 679, 690 (1996).

In *Ward v. Michigan State University*,[211] a hockey puck struck and injured a spectator sitting in an area of the arena not protected from the ice rink by plexiglas. In the subsequent lawsuit on cross-appeal, the plaintiff alleged that the university was not immune from liability because the injury resulted from a proprietary function.[212] Plaintiff alleged that the university manifested intent to generate a profit from its athletic department by expanding athletic facilities, firing and hiring specific coaches, and its concern with team success.[213] Plaintiff also noted that the athletic department receives over $3 million in revenue over its expenses.[214]

The court of appeals held that the operation of the ice hockey program is not a proprietary function.[215] The court cited an earlier case which held that "in light of the history of intercollegiate athletics at Michigan universities and colleges that has historic support from the Michigan Legislature, we find that intercollegiate athletics is a governmental function for purposes of immunity."[216] Plaintiff argued that times have changed since the *Harris* decision and university athletic programs generate enormous revenue.[217] The court of appeals concluded, however, that since the "primary" purpose of the university athletic programs was not to generate a profit, the proprietary function exception did not apply to injuries and damage resulting from operation of the hockey program.[218]

In the second case, a different panel of the court of appeals agreed with the trial court that there were questions of material fact as to whether the government operation fell within the proprietary function exception.[219] In 1973, Wexford County began operating a landfill for the disposal of waste from Wexford County residents.[220] In 1990, the landfill began accepting waste from a neighboring county,[221] but waste from that county has never exceeded 13.2% of the total intake.[222] In 1984, tests

211. 287 Mich. App. 76, 79 (2010).
212. *Id.* at 84.
213. *Id.* at 86.
214. *Id.*
215. *Id.*
216. *Id.* at 85-86.
217. *Ward*, 287 Mich. App. at 86.
218. *Id.*
219. Dextrom v. Wexford County, 287 Mich. App. 406 (2010).
220. *Id.* at 431.
221. *Id.* at 410.
222. *Id.* at 411.

confirmed that groundwater wells serving neighboring residents were contaminated with chemicals leaching from the landfill.[223]

Despite ongoing enforcement action by the State of Michigan and attempts to cap certain portions of the landfill to prevent further contamination, environmental problems at the landfill persisted.[224] A number of Wexford County residents affected by the landfill operation eventually sued, claiming numerous torts including trespass, nuisance, and negligence.[225] Plaintiffs further argued in response to the county's motion for summary disposition on immunity grounds that the operation of the landfill was proprietary, was conducted in order to make a profit, and was not of a size and scope normally supported by fees or taxes from a community the size of Wexford County.[226]

The Michigan Court of Appeals acknowledged that "defendant's operation of a landfill constitutes a governmental function, for which a governmental agency is generally immune."[227] The court noted, however, that "between 2000 and 2005, the landfill transferred approximately $2.7 million out of the landfill fund for uses unrelated to the landfill."[228] These transfers amounted to approximately half of the landfill's annual net earnings plus interest.[229] The court also cited evidence provided by plaintiffs that included numerous statements by county officials that indicated a profit-making motive.[230] The court noted another case involving university athletic programs which concluded that the proprietary function exception "turns on the agency's motive."[231] With the *Hyde* explanation in mind, the court concluded that the evidence concerning the landfill's operations and finances created a question of material fact as to whether the county was operating the landfill strictly as it originally intended as a facility for the county's waste, or whether its primary motive and purpose in accepting waste from neighboring communities was to make a profit.[232]

The court of appeals also noted that "even if an activity is conducted for the primary purpose of making a profit, the proprietary function exception does not apply if the activity is normally supported by taxes or

223. *Id.*
224. *Id.* at 411-12.
225. *Dextrom,* 287 Mich. App. at 413.
226. *Id.*
227. *Id.* at 420.
228. *Id.* at 423.
229. *Id.*
230. *Id.* at 424.
231. *Dextrom,* 287 Mich. App. at 421 (citing Hyde v. Univ. of Mich. Bd. of Regents, 426 Mich. 223, 257 (1986)).
232. *Id.* at 431.

fees."[233] The taxes and fees, however, have to be appropriate to the size of the community on which they are imposed.[234] The court cited favorably the *Coleman* decision, which found that immunity does not apply when the government entity engages in an enterprise "of such vast and lucrative scope" that is "simply not supported" by a small community "either through taxes or fees."[235] The court noted that in *Coleman*, the City of Riverview accepted garbage not only from its residents but also from the county and the province of Ontario, Canada.[236] The *Coleman* court concluded that since the taxes and fees were beyond the scope of those which would be paid by the residents of the city alone, the proprietary function test had been met and the city of Riverview was not immune from tort liability.[237]

The *Dextrom* panel remanded the case to the trial court for the explicit purpose of an evidentiary hearing to "determine whether defendants' operation of the landfill was subject to the exception *as a matter of law*." [238] The court emphasized that a government operation that is well-managed enough to be financially solvent should not be penalized for making a profit by losing immunity.[239] The clear implication of this decision is that an operation, which intentionally generates large profits in order to subsidize other unrelated programs or purposes can jeopardize a government entity's immunity for damages related to that operation.

233. *Id.* at 424 (citing Coleman v. Kootsillas, 456 Mich. 615, 622 n.8 (1986); *Hyde*, 426 Mich. App. at 259-60).

234. *Id.* at 425.

235. *Id.* at 425 (quoting Coleman v. Kootsillas, 456 Mich. 615, 623 (1998)).

236. *Id.*

237. *Dextrom*, 287 Mich. App. at 425.

238. *Id.* at 433.

239. *Id.* at 422.