



FROM GARAN LUCOW MILLER'S MUNICIPAL LAW DEPARTMENT

GOV LAW

Monthly Publication for Michigan Cities, Townships, Villages and Schools

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From the Editor by John J. Gillooly



You have undoubtedly heard the saying that the key to a successful real estate transaction is "location, location, location."

Your ultimate success in legal matters depends in large part on "communication, communication, communication." That's how GLM can help.

For many years, we have helped clients and non-clients alike get a better understanding of the law through our well-publicized breakfast seminars.

We hope that you are able to join us for a breakfast seminar dealing with the most current municipal topics on **Thursday, January 27, 2005, at the Troy Marriott**. Our agenda for the **Governmental Liability Seminar** will include:

- 8:00 - 8:30 a.m. Continental Breakfast**
- 8:30 - 9:15 a.m. "Shoot / Don't Shoot" - a review of the use of deadly force**
- 9:15 - 10:00 a.m. Do Your Ordinances Pass Constitutional Muster?**
- 10:00 - 10:30 a.m. "So You Want to Take an Appeal?" - the top ten ways to better your chances on appeal**
- 10:30 - 10:45 a.m. Break**

10:45 - 11:30 a.m. Tips and Tricks of Litigating Municipal Claims in Michigan

11:30 - 12:30 p.m. Complimentary Lunch

Please let us know if you plan to attend the seminar by calling John Gillooly at 313.446.5501.

BREAKING NEWS!!!



The 6th Circuit Court of Appeals ruled on 10/26 that voters in the 2004 election must cast their ballots in the precinct in which they live.



In Washtenaw Circuit Court, GLM wins multi-million dollar verdict on behalf of Salem Township against a breaching landfill operator for failure to pay under lease agreement. *Twp of Salem v Allied Waste Ind., Inc.*



Garan Lucow has successfully negotiated refuse disposal contracts on behalf of municipalities. Call 313.446.5501.



The Michigan Supreme Court released an opinion on 10/26/04, holding that a police vehicle while stopped partially on the roadway while the officer assisted a stalled vehicle was not "unreasonably" parked for purposes of liability under the no-fault act. *Stewart v State of Michigan, Sup Ct #124676.*

At the Polls 2004

by Ebony L. Duff



With the 2004 general election fast approaching, below are a few tips to ensure the efficient management of polling precincts in your municipality. Find the complete laws at MCL 168.1 *et seq*:

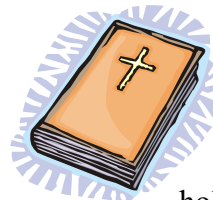
- ✓ Polling places must be open and ready for voting at 7:00 a.m. on November 2, 2004. The polling place must remain open for voting until 8:00 p.m. Every voter standing in line at 8:00 p.m. must be permitted to vote.
- ✓ A suitable barrier must be erected in each polling place to separate election officials, challengers, voting machines/ballot boxes and voting booths from electors in the process of voting.
- ✓ The clerk of your municipality must ensure that all voting machines are properly labeled, thoroughly tested, and set for proper operation, then sealed and locked until election day. The clerk must also have the voting machines delivered to the polling places at least 1 hour before the polls open.
- ✓ The Secretary of State and/or the boards of county election commissioners deliver all forms and supplies to county clerks. County clerks must deliver forms and supplies to the city and township clerks at the time official ballots are delivered for distribution to the precinct election inspectors.
- ✓ Immediately upon closing the polls, the board of election inspectors must conduct a public canvass of the votes. The counted ballots should then be securely tied and placed in the ballot bags and boxes approved by the secretary of state before they are delivered to the clerk of the municipality.
- ✓ The board of election inspectors must complete duplicate statements of the returns showing the total number of votes cast for all offices. All inspectors must sign the statement of returns, and those who fail to do so will be deemed guilty of a misdemeanor. Any inspector

who knowingly executes a false or incorrect statement of returns will be deemed guilty of a felony.

- ✓ All election returns, including poll lists, statements, tally sheets, absent voters' applications, absent voters' return envelopes, and other returns made by the inspectors of the various precincts must be preserved and may only be destroyed after the expiration of 2 years following the November 2, 2004 election.
- ✓ On January 8, 2004, Governor Granholm signed into law a package of bills that will change Michigan's elections system beginning on January 1, 2005. An overview of these changes will be addressed in upcoming issues of Gov Law.

Seasonal Holiday Displays and the "Separation of Church and State"

by Daniel S. Saylor



The new chill in the air reminds us that the snowflakes will soon be falling again. And as likely as not, arriving with the snowflakes will be the annual disputes over nativity scenes and other holiday displays appearing on the lawns of city halls and other municipal properties. Whether a particular display is legally permissible depends on a combination of certain specific factors.

Where a holiday display includes such religious symbolism as a Christian nativity scene or a Jewish menorah, whether the display should be allowed generally turns on whether a "reasonable observer" would perceive the display as a governmental endorsement of religion. *Jocham v Tuscola County*, 239 F Supp 2d 714, 740 (ED Mich, 2003), *citing*, *Adland v Russ*, 307 F3d 471, 479 (CA 6, 2002). In this regard, the particular context of the display will make all the difference.

A critical consideration is whether the display is publicly or privately sponsored. A fundamental constitutional distinction exists between a religious display that is sponsored and erected by the municipality (or other governmental entity) and one that, although

situated on public land, is sponsored by a private group. A government display that is clearly religious in nature unavoidably sends an impermissible message of endorsement.

Yet for the government to allow a private group access to a traditional public forum to exercise its right to free speech, even where that speech is overtly religious, not only is permissible but probably is mandatory. A government cannot rely on the religious content of speech to discriminate among those who would have access to the public forum. "There is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Americans United for Separation of Church and State v Grand Rapids*, 980 F2d 1538, 1545 (CA 6, 1992).

Another basic consideration is whether the religious symbol on display "stands alone" or is a component of a larger, overall display containing both religious and secular symbols of the holiday season. Again, how the overall display is perceived by the hypothetical "reasonable observer" is determinative. A municipality sends an impermissible message of endorsement when, of all the various holiday symbols, it chooses to display only those with religious content. On the other hand, when the context suggests only a message of holiday celebration and good cheer, the religious components contribute to a message of pluralism, not governmental endorsement. *Doe v City of Clawson*, 915 F2d 244, 247 (CA 6, 1990); *Jocham*, 239 F Supp 2d at 741-742.

Whether these factors align or conflict in a given case can be a fact-intensive inquiry. We at Garan Lucow Miller, P.C., stand ready to assist you in this analysis should the need arise.

Heads Up!!!!

Supreme Court Preview

by Rosalind H. Rochkind and Melissa A. Taylor



The U.S. and Michigan Supreme Courts have granted review in several cases of interest to governmental entities:



Ability of municipality to enforce local parking ordinance against disabled driver who claims the right to violate the ordinance without being ticketed. *City of Monroe v Jones*, 259 Mich App 443 (2004), oral argument ordered on application 7/8/04, argued by GLM attorney Robert Goldstein, October 6, 2004.

Whether zoning decision made after partial taking may be considered in determining the value of the property at the time of taking. *Dept of Transp v Haggerty Corridor Partners*, CA #234099; 240227 (7/22/03), leave granted 6/11/04, oral argument to be scheduled.

Whether prisoners may utilize 42 U.S.C. § 1983 to challenge their parole proceedings rather than habeas corpus statute. *Wilkinson v Dodson*, 329 F3d 463 (6th Cir. 2003), cert granted 3/22/04, oral argument scheduled for December 6, 2004.

Right of indigent criminal defendants to appointed appellate counsel after plea of guilty. *Kowalski v Tesmer*, 333 F3d 683 (6th Cir 2003), cert granted 1/20/04, oral argument heard October 4, 2004.

Meaning of "motor vehicle" for purposes of motor vehicle exception to governmental immunity and potential application to tractors being used in maintenance operations. *Regan v Washtenaw County (On Remand)*, 257 Mich App 39 (2003), oral argument ordered on application 6/11/04, argument scheduled for December 2004.



When is an arrest constitutionally reasonable if there was probable cause to arrest for an offense, but that was not the offense articulated by the arresting officer? *Devenpeck v Alford*, 333 F3d 972 (9th Cir 2003), cert granted 4/19/04, oral argument scheduled for November 8, 2004.

When (and how) is it permissible for a police officer who executes a valid search warrant to detain the occupant and question him about crimes for which the officer has no probable cause to believe the occupant had been engaged in? *Muehler v Mena*, 332 F3d 1255 (9th Cir 2003), cert granted 6/14/04, oral argument scheduled for December 8, 2004.