MMAA Newsletter May 2007

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EVENTS

TAN-TAR-A RESERVATIONS: Please remember to make room reservations at Tan-Tar-A for the Summer Seminar by the June 13 cut-off date to ensure lodging on the main property. Otherwise you may be placed in the Estates where you have a 50 percent chance of finding your room after dark (even sober). The reservation number is 800-TAN-TARA. Changes have been made to the Tentative Agenda to view those, please visit our Web site at www.mocities.com.

IMLA EXECUTIVE DIRECTOR TO ATTEND SEMINAR: IMLA Executive Director Chuck Thompson will be a featured speaker at the Summer Seminar on the topic "IMLA and National Legal Issues."

CASE OUTLINES (MISSOURI)

UTILITY COMPANY PAYS FOR RELOCATION OF UTILITIES: The city of Bridgeton planned to expand and improve a city street called Taussig Road. The City's costs for the project would be paid for by TRiSTAR (developer). The Taussig Road project required the relocation of certain water mains, pipes, and fire hydrants costing $500,000 that were installed and maintained by Missouri-American Water Company (water company). The issue was whether the developer or the water company had to pay for the relocation of the utilities. In order to answer this question, the court examined the historical record with respect to several franchises. In 1902, the St. Louis County Court granted the predecessor to the water company a franchise to lay and maintain its water lines along and across all public highways as they may now exist or may hereafter be laid out when the property was in the unincorporated area of St. Louis County. In 1951, the City granted to the predecessor of the water company a 20 year franchise to use the streets and public places in the City to lay its pipes and fire hydrants. In 1956, the City annexed Taussig Road. All of the pipes and facilities of the water company were installed after the annexation. When the franchise expired in 1971, it was not renewed and a new franchise was not granted although the water company continued to provide water and pay gross receipts taxes to the City. In 1967, the railroad company executed a license to the water company to lay underground facilities on land it owned adjacent to Taussig Road. This agreement provided that the water company had to relocate its facilities at its own cost if requested by the railroad and that the license inured to the benefit of the railroad's successor or assigns. The City now owns this land. For years the City has wanted to make improvements to Taussig Road. In 1999, the City executed a development agreement with a developer that provided that the developer would help with the improvements to Taussig Road improvements. In 2003, the City passed an

ordinance that included a finding that the improvements to Taussig Road were "public governmental acts in the public interest and safety to serve the traveling public and encourage business and industrial activity and growth." The ordinance directed city officials to take all acts necessary to carry out the project. In 2004, the City filed a trespass and ejectment action against the water company. The water company filed a motion for summary judgment that was sustained by the circuit court. The Missouri Supreme Court took this case after the Eastern District affirmed the circuit court's decision that granted the water company's motion for summary judgment. The Eastern District determined that the City was the successor to the 1902 county franchise when it annexed the property. With respect to the 1951 city franchise that expired in 1971, the Court held that if the parties continue to operate under an expired franchise there was an implied franchise on the same terms and conditions. Unfortunately, the 1951 franchise did not cover the issue of who pays for the relocation of utilities leaving this issue to be determined under the common law. The Court took great stock in the ordinance passed by the City Council declaring that the project was a public project needed to serve the public; therefore under common law and a prior case involving a LCRA redevelopment project the water company was required to relocate its water lines and facilities at its own cost. With respect to the property the City acquired from the railroad the water company was not entitled to summary judgment; therefore, the Court reversed for further proceeding on that issue. Although the Court's discussion makes it pretty clear that the City, as the successor, gets all of the rights of the railroad. *City of Bridgeton v. Missouri-American Water Co.*, (SC87744, 04/17/07).

Comment Howard: Congratulations to the attorneys who represented the city of Bridgeton as well as the state, the St. Louis County Municipal League, and several other municipal corporations from St. Louis County who were amici in this case. This was a very difficult case and it is a very important win for local government. The key factor was the ordinance that found the project to be in the public interest. For sure, a determination of the public interest similar to the one used by Bridgeton needs to be included in your boiler plate particularly when you are involved in a public/private partnership. The holding under common law that even though the franchise has expired – there is an implied franchise when the parties continue to act as though it was still in force should give you pause to look at what might be in those old expired franchises. This is a common situation.

353 BLIGHT DETERMINATION REQUIRES EVIDENCE OF SOCIAL LIBILITIES: In 2004, Centene Plaza Redevelopment Corporation (Centene) purchased property at 7700 Forsyth and 21 Hanley Road with the intent to expand their current office and parking. Centene also wanted to purchase a parking garage owned by the city of Clayton (City) that was adjacent to their property. Centene learned that the City was seeking redevelopment of the entire block bordered by South Bemiston, Hanley Road, and Carondelet Avenue (the area). Centene proposed the formation of a 353 Corporation and sought tax abatement and the power of eminent domain in order to acquire the properties it did not own to implement the project. Centene commissioned a study with PGAV that concluded the property was blighted. The City subsequently passed an ordinance declaring the area blighted and approved a redevelopment agreement between the City and Centene. Centene condemned several properties. The condemnation petition was filed before the effective date of the new eminent domain law. Defendants argued that the new law and standard of review of the decision to blight was procedural and applied retroactively. The circuit court upheld the City's determination of blight and ordered appointment of commissioners. Defendant's sought review of the decision to appoint commissioners in the Eastern District. The

Eastern District's opinion starts by stating that the heart of the matter is whether or not the 2006 legislation concerning eminent domain and specifically 523.261 applies to this case but completely avoids this issue by determining that the circuit court's decision did not meet the test to blight under either the old or new standard. Under 353.020(2) a "blighted area" is an area that consists of those portions of the city which the city determines "that by reason of age, obsolescence, inadequate or outmoded design or physical deterioration have become economic and social liabilities, and that such conditions are conducive to ill health, transmission of disease, crime, or inability to pay reasonable taxes …" The court determined that the evidence of blight before the City did not support a conclusion of social liability in the area under the old common law standard of review or the new standard under 523.261. The court further determined that proof of just economic liability is not sufficient and economic liability cannot be used to prove social liability. The definition of social liability as used in 353.020(2) in its "historical context" focuses on "the health, safety, and welfare of the public." The City's blight report did not have evidence to support a determination of social liability. *Centene Plaza Redevelopment Corporation v. Mint Properties, Inc. et al.* (ED89275, 04/24/07).

Comment Howard: This is not the last word since the court of appeals transferred this case to the Supreme Court on its own motion due to the importance of the issues. If this decision is upheld, it will erode the ability to blight properties under Chapter 353 that are located in what seems to be a thriving area even though the redevelopment would improve the area.

PARTIAL RERUN – INFILTRATION OF SEWER SYSTEM RESULTS IN TAKING OF PROPERTY: In November of 2006, we reported on *Collier v. City of Oak Grove*. That opinion was subsequently withdrawn and a new opinion was issued in April of 2007. The new opinion appears to be a rerun of the earlier opinion with the exception that the court determined that the City agreed that the court could determine interest that was owed from the date of the taking and Judge Spinden's concurring opinion was withdrawn. Judge Spinden's earlier opinion made the point that the court's ruling on the inverse condemnation claim was obiter dictum. Seems to me that this opinion is still obiter dictum on the inverse condemnation claim. Best I can tell the judges are sending a loud and clear message about the law in this area.

The plaintiff, Collier, bought a house in 1972. In 1992, Collier finished the basement to use as a family room. After finishing the basement there were reoccurring sewer backups when it rained in 1992, 1995, 1999, 2001, and 2002. The flooding from the sewer system damaged the basement and caused personal injury to Collier. The city of Oak Grove (City) compensated the plaintiff for the sewer backup in 1992 but denied all other claims and did not take any action until 2004. After 2002, the intensity and frequency of the backups increased and the plaintiff abandoned her house based on her doctor's recommendation. During this period of flooding, the citizens of Oak Grove rejected several bond issues to make capital improvements to the sewer system that might have corrected the inflow and infiltration (I&I) to the sewer system that supercharged the system and created the sewer backup. Collier, the property owner, filed suit claiming negligence, nuisance, and inverse condemnation. At the close of the case the City failed to move for a directed verdict. A jury returned a verdict of $200,000 on her inverse condemnation property damage claim and $60,000 for personal injuries. After the verdict, the circuit court awarded her $139,528 in interest on her inverse condemnation claim from the date of the taking. The City appealed the inverse condemnation verdict on the grounds that it could only be held liable for an affirmative act and that it owed no duty to Collier to correct the I&I to the sewer system that occurred when it rained. The Western District, noted that the City did not

preserve any error with respect to matters submitted to the jury because the City did not move for a directed verdict at the close of all of the evidence; nevertheless the court gratuitously reviewed the inverse condemnation claim rejecting the City's "no duty to act" theory. The court sustained the $200,000 inverse condemnation verdict even though the difference between the before and after value of the property was, according to Collier's own expert, $35,000 and less according to the City's expert; nevertheless, because the City did not object to a non MAI jury instruction that improperly stated the measure of damages, the verdict stands because it was not so excessive as to shock the conscious. The court also finds that in an inverse condemnation case the jury is required to determine the amount of interest; however, the City agreed to the court making this determination thereby waiving its objection. The court invited the General Assembly to address the issue of how procedurally interest should be computed in an inverse condemnation case. *Collier v. City of Oak Grove*, (WD65355, 04/24/07).

Comment Howard: There was a massive amount of evidence showing the failure of the City to address this problem. The jury was sending a loud and clear message to the City. The appellate court by its gratuitous review of the City's defense to the inverse condemnation was also sending a message. This is not to suggest that these issues are easy since correction of I&I is very expensive and on three occasions, the citizens of Oak Grove rejected bond issues to increase sewer capacity and maintain sewers. Hopefully, this case will help citizens realize the need to meet an I&I problem head on. In the interim, it may make sense for the City to require back flow valves in homes or areas where there is I&I while they develop programs to eliminate I&I. You also need to be alert that MDNR has been including in new NPDES and storm water permits language that prohibits sanitary sewer overflows. You may want to alert your city in case your permit is being renewed so that they do not agree to this without review by environmental counsel. You may have a challenge to this new requirement based on a violation of the mandates provision of the Hancock Amendment.

FIVE YEAR STATUTE OF LIMITATIONS APPLIES TO PERSONAL PROPERTY INVERSE CONDEMNATION CLAIM: In 1977, the Missouri Highway and Transportation Commission (MHTC) constructed a bypass around Carrollton, Missouri. In 1993, Missouri experienced one of the worst floods in its history and as a result the real and personal property of several property owners was damaged (property owners). On May 24, 1999, the property owners brought an inverse condemnation suit against MHTC alleging that the work related to the 1977 improvements materially altered and changed the flow resulting in flooding in 1993 and again in 1998. MHTC filed a motion to dismiss the personal property claim arguing that the five year statute of limitations precluded the personal property claim. The circuit court granted the motion and a jury rendered a verdict against MHTC on the real property claim. After the verdict, the circuit court awarded interest on the claim from the date of the taking, which was the 1993 date when the property first flooded. Both parties filed appeals. On appeal, the Western District held that the five year statute of limitations applied to personal property claims when brought under an inverse condemnation action. The date for determining when the statute of limitations began to run was the date the cause of action was first ascertainable which was in 1993; therefore, the property owner's claim was not filed within the five year statute of limitations. Property owners argued that even if the five year statute applied the flooding in 1998 constituted a new cause of action. The normal rule is that the date when the statute begins to run is when the damages are capable of ascertainment, however in situations involving successive floods, the damages may not be ascertainable on the date of the first flood and may only become

ascertainable after successive floods. In this case the damages were ascertainable in 1993. The taking was permanent and not temporary. The court notes that under Missouri law only the jury can determine the amount of interest that is owed and that the court has no authority to determine the interest; however in this case the parties agreed to allow the court to determine the interest thereby waiving any objection. *Randolph v. Missouri Highways and Transportation Commission,* (WD66269 and 66289, 04/24/07).

CASE OUTLINES (FEDERAL)

VIDEO WORTH THOUSANDS OF WORDS, YOU DECIDE: In a landmark decision, the United States Supreme Court based on its review of a video tape, held that a law enforcement officer did not violate a fleeing motorist's Fourth Amendment right to be free from excessive force in an unreasonable seizure when the officer rammed the vehicle of the person fleeing from a speeding violation resulting in a serious injury to the driver. In this case, the driver was clocked by a law enforcement officer driving 73 miles per hour in a 55 mile per hour zone. The officer activated his lights and siren and the driver sped up trying to elude the officer. A chase resulted with the vehicles traveling mostly over a two-lane road at speeds of 85 miles per hour. The fleeing driver was almost trapped in a parking lot of a shopping center but escaped after hitting another officer's car. The officer whose vehicle was hit continued to pursue the car taking the lead. The officer asked permission to execute a "PIT" maneuver which request was granted but not executed due to the high speeds. Instead, the officer rammed the vehicle from behind causing the driver of the fleeing vehicle to lose control and go over an embankment which resulted in the driver becoming a quadriplegic. The driver brought suit under 42 U. S. C. 1983 against the officer who rammed his vehicle from behind alleging a violation of his Fourth Amendment right to be free from excessive force in an unreasonable seizure. The district court denied the officer's motion based on qualified immunity and the officer filed an interlocutory appeal. The 11th Circuit affirmed the district court's decision. The United States Supreme Court granted certiorari and reversed after reviewing the videotape that showed the chase over a six minute, 10 mile period. The Supreme Court held: "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent by-standers does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." This appears to be a per se rule although some of the concurring opinions suggest otherwise. The court noted that when motions for summary judgment are filed the courts are required to view the facts and draw reasonable inferences in the most favorable light to the party opposing the summary judgment motion, which in this case was the plaintiff. This was exactly what the 11th Circuit did; however, the court criticized the lower courts for not examining the videotape that captured the high-speed chase. After the Court reviewed the videotape, it concluded there was no factual basis to the plaintiff's version of the facts and chastised the lower court for simply relying on the plaintiff's versions. It described the plaintiff's version, adopted by the 11th Circuit, as though the plaintiff was taking a driver's test while the tape disclosed what resembled a "Hollywood-style car chase of the most frightening sort, placing police officers and bystanders alike at great risk of serious harm." The Court stated that even if there was some alleged difference of facts it did not defeat a motion for summary judgment when review of the facts showed that there was no dispute about any genuine issue of material facts. The Court held that the officer was entitled to qualified immunity and that his motion for summary judgment should have been granted. *Scott v. Harris*, (No. 05-1631, April 30, 2007).

Comment Howard: This case is a major victory for law enforcement and attorneys defending excessive force cases when a fleeing suspect's flight threatens risk or serious injury to the lives of innocent bystanders. It also serves as a reminder that pictures and videotapes can help law enforcement. In this case, the videotape literally took over the case providing a basis for the decision and for the court to change its so called "order of battle" analysis by providing a vehicle for the court to review the constitutional question as the first order of business. Justice Breyer, who wrote a concurring opinion, stated that the tape changed his view. For those who are interested, the Court has provided a link to the videotape on its Web site.

Comment Ragan: This is a very good decision. The courts will still have to handle these cases on a case-by-case basis, but it will force attorneys who file 1983 claims to be more judicious in the claims they file.

U.S. SUPREME COURT UPHOLDS FLOW CONTROL ORDINANCE: Counties created a state authorized public benefit corporation to own and operate a solid waste processing facility where all solid waste for disposal in the two counties is directed for processing (flow control ordinances). This case is essentially a rerun of a 1994 case *C & A Carbone, Inc v. Clarkston,* in that the United States Supreme Court invalidated a similar type of ordinance except in this case a public authority owns and operates the solid waste processing facility. In the *Carbone* case the facility was owned and operated by a private corporation. Chief Justice Roberts distinguished this case from the *Carbone* case on the grounds that the processing facility was owned and operated by a public benefit corporation not a private corporation and upheld the flow control ordinances. Justice Roberts noted that the court did not rule on the issue of public ownership in the *Carbone* case. The court upheld the ordinances "because any incidental burden they may have on interstate commerce does not outweigh the benefits they confer on the citizens of Oneida and Herkimer Counties." Under the ordinances, all private haulers, whether they are engaged in interstate commerce or not, are treated the same; therefore, the ordinance does not discriminate against interstate commerce even though there are additional costs for haulers who previously disposed of their solid waste in out of state landfills. The court noted that whether or not the public benefits outweighed additional costs was the matter for the elected representatives to determine. *United Haulers Association, Inc., et al. v Oneida-Herkimer Solid waste Management Authority et al*, (No. 05-1345 April 30, 2007).

Comment Howard: For years environmental groups have struggled with how to create a system for the disposal of solid waste that produces revenues to pay for the cost of disposal of solid waste and recycling services. The 1994 decision in *Carbone* seemed to have closed this door forever. Chief Justice Roberts opinion uses language very favorable to state and local government by giving significant weight to the political decisions made by state and local officials. The majority refuses to scrutinize economic legislation based on the police power under the "guise of interpreting the due process clause."

EMPLOYEE REQUIRED TO MAKE AVAILABLE MEDICAL RECORDS AS PART OF FITNESS FOR DUTY EXAMINATION: In this case, the supervisor noted some unusual behavior like the employee falling asleep while on duty as a typist and recommended that the employee seek medical advice. Shortly thereafter, the employee advised her supervisor that she was experiencing job-related stress and was excused from work for three weeks. She was told prior to returning to work she needed to undergo a fitness-for-duty evaluation. Employee agreed to participate but the evaluation could not be completed because she would not release her

medical records to the examining physician. The physician stated that he could not issue a final report without the medical records due to numerous conflicting statements. After several requests for the records, which were refused, the Kansas City Police Department terminated the employee. Employee filed suit under the ADA and Age Discrimination Act. The district court granted summary judgment and the 8th Circuit affirmed holding that the request for medical records was no broader or more intrusive than necessary. *Thomas v. Corwin*, (8th Cir., No 06-1496,04/03/07)

CONNECTION REQUIRED BETWEEN FIRING AND PROTECTED ACTIVITY: Carrington an African-American employee of the city of Des Moines, Iowa, was very disruptive at work, swore at his supervisor, and his work was generally poor. Employee was transferred to another site and was later disciplined for leaving work early and for not performing assigned work. Employee made numerous complaints about mistreatment and discrimination because of his race and filed a complaint with the EEOC. Employee was fired under the city of Des Moines progressive discipline policy and he filed a complaint in federal district court. City filed motion for summary judgment that was granted and the employee appealed to the 8th Circuit. On appeal, the 8th Circuit affirmed applying the shifting burden analysis under *McDonnell Douglas* holding that the employee failed to show any connection between the firing and his complaints of discrimination. The timeline did not support an inference of discrimination. *Carrington v. City of Des Moines* (8th Cir. No. 06-1801 04/06/07).

Comment Howard: This is a very good case that illustrates how to deal with a very disruptive employee utilizing the concept of progressive discipline.

GENDER BASED JOB ASSIGMENT UPHELD FOR PRISON: A gender-based job assignment policy was upheld despite allegation of sex discrimination. The court ruled that the policy was not unlawful because it furthered important government objectives in the handling of prisoners. *Tipler v. Douglass County*, (8th Cir. No. 06-2553, 04/12/07).

LEGISLATION, NEWS, AND OTHER MATTERS

PLANNING AND ZONING SEMINAR: There is a one-day seminar in Springfield on July 20, 2007, at the Holiday Inn North from 9:00 a.m. to 4:30 p.m. on Navigating the Maze of Land Use Regulations in Missouri. You may register at www.lorman.com.

FCC CHALLENGE: A challenge to the FCC decision over local government real property and cable franchise grants and denials is now proceeding in the 6th Circuit with the court expected to issue a briefing schedule. The actual text of the decision was released on March 5, 2007, and can be found at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-180A1.pdf. A useful discussion of the case can also be found at http://www.millervaneaton.com/00126735.pdf.

CLOSING PERSONNEL RECORDS: Howard Paperner has prepared an ordinance for the closing of personnel records in light of the recent decision S*tate ex rel. Missouri State Board of Pharmacy v. The Administrative Hearing Commission* discussed in the *MMAA Newsletter.* A copy of the ordinance may be obtained on MML's Web site at www.mocities.com under "What's New."

HOW TO OBTAIN OPINIONS

The material contained in this *Newsletter* is summarized as a service to MMAA members. Almost everything cited in the *Newsletter* can be found on the Internet. There are a variety of places to search for cases on the internet. Below are several sites that I use for searches. If you have questions or comments please feel free to email me at howardcwright@mchsi.com.

Missouri: http://www.courts.mo.gov/courts/pubopinions.nsf.,
Federal: http://www.ca8.uscourts.gov/onestop.html.
Other sources: www.findlaw.com and http://www.molawyersweekly.com/.

The opinions cited in this Newsletter may be subject to revision or withdrawal prior to publication.