



## Bauckham, Sparks, Lohrstorfer, Thall & Seeber, P.C.

### Municipal Law Update

November 4, 2011

**PA 196 of 2011 allows municipal officials or employees to serve as the fire chief in municipalities with less than 3,000 population**

PA 196 of 2011 amends the Incompatible Public Offices Act (MCL 15.181, et seq) to allow a township (or other municipal) official or employee to serve as that municipality's fire chief in municipalities with less than 3,000 population.

PA 196 was given immediate effect on October 18, 2011.

#### [PA 196 of 2011](#)

#### **Michigan Supreme Court to review Court of Appeals' holding in *Toll Northville v Township of Northville***

On September 28, 2011, the Michigan Supreme Court granted leave to review the Court of Appeals' opinion in *Toll Northville v Township of Northville*. Specifically, the Michigan Supreme Court will review whether the Michigan Tax Tribunal had jurisdiction to reduce an unconstitutional increase in taxable value of a property,



**Greetings:** Welcome to a spectacular Michigan fall! Our attorneys and staff are enjoying high school and college football, watching the leaves change, apple picking and all other fall activities. (We have several Spartans working here and even a few dedicated Wolverine fans!!)

In addition, we are working hard to serve our firm's clients and friends throughout the State of Michigan. To that end, we provide this update on case law, statutes and other trends of interest to our municipal clients.

Please feel free to contact us with any questions or comments. We appreciate the opportunity to serve our many municipal and private clients throughout the State of Michigan.

**Bauckham, Sparks, Lohrstorfer, Thall & Seeber, P.C.**

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#### **Personal notes prepared and kept by a township trustee are not public records and are not subject to disclosure under FOIA**

The Michigan Court of Appeals held recently that a township trustee's personal notes, taken during township meetings but used for purely personal purposes and not shared with other township officials were not public records. Therefore, the township trustee's personal notes were not subject to disclosure in response to a resident's FOIA request for "copies of any notes taken by any elected official during any

if the improperly increased taxable value was not challenged in the year of the increase.

The outcome of this case is important to municipal officials across the State.

**Is it time to review your zoning ordinance definition of recreation?**



Many of our municipal clients are dealing with the issue of motorbike and/or off road vehicle riding on private property. In many cases, property owners will open their agricultural or residential zoned property to friends, neighbors and acquaintances to ride. Additionally, many property owners build tracks or trails on their property to facilitate motorcross or off road vehicle riding.

It usually isn't until adjoining neighbors start to complain about the noise, dust and other negative impacts arising from such riding that a municipality is faced with regulating or enforcing against such activity. Often, zoning ordinances aren't clear on whether off road vehicle riding is a permitted use, an accessory use or not permitted at all. Does such use fall within the definition

Duncan Township Board or Zoning meetings over the last 12 months."

The township trustee routinely took notes in a personal diary, not only during township meetings, but during all activities, to help himself remember things. In response to a resident's FOIA request, the township did not produce the trustee's personal notes, based its determination that the trustee's notes were not used during township meetings and were not used for preparation of the minutes. Thereafter, the resident brought suit against the Township for violation of FOIA. The Township's defense was that the trustee's notes were not public records and were not subject to disclosure under FOIA. The trial court granted the Township's motion for summary disposition and the resident appealed.

Upon review, the Court of Appeals upheld the trial court's grant of summary disposition for the Township, finding that while the trustee took his notes during a township meeting, the trustee's notes were not in furtherance of an official function. Instead, the trustee took his notes for his own personal use, the notes were not circulated among or discussed with the other township board members, were not used in preparation of the meeting minutes and were retained by the trustee at his sole discretion. The Court of Appeals found that in these circumstances, the trustee's personal notes were not public records and were not subject to disclosure under FOIA.

*Hopkins v Township of Duncan, 10/20/11, released for publication*  
*Duncan (released for publication)*

**BSLTS attorney moderates presentation on Cass County Medical Marihuana working group at MTA Supervisors' seminar**



Attorney John Lohrstorfer served as a moderator for a panel discussion by the Cass County Medical Marihuana working group at the MTA Supervisors' seminar held in September, 2011 in Cadillac. As one of the members of the Cass County working group, Attorney Lohrstorfer represented eight Cass County township clients, while working in conjunction with the County Prosecutor's office, the County

Sheriff's office and all local municipal officials and law enforcement to develop similar medical marihuana regulations for all Cass County municipalities.

of public or private recreation? If the use is not specifically allowed in the zoning ordinance, can the zoning administrator make a determination that it is allowed? If so, what are the standards the zoning administrator would use to render such determination?

How does any zoning regulation interrelate to a police power nuisance and/or noise ordinance?

In light of the increase in such activities, we urge our clients to review their zoning, noise and/or nuisance ordinances to determine their applicability to such situations. In addition, we note that our office has prepared many ORV ordinances for clients, which would regulate the extent and scope of ORV activities in the municipality through a police power ordinance.

If you have further questions on ORV ordinances, please contact Attorneys Roxanne Seeber, John Lohrstorfer or Catherine Kaufman.

#### BSLTS Attorneys

[John H. Bauckham](#)  
[Kenneth C. Sparks](#)  
[John K. Lohrstorfer](#)  
[Robert E. Thall](#)  
[Roxanne C. Seeber](#)  
[Catherine P. Kaufman](#)

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The Cass County Medical Marijuana working group was formed under the direction of Cass County Prosecutor Victor Fitz. Prosecutor Fitz thought it would be helpful to both Cass County law enforcement and the Prosecutor's office if all Cass County municipalities could develop and adopt somewhat similar medical marijuana regulations. Prosecutor Fitz's office headed up a County wide working group that met for several months in 2010 - 2011, to develop medical marijuana regulations. Several Cass County townships, villages and cities have since adopted medical marijuana regulations.

Attorney Lohrstorfer thanks Cass County Prosecutor **Victor Fitz**, Assistant Prosecutor **Diab Rizk**, Cass County Undersheriff **Rick Behnke** and Pokagon Township Supervisor **Linda Preston** for serving on the MTA speakers' panel with him.

#### **Michigan Court of Appeals holds that a primary caregiver's medical marijuana plants must be held in a separate, enclosed, locked facility**

The Michigan Court of Appeals held in a recent opinion (9/27/11, released for publication) that a licensed medical marijuana primary caregiver cannot intermingle medical marijuana plants for his designated patients with those of other caregivers or patients.

Defendant Bylsma was arrested for having 88 marijuana plants. Defendant was a registered primary caregiver for 2 patients, which would allow him to have 24 marijuana plants. Defendant told the police that he was helping other registered patients and caregivers grow their medical marijuana plants in his locked facility, which he claimed was permitted under the Michigan Medical Marijuana Act (MMMA). Defendant used the MMMA as an affirmative defense against his arrest and requested the court to dismiss the charges against him. The trial court denied Defendant Bylsma's request to dismiss charges, as Defendant Bylsma had many more plants than allowed under the MMMA in his storage area.

The Court of Appeals upheld the trial court's ruling, holding that Defendant (as a registered primary caregiver) was not allowed to possess medical marijuana plants for parties other than his designated patients. He was allowed only to possess the 24 plants permitted by the MMMA for his 2 designated patients. He was not allowed to assist other patients or caregivers in growing medical marijuana, nor was he allowed to let others grow plants in his rented space (enclosed, locked facility). Accordingly, the Defendant could not assert the

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MMMA as an affirmative defense to prosecution.

*People v Bylsma, 9/27/11, released for publication*

### Expansion of non conforming sign held to be nuisance per se



nuisance per se.

On October 27, 2011, the Michigan Court of Appeals issued an unpublished opinion holding that the expansion of a non-conforming sign was a violation of the township zoning ordinance and a

Defendant sign company removed a portion of a non-conforming billboard and replaced it with a new sign face that was still non-conforming in terms of the township zoning ordinance, but which decreased the level of non-conformity. The defendant did not seek township approval before updating its non-conforming sign. The township brought suit, asserting that the non-conforming sign was a violation of the zoning ordinance and a nuisance per se. Defendant sign company counter-claimed, alleging that the township's sign regulations (spacing) violated the First Amendment and that the zoning ordinance did not provide standards for the zoning administrator's determination on changing non-conforming uses.

The trial court held for the township, finding that the defendant's sign was non-conforming in three respects: sign surface was too big, sign was too tall and sign was located too close to another sign. The trial court also found that while the new sign was in greater conformity with zoning ordinance requirements than the previous sign, the sign was still non-conforming as to spacing distance from other signs. The trial court held that the revised sign was in violation of the zoning ordinance and was a nuisance per se. The trial court ordered the revised sign removed within 21 days and dismissed Defendant's counter claim.

On appeal, defendant argued that Michigan law prohibits the township from restricting the modification of a non-conforming use or structure if the modification lessens the non-conformity. The Court of Appeals, however, found this argument to be without merit, noting that Michigan law does not authorize any improvement to a non-conforming

use, exclusive of the application of the pertinent zoning ordinance. Notably, the township's zoning ordinance did not prohibit maintenance or modernization of a non-conforming sign if the proposed improvement did not exceed 30% of the replacement value. Defendant's cost of updating its billboard, however, exceeded 30% of the replacement cost. Accordingly, it was a violation of the zoning ordinance and a nuisance per se.

Additionally, the Court of Appeals upheld the trial court's striking of a sentence of the zoning ordinance that authorized the zoning administrator to make a determination on non-conforming uses, as there were no standards included to guide the zoning administrator's decision. The Court of Appeals also upheld the township's spacing requirement for billboards, noting that the regulation was properly tailored as a restriction on commercial speech.

*Township of Blair v Lamar OCI North Corporation,  
10/27/11, unpublished*

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Bauckham, Sparks, Lohrstorfer, Thall & Seeber P.C. | 458 W. South Street | Kalamazoo | MI | 49007