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MUNICIPAL LAW News

Foster Swift Administrative & Municipal Group

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We have a new look!

Recently, Foster Swift has undergone a re-brand. Through the first quarter of 2010, we are rolling out our new logo, colors and web site. Our old copper and teal colors have been replaced with a fresh blue and gray.

FCC Enacts New "Shot Clock" For Municipalities to Decide Wireless Cellular Facilities Siting Applications

The Federal Communications Commission (FCC) just set new rules that directly impact how a municipality can act on a request to locate wireless cellular facilities in the municipality. The FCC's recent *Declaratory Ruling* sets specific timelines by which a municipality has to act on an application to locate wireless cellular facilities.

A. New Rules Regarding Timing to Decide Applications

Specifically, the FCC set out these new rules on the time a municipality has to resolve requests:

- A municipality must act on a wireless facility siting request for "personal wireless services" (1) within 90 days for collocations, and (2) 150 days for all other wireless facility siting applications.
- If the municipality fails to act within that relevant time frame, then a presumptive "failure to act" has occurred and wireless providers may seek relief in court within 30 days of the failure to act per the Federal Communications Act. However, the municipality will have the opportunity to rebut the presumption of reasonableness.
- The timeframes may be extended beyond 90 or 150 days by mutual consent of the wireless provider and the municipality, and in such instances, the start of the 30-day period for filing suit will be tolled.
- If the review period in a local ordinance is shorter or longer than the 90-day or 150-day period, the applicant may pursue any remedies granted under local regulation when the applicable local review period has lapsed. So if the local review period is longer, the applicant may sue after 90 days or 150 days, subject to the 30-day limit on filing, and may wait to pursue any remedies granted under local regulation until the applicable local time limit has expired. If the local review period is shorter, the applicant must wait until the 90-day or 150-day period has expired before bringing suit.

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- For all currently pending applications that have been pending for less than 90 or 150 days as of November 18, 2009, the municipality will have until **February 16, 2010**, or **April 17, 2010**, to take action.
- A party whose application has been pending for at least 90 days (for collocations) or 150 days (for other applications) as of November 18, 2009, may, after providing notice to the relevant state or local government, sue if the municipality fails to act within 60 days from the date of such notice.
- If a municipality notifies the applicant within the first 30 days after receipt of an application that it is incomplete, the time it takes for an applicant to respond to a request for additional information **will not count** toward the 90 or 150 days.

B. No Denials Based Solely On Existence of Other Providers

The FCC also clarified that a municipality may **not** deny a wireless facility siting application solely because there is service available from another provider. The FCC ruled that such a denial is unlawful since it "prohibits . . . the provision of personal wireless services" under the Federal Communications Act. As a result, a municipality may not base a denial of a wireless facility siting application based solely on the fact that there may be other carriers who provide service to the area in question.

C. Conclusion

The FCC's *Declaratory Ruling* appears to be strong evidence that the FCC will pursue avenues to further promote the deployment of wireless services. Its new timing constraints, while likely viewed with open arms by wireless providers, may be challenging for municipalities to meet. Nevertheless, municipalities should be aware of these new rules in resolving wireless service siting applications given the consequences the FCC set out of not heeding those new rules.

If you have any questions about the FCC's *Declaratory Ruling*, or resolving wireless service siting applications, or related telecommunications issues, please contact **Ron Richards** at **517.371.8154** or **rrichards@fosterswift.com**.

Shuster v Leelanau Township (Unpublished Michigan Court of Appeals decision, December 10, 2009)

In a case of significance handled by this firm on behalf of Leelanau Township, the Court of Appeals recently affirmed an opinion of the Tax Tribunal regarding the valuation of real property encumbered by a conservation easement.

This was a Small Claims appeal before an Administrative Law Judge for the Tribunal. Petitioner owns approximately 23 acres of vacant property, with 1,400 feet of frontage on Lake Michigan. The property is also encumbered with three conservation easements which restrict subdivision of the property, and prohibit the installation of utilities on the property, among other things.

The ALJ held that Petitioner's appraisal, which was prepared for income tax purposes with an "as of" date of December 9, 2003, was the better evidence of the

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value of the subject property for the 2005 - 2007 tax years. The appraisal concluded that the property was worth $960,000 before it was encumbered by the three easements, but only $85,000 after the easements were in place. The ALJ agreed with Petitioner's appraiser that only the first 100 feet of the lake shore property should be valued under a theory that no purchaser would pay for all 1,400 feet of frontage and that there is only one access point to the property.

The Township filed exceptions to the ALJ's proposed opinion based on, among other things, the appraisal techniques used by Petitioner's appraiser and the impact of the easements on the property's value.

The Tribunal then overturned the Proposed Opinion issued by the ALJ and agreed with the Township that the value of the property should be the approximately $600,000 true cash value determined by its assessor.

The property owner then appealed this rejection of the ALJ's opinion by the Tribunal judge to the Court of Appeals, arguing that:

1. The Tribunal erred because it did not consider oral testimony presented at the small claims hearing and therefore could not fully and fairly evaluate the referee's opinion without a formal record of the proceedings. [Note that small claims hearings do not have a formal record, and that is just one of the decisions a property owner must make in deciding whether to appeal to the Full Tribunal or file a Small Claims appeal];

2. The Tribunal erred because it did not make an independent determination of the true cash value of the property and because the Tax Tribunal adopted the Township's valuation of the property without an explanation why it believed the Township's valuation more accurately reflected the true cash value of the property. [Here, the Court of Appeals noted that the Tax Tribunal must make its own independent determination of value; in doing so, it may accept one theory and reject the other, it may reject both theories, or it may utilize a combination of both in arriving at its determination of value. Further, a decision of the Tax Tribunal must include a concise statement of the facts and conclusions of law that support its decision. Here, the Court of Appeals held that the Tribunal satisfied its burden by adopting the hearing referee's findings of fact and conclusions of law, but modified them to reflect its specific findings.]

3. The Tribunal erred in basing its decision on evidence not raised in the exceptions filed by the township. [The Court of Appeals concluded that the Tribunal responded properly to the evidence in the case and the exceptions filed by Respondent.]

The important point of this case is that if an assessor does not agree with a hearing referee's conclusion in a small claims case and that referee's decision is not supported by the findings of fact and conclusions of law stated in the opinion, it is not a worthless effort to file exceptions to the decision. Here, the township believed that the decision of the ALJ was not supported by the facts, filed exemptions with the Tribunal and convinced the Tribunal judge to reverse the decision of the ALJ. The Court of Appeals has confirmed that a Tribunal judge may do so, so long as the facts and law support its decision.

If you have any questions regarding *Shuster v Leelanau Townshi*p, please contact **Steven H. Lasher** at **517.371.8118** or **slasher@fosterswift.com**.

State Tax Commission's Industrial Classification Appeals

The Department of Treasury (State Tax Commission) has begun the filing of nearly 10,000 appeals with the Michigan Tax Tribunal to address the issue of property that is improperly classified as Industrial Real or Industrial Personal. Industrial Real Property is "[p]latted or unplatted parcels *used for* manufacturing and processing purposes, . . . with or without buildings." MCL 211.34c (2)(d) (emphasis added). In other words, a vacant building sitting within an industrial park does not necessarily fall within the definition of Industrial Real Property. For this reason, the State Tax Commission suggests that assessors research the last use and probable future use of a building. Industrial Personal Property includes "all machinery and equipment, furniture and fixtures, and dies on industrial parcels, and inventories not exempt by law." MCL 211.24c (3)(c). The State Tax Commission has emphasized this type of property is "property being used for an industrial (manufacturing and processing) purpose."

These classifications are important because Industrial Personal Property receives a greater tax exemption than property classified as Commercial Personal. Therefore, improperly classified property negatively affects the school aid fund.

The Michigan Tax Tribunal has listed the appeals that have been or will be filed on the State Tax Commission website at www.michigan.gov/statetaxcommission. The Department of Treasury asks that all assessors review the list and properly classify the property for the 2010 assessment roll. If properly classified property is on the appeal list, contact the State Tax Commission at statetaxcommission@michigan.gov so that the Department of Treasury can withdraw its petition.

If you have any questions regarding the classification of industrial property, please contact **Steven Lasher** at **517.371.8118** or **slasher@fosterswift.com**.

Personal Property Appeals

The Michigan Tax Tribunal recently addressed the issue of whether it was proper for an appraiser to use Internet sources to determine the value of personal property. In *Ferndale Laboratories, Inc v City of Ferndale*, Docket No. 315338 & 329408, 16 MTT 680 (2009), petitioner argued that the city overvalued his personal property, which included furniture, fixtures, machinery and equipment, and computer equipment, when the city used the STC Manual and multiplier methodology to determine the personal property's market value instead of determining the specific assets' true cash value from market sources.

Petitioner's appraiser testified that he only used the cost less depreciation method to value special purpose properties, defined as "new properties that don't have a market value because people hold onto them and use new items so they are not traded actively." To value most of the personal property, the appraiser used the market data approach. Specifically, the appraiser visited e-commerce sites or called the manufacturer, seller or dealer and asked for a price to determine the value of the personal property. He then made any necessary adjustments for differences

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in the condition between the petitioner's personal property and comparable personal property. The appraiser explained that the use of the Internet allows an appraiser to quickly and efficiently gather a large amount of reliable data. He also stressed that "the ability to print out the tangible documentation adds to the credibility." Respondent argued that appraisers should only visit auction sites, such as E-bay, if that method has become commonplace in the assessment jurisdiction.

The Tribunal held that the use of e-commerce sites to determine market value is an updated and reliable valuation method. The Tribunal emphasized that this method is especially appropriate given the common definition of "value" as "the monetary worth of a property, good, or service to buyers and sellers at a given time."

The Tribunal concluded that petitioner presented a good market approach to value for the personal property because petitioner's appraiser did not "randomly select depreciation for an entire classification of equipment." Instead, the appraiser analyzed the unique qualities of each asset and selected a comparable counterpart to determine the asset's value. In contrast, the Tribunal explained that the STC Multiplier method is "better employed as a mass appraisal technique for its uniformity of result and ease of administration."

The lesson from this case is simply that the Tax Tribunal will not automatically accept the STC multipliers as the best evidence in a personal property tax appeal, whether a small claim or full tribunal case. Where petitioners present market evidence of the value of personal property, even bid and asked information from E-bay, assessors should be prepared to perform their own research and submit valuation evidence beyond the STC multipliers in defense of their assessments.

If you have any questions regarding the proper method of appraisal, please contact **Steven Lasher** at **517.371.8118** or **slasher@fosterswift.com**.

Death of a Joint Tenant is not a Transfer of Ownership

A recent Michigan Court of Appeals decision further explained the meaning of "transfer of ownership" within the context of a joint tenancy. In *Klooster v City of Charlevoix*, No. 00-323883, 2009 WL 4824971, at *1 (Mich App Dec 15, 2009), the court addressed the issue of whether the death of a joint tenant constitutes a "transfer of ownership," thereby allowing the city to "uncap" the property's taxable value. The court held that the death of one joint tenant in a joint tenancy does not result in a transfer of ownership for taxable value purposes under MCL 211.27a and MCL 211.34d; therefore, the city erred when it uncapped the property's value.

In *Klooster*, petitioner's parents held property as tenants by the entirety until petitioner's mother

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quitclaimed her interest to petitioner's father. On that same day, petitioner's father quitclaimed the property to himself and petitioner as joint tenants with rights of survivorship. Petitioner's father subsequently died, and eight months later, petitioner created a joint tenancy with rights of survivorship with his brother. The city uncapped the taxable value of the property, arguing that the death of petitioner's father caused the transfer of ownership. The Michigan Tax Tribunal concluded that the taxable value of the property should be uncapped since a transfer of ownership occurred. Petitioner argued that his father's death did not constitute a transfer of ownership under MCL 211.27a(7)(h) and appealed.

In its analysis, the Michigan Court of Appeals referenced the *Moshier* holding that a transfer between two or more persons that creates or terminates a joint tenancy will not constitute a "transfer of ownership" and thus triggers the statutory exemption if:

> "(1) at least 1 of the persons involved in the transfer was an original owner of the property before the tenancy was initially created and, if the property was held as a joint tenancy at the time of the transfer,
>
> (2) 'at least 1 of the persons' involved in the transfer was a joint tenant at the time the joint tenancy was originally created and has remained a joint tenant since that time." *Moshier v Whitewater Twp*, 277 Mich App 403; 745 NW2d 523 (2008).

Because petitioner's father was the original owner of the property before the joint tenancy was created, "at least 1 of the persons involved in the transfer was an original owner of the property before the tenancy was created." MCL 211.27a(7)(h). The *Klooster* Court referred to the second prong as a "conditional requirement" that "need only be met in instances where the property was held as a joint tenancy at the time of the conveyance." Contrary to the city's argument, the Michigan Court of Appeals determined that a joint tenant's death was not a conveyance within the meaning of MCL 211.27(7)(h); therefore, the second requirement was not applicable to *Klooster's* case. In its analysis, the court reviewed the meaning of "conveyance" as defined by Black's Law Dictionary (8th ed) and concluded that a conveyance "requires that there be some instrument in writing affecting the title of the real property." The death of petitioner's father did not create a conveyance because "no instrument in writing was created that affected title to the subject real estate." Therefore, the taxable value of the property should not have been uncapped under MCL 211.27a(3).

If you have any questions regarding the "transfer of ownership" or the decision made by the Michigan Court of Appeals, please contact **Steven Lasher** at **517.371.8118** or **slasher@fosterswift.com**.

Administrative & Municipal attorneys named 2010 *Best Lawyers in America*

Brian G. Goodenough - *Municipal Law; Real Estate Law; Workers' Compensation Law*

Steven H. Lasher - *Administrative Law*

Michigan Municipal Bond Authority's Local Government Loan Program

The Michigan Department of Treasury's Michigan Municipal Bond Authority (MMBA) offers a variety of financing programs to Michigan municipalities. All Michigan local governmental units and public entities are generally eligible to participate in the MMBA's Local Government Loan Program to finance a variety of capital expenditures including the purchase of equipment, school buses, fire trucks, real property, energy conservation improvements, and infrastructure needs, and to refinance existing debt. The Program provides competitive interest rates for 3 to 30 year loans.

Participation in the Program could result in cost savings for your township, city or other local governmental unit, compared to other financing alternatives. The Program does not require an application fee and interest rates for Local Government Loan Program financings vary depending on the loan type and the loan period. Under the Program, borrowers may pledge state aid as security for the loans and also have the option of using their own investment credit or bond insurance, if available.

If you have any questions on participating in the Program, feel free to contact:

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Governmental Plan Compliance Deadlines

Qualified retirement plans that are maintained by governmental employers must comply with various tax law changes. The deadlines by which they must comply with those changes have, however, been extended in several instances. The most notable of those extensions are discussed below.

1. **The EGTRRA Restatement Requirement**.
   Every governmental qualified retirement plan must be amended and restated to comply with EGTRRA. Any governmental employer that elected the delayed deadline for the EGTRRA restatement must complete that restatement on or before January 31, 2011. In order to obtain a retroactive determination letter from the IRS regarding that restatement, the document must also be filed with the IRS on or before January 31, 2011.

2. **Pension Protection Act Amendments**.
   Various provisions of the Pension Protection Act of 2006 must be reflected in governmental qualified retirement plan documents. Because of a postponed effective date for governmental retirement plans, these amendments must be adopted on or before the last day of the first plan year that begins on or after January 1, 2011. Thus, for example, a governmental retirement plan having a plan year that begins on July 1 must complete these amendments on or before June 30, 2012.

3. **Normal Retirement Date Amendments**.
   Any governmental qualified retirement plan that provides for a normal retirement age earlier than 62 must, in most circumstances, be amended to comply with new normal retirement date rules. These amendments must be adopted on or before the last day of the first plan year that begins on or after January 1, 2013. Thus, for example, a governmental retirement plan whose plan year begins on October 1 must adopt these amendments on or before September 30, 2014.

If you have any questions regarding the compliance of qualified retirement plans, please contact **Sherry Stein** at **517.371.8269** or **sstein@fosterswift.com**.

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Public Finance Practice Grows

Janene McIntyre joined Foster Swift in January 2010, enhancing the strength and depth of the firm's Public Finance practice.

Prior to joining Foster Swift, Janene was a full-time bond lawyer with Lewis & Munday, P.C. in Lansing. Her experience includes service as: (A) bond counsel, co-note counsel or underwriters' counsel in over 30 state and local issues in Michigan aggregating over $4 billion, including State of Michigan, MMBA and MPEFA issues; and (B) sole bond counsel or co-bond counsel in ten issues of the State of Connecticut and the Connecticut Health and Educational Facilities Authority aggregating another $4.2 billion.

Before her legal career, Janene was a State of Michigan employee for over 12 years – Executive Assistant in the MMBA in the Michigan Department of Treasury (February 1995 - January 2000), and Equal Employment Officer and Departmental Specialist in the Office of Equal Opportunity in the Michigan Department of Human Services (January 2000 - September 2007). As the MMBA Executive Assistant, Janene served as lead liaison to authorized governmental officials, superintendants and chief financial officers interested in financing alternatives offered by the MMBA. She assisted in the coordination and monitoring of work activities pertaining to the MMBA's financing programs, and served as liaison to the MMBA's Board of Trustees.

While maintaining her employment with the State, Janene attended Thomas M. Cooley Law School as an honors scholarship recipient, served as an Ingham County Circuit Court judicial clerk, and served as a legislative assistant to the Representative for the 68th District in the Michigan House of Representatives. In addition, Janene studied International Comparative Law in Florence, Italy, (May - July 2005) through the University of San Diego School of Law Foreign Study Program.

Janene is a Board Member of Michigan Women in Finance, a member of the National Association of Bond Lawyers, the State Bar of Michigan and the Women Lawyers Association of Michigan. She attended the 2009 NABL Bond Attorneys' Workshop in Phoenix in October.