January 2011

Municipal Law News

MTA SPECIAL EDITION

Foster Swift Administrative & Municipal Group

What's Inside:

Tax Tribunal States Value of Home May Be Included In Asset Test For Poverty Exemption

by: Ronald D. Richards Jr.

Municipalities frequently are asked to determine if a landowner is eligible for a hardship or poverty exemption from property taxes. Under the tax laws, a poverty exemption is allowed for anyone deemed "unable to contribute toward" their taxes. To be eligible, the person must either (a) meet the federal poverty guidelines, or (b) meet alternative guidelines adopted by the municipality so long as the alternative guidelines do not provide income eligibility requirements less than the federal guidelines. MCL 211.7u. The first test is commonly called the income test; the latter test is commonly called the asset test.

In drafting their versions of the asset test, many municipalities direct that the poverty exemption is to be evaluated by considering, among other assets, the equity value of the landowner's homestead. Others exclude the value of the homestead when evaluating if a landowner is eligible for the poverty exemption under the asset test.

We have recently observed some confusion out there as to whether the asset test may take into account the value of the owner's homestead. For example, we have seen it reported that a 1997 Michigan Tax Tribunal ruling concluded that the asset test should not include the value of the homestead. And we have also seen it reported that a May 2010 State Tax Commission Bulletin cite that 1997 case for the same proposition. These two reports may have prompted some municipalities to consider revising their guidelines. Those municipalities might consider hitting the brakes.

In November 2010, the Michigan Tax Tribunal issued a ruling that states that a municipality **may include** the value of the owner's homestead in the asset test. *Kuneberg v Haring Twp* (MTT Small Claims Division, Docket No. 324493, issued 11/10/10). The Tribunal judge reasoned that the Legislature granted municipalities fairly wide discretion in defining their asset test. She concluded that a municipality is fully within its rights to include an asset test that includes the homestead property as part or the net assets to be evaluated.

If you have questions about the poverty exemption or how the asset test for that exemption may be drafted, please contact:

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FOCUS: Labor & Employment Corner

Michigan Public Sector Labor Law 101

by: Michael R. Blum

In Michigan, public sector labor-management relations are governed by the Michigan Employment Relations Commissions (MERC). The principal statute administered by MERC is the Public Employment Relations Act (PERA), which grants collective bargaining rights to public employees.

PERA requires a public employer to bargain collectively with a union selected by a majority of the employees in an appropriate bargaining unit. A bargaining unit is a group of employees who share a "community of interest" based on factors such as similarity of duties, supervision, work rules, compensation, benefits, skills, working conditions, classifications, physical location, and centralized labor relations.

Unions can demonstrate majority status either through voluntary recognition or an election. To secure voluntary recognition, employees generally sign applications for membership stating they wish to be represented by a particular union, and the employer may grant recognition if it is satisfied a majority of employees have designated the union as their representative. If a public employer does not grant recognition voluntarily, a petition may be filed with MERC requesting an election. Voting in the election is by secret ballot. If the union receives a majority of the valid ballots cast, it is certified as the exclusive collective bargaining representative of all of the employees in the bargaining unit.

Once a labor organization is recognized or certified, is it unlawful for the employer to refuse to bargain collectively with the union. The duty to bargain includes the obligation to meet with the union at reasonable times and to confer in good faith with respect to wages, hours and other terms and conditions of employment. The duty to bargain does not, however, require either party to agree to a proposal or make a concession. An impasse occurs when the parties have exhausted all means of reaching an agreement.

In the event impasse is reached, either party may request MERC to mediate. Mediation is a non-binding process in which a neutral third person assists the parties to resolve their dispute. The mediator has no authority to impose a settlement or compel resolution of disputed issues.

If bargaining and mediation fail to result in a final agreement, fact finding may be requested. A neutral fact finder will issue a non-binding recommendation for settlement of the dispute. Since strikes are prohibited in the public sector, fact finding is the final impasse resolution procedure available, except for public safety personnel who are subject to Act 312 arbitration. Parties often return to negotiations or mediation after fact-finding and are frequently able to resolve their differences.

Act 312 provides for compulsory arbitration of unresolved contract disputes in police and fire departments operated by a city, county, village, or township, as well as emergency medical personnel and emergency telephone operators employed by a municipal police or fire department. Act 312 is not intended to supplant collective bargaining, but rather is the final step in that process.

Labor-management relations in the public sector can be complex. Municipalities are well advised to seek the assistance of experienced counsel in any situation involving union organizing activity or the collective bargaining process.

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Condemnation Law 101

by: Brian J. Renaud

INTRODUCTION

The power of "eminent domain," or "condemnation," allows governmental authorities in Michigan, including townships, to take private property for public purposes, without the owner's consent. This power arises from Michigan statutes and the Michigan Constitution. A condemning authority must pay to the owner "just compensation" for the property taken.

Just compensation is usually determined based on the fair market value of the acquired property as of the date of the taking. In cases involving a "partial taking" of property, the resulting reduction in value of any remaining affected property is also considered. All condemning authorities must observe strict procedures when taking private property. These are set forth in Michigan's "Uniform Condemnation Procedures Act" (Act).

PRELIMINARY PROCEDURAL REQUIREMENTS

Prior to any taking, the authority must pass a resolution that the proposed taking is "necessary" to accomplish the stated public purpose. Such resolutions are usually passed after conducting engineering and feasibility studies. After the resolution is passed, the authority must establish a value for the property to be taken. This is referred to in the Act as the "estimated just compensation" or "EJC." An appraisal conducted by a certified appraiser is the method by which most authorities estimate just compensation.

After the EJC is determined, the authority must make a "good faith offer" to purchase the property from the owner for an amount not less than the amount set forth in its appraisal. The offer must state, among other things, whether any legally required relocation assistance will be provided, and whether the authority reserves or waives its rights to bring an environmental cost recovery action with respect to the property.

The Act defines "owner" very broadly, Thus, owners of record, lien holders, tenants, and easement holders, among others who are also known to claim interests in the target property, must receive a good faith offer. An authority may elect to make a single sum, blanket good faith offer where multiple such "owners" are involved.

THE CONDEMNATION LITIGATION PROCESS

If the authority and the owner are unable to agree on the price to be paid, the authority may formally "declare" a taking by resolution and then commence a condemnation lawsuit against the owner, at the same time placing the EJC into an escrow account.

An owner who desires to challenge the claimed public necessity of the taking must file a timely motion challenging it. If necessity is timely challenged, the court decides the issue before any proceedings concerning just compensation take place. If the challenge is successful, the proposed condemnation may not go forward. If the necessity motion is not timely filed, or if it is denied, the issue of necessity is conclusively determined in favor of the authority. When this occurs, title to the property sought to be condemned "vests" in the authority, retroactively to the date of the filing of the condemnation complaint. The EJC is then released from escrow to the owner(s), and the case proceeds forward only on the issue of whether additional just compensation is owed.

Once the just compensation litigation process begins, the court usually establishes a mutual appraisal exchange date. This serves to prevent parties from "shopping" the other party's appraisal to a valuation expert who might be tempted to establish an abnormally high or low contrary opinion of value for the property.

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WHO PAYS FOR CONDEMNATION LITIGATION?

In the majority of cases, the owner is entitled to be paid by the authority the reasonable and necessary expert witness fees incurred in defending against the condemnation lawsuit. The owner's ***attorney fees*** incurred in ***successfully*** defending against the lawsuit must also be paid by the authority, based on a "success formula" set forth in the Act. The Michigan Legislature's inclusion of these expert witness and attorney fee provisions in the Act is consistent with the constitutional requirement that private property rights are to be preserved. Other provisions of the Act provide for the payment to an owner whose "principal residence" is taken, a sum equal to 125% of its fair market value.

An authority and an owner may settle a condemnation lawsuit on mutually agreeable terms. However, the Act prohibits an authority from unilaterally discontinuing a condemnation lawsuit once possession or title to the subject property has vested in the authority. If a condemnation case is unilaterally discontinued, the authority must pay the actual expenses, reasonable attorney fees and actual damages to ***all*** parties affected by the discontinuance.

CONCLUSION

The condemnation process in Michigan can be complex. Authorities and owners are well advised to seek the assistance of experienced condemnation counsel in any situation in which condemnation may become an issue.

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New Test To Gauge Validity of Zoning Ordinance or Decision Relating To Mineral Extraction - "No Very Serious Consequences" Test Is Eliminated In Place of "Reasonable" Test

by: Laura J. Garlinghouse

For decades, Michigan courts have held that a zoning ordinance that prevents extraction of natural resources is invalid unless "very serious consequences" would result from the proposed extraction. Premised on the public's interest in accessing natural resources, the "no very serious consequences" rule has long been an exception to the usual "reasonableness" standard that courts otherwise use to evaluate if a zoning ordinance or zoning decision is valid.

Recently, however, the Michigan Supreme Court eliminated the "no very serious consequences" rule in mineral extraction cases. *Kyser v Kasson Tp*, 486 Mich 514; 786 NW2d 543 (2010). In *Kyser*, Kasson Township established a gravel mining district in accordance with the Michigan Zoning Enabling Act. The plaintiff owned property with a large deposit of valuable outwash gravel, but the property was located outside of the gravel mining district. The plaintiff sought rezoning to allow

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gravel mining on her property, but the township denied her request. The plaintiff sued, claiming the township's ordinance was invalid. The trial court applied the "no very serious consequences" rule and found in favor of the property owner. The Court of Appeals affirmed.

The Supreme Court reversed. It held that the "no very serious consequences" rule is not constitutionally required and was an invalid rule itself. The Court found as follows:

- the "no very serious consequences" rule improperly elevated mineral extraction to a specially protected land use. Mineral extraction zoning decisions should be treated as other land uses – the "reasonableness" standard should apply.
- the "no very serious consequences" rule violated the separation of powers principles in the Michigan Constitution. The rule effectively established a statewide policy that preferred mineral extraction over other public policies. The Court emphasized that it is the role of local governments – not courts – to regulate land use.
- the ZEA superceded the "no very serious consequences" rule since the ZEA prohibits exclusionary zoning. So long as a regulation does not constitute exclusionary zoning, a municipality may regulate land uses, including mineral extraction.

As a result of *Kyser*, zoning regulations and zoning decisions relating to mineral extraction are now subject to a "reasonableness" standard. This case gives municipalities broader authority to regulate mineral extraction, including gravel mining, which may better equip them to engage in long-term land use planning.

If you have questions about *Kyser* or how it impacts your township or city, please contact:

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Noteworthy 2010 Municipal Court Decisions - A Quick Summary

by: Ronald D. Richards Jr. and Lindsey E. Bosch

NO EXCLUSIONARY ZONING WHERE TOWNSHIP ONCE HAD LAND USE BUT THAT USE IS NOT IN THE TOWNSHIP DUE TO CITY ANNEXATION

The Court of Appeals rejected a claim that a township was excluding commercial uses where there are many commercial uses in the neighboring city and some of those uses were formerly in the township before the city annexed the land on which they exist. *DF Land Development, LLC v Charter Twp of Ann Arbor,* unpublished per curiam opinion of the Court of Appeals (Docket No. 291362, dec'd 7/13/02). The Court found no total exclusion, noting that there is a considerable amount of commercial uses within very close proximity to the township. The Court noted that much of the township has been annexed to the City of Ann Arbor, and there is much commercial land in what was formerly

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part of the township. Thus, there is ample commercial use "within close geographical proximity of everywhere in the township. Foster Swift represented the Township.

COURT REJECTS CONSTITUTIONAL CHALLENGES TO TOWNSHIP'S REZONING DENIAL

The Court of Appeals recently rejected a constitutional challenge to a township's decision to deny a rezoning request. *Chestnut Development, LLC v Twp of Marion*, __ Mich App __ (unpublished decision of June 22, 2010). There, the Court agreed the township's decision was not arbitrary since the township considered the following: (1) advice from its planning consultant, (2) the nature of the surrounding property, (3) the absence of sewer service, and (4) the notation in the county comprehensive plan that sewer should not be extended to property such as plaintiff's. It also rejected the developer's takings claim, since the developer did not show that it was completely deprived of all economically beneficial uses of the property. Namely, the plaintiff admitted that it did not pursue a Planned Unit Development (PUD) request under the SR (Suburban Residential) zoning scheme. Further, the plaintiff did not evaluate the potential for splitting the property for development, and it presented no evidence indicating that it could not use the property in some other economically viable manner or that the property was unmarketable for some use as zoned. Further, the plaintiff could not establish a valid takings claim because the plaintiff all but acknowledged that it could still sell the property at a profit, and it purchased the land with full knowledge of its zoning classification and poor soil. Foster, Swift, P.C. represented the Township.

MICHIGAN SUPREME COURT REJECTS EXCLUSIONARY ZONING CLAIMS SINCE DEVELOPER DID NOT SEEK REZONING OR A VARIANCE

The Michigan Supreme Court recently held that a township's denial of an application for rezoning at a proposed lower-density level does not automatically establish that its exclusionary zoning challenge to the township's ordinances is ripe, or that it would be futile for the developers to apply for a higher-density use. *Hendee v Putnam Twp*, 486 Mich 556, 560-61; 786 NW2d 521 (2010). There, the township denied a rezoning request for a 95-unit PUD. The developers then sued, claiming the township unlawfully excluded mobile home parks and sought permission to build a 498-unit mobile home park. The Supreme Court ruled that the claim was not ripe, siding with the township. The Court emphasized that the complaint is not ripe since the developers did not submit any rezoning request for a 498-unit mobile home park to the township. The Court rejected the claim that the futility exception to the ripeness doctrine should apply. The developers argued it would have been futile to seek permission to develop a 498-unit mobile home park because the township had already denied their rezoning request for the 95-unit PUD. But because they did not pursue an application for rezoning from for a mobile home park, they could not show that the futility doctrine applied. Foster Swift successfully represented the Township.

MDEQ MAY NOT FORCE A TOWNSHIP TO INSTALL A PUBLIC SEWER SYSTEM WHERE PRIVATE SYSTEM FAILS AND THE TOWNSHIP IS NOT THE CAUSE OF THE FAILURE

The MDEQ lacks the power to require a township to install a sanitary sewer system where there is widespread failure of private septic systems resulting in contamination of lake waters. *MDEQ v Twp of Worth* ___ Mich App ___ (published decision of August 17, 2010). There, the MDEQ sued to compel the township to install a public sewer system when private systems failed. The trial court sided with the MDEQ, requiring the township to design, construct, and operate a sewer project to remedy the failing system and resulting discharges. The trial court also imposed a $60,000 fine and awarded attorney fees. The Court of Appeals reversed, ruling in the township's

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favor. The Court interpreted the controlling statutes to impose liability on the "municipality" in which the discharge occurred only if the discharge occurred due to actions of the municipality. Since there was no evidence that the township was the source of the discharge as it did not operate the system, the township could not be penalized for the discharge.

The MDEQ has asked that the Michigan Supreme Court review the decision. So the last word may not have been heard on this one yet.

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FOCUS: Bond Counsel Corner

PACE Act May Help Municipal Units Advance Energy Efficiency Goals

by: Janene McIntyre

Michigan's recently enacted Property Assessed Clean Energy (PACE) Act made Michigan one of the 22 states that allow municipal units to fund loans to commercial and industrial property owners for energy efficiency projects. Through establishing a property assessed clean energy program, a local government would be able to enter into contracts with such property owners who voluntarily choose to finance energy efficiency improvements or renewable energy systems through the program.

The Act defines an "energy efficiency improvement" as equipment, devices or materials intended to decrease energy consumption, including but not limited to insulation in walls, roofs, floors, foundations or heating and cooling distribution systems; storm windows and doors; multi-glazed windows and doors; automated energy control systems; caulking, weather-stripping and air sealing; energy recovery systems; and day lighting systems.

Local governments are authorized, under the Act, to:

- adopt property assessed clean energy programs and create districts to promote the use of renewable energy systems and energy efficiency improvements by owners of commercial and industrial (but not residential) real property;
- repay the improvements' costs from voluntary assessments on benefited property and provide that an assessment imposed under a property assessed clean energy program would constitute a lien against the property;

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- provide for financing such programs through voluntary property assessments, commercial lending and other means; and
- issue bonds, notes and other evidences of indebtedness, and use the proceeds to pay the cost of the renewable energy systems and energy efficiency improvements.

In issuing bonds, as security for their payment a local government would use payments on assessments on benefited property or other moneys lawfully available for such purposes. The bonds may not be issued as general obligations of the local government.

In order for a local government to take advantage of the PACE Act, it must fulfill a number of procedural requirements, including establishing the program.

If you have questions regarding the PACE Act or would like more information on how your governmental unit may utilize and benefit from the Act, please contact:

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Public Act 321 Allows Some Bond Refundings at a Net Present-Value Loss, to Permit Restructuring Future Debt Payments

by: John M. Kamins

A new law signed by Governor Granholm in December 2010 – Public Act 321 – may provide some relief for Michigan municipalities facing severe budgetary challenges meeting their payment obligations on outstanding bonds. Many municipalities face those challenges due to decreased property tax revenues and other decreased revenues. Act 321 has amended the Revised Municipal Finance Act to allow a municipality to issue refunding bonds *without present value savings* to refund all or a portion of their outstanding bonds, but only before December 31, 2012 and with prior approval from the Michigan Department of Treasury and a required public hearing. This may enable municipalities to restructure their debt service obligations for projects that have not yet generated anticipated revenue streams, by extending some principal payments into later years and lowering current payment obligations to comport better with revised revenue projections. Act 321 does not apply, however, to outstanding bonds secured by the unlimited full faith and credit pledge of a municipality.

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FOCUS: Bond Counsel Corner

No Legislative Relief in 2010 for Delinquent Special Assessment Bonds

by: John M. Kamins

This updates our July 2010 Bond Counsel Corner article entitled "Pending Legislative Relief for Delinquent Special Assessment Bonds," which reported on a bill then-pending in the Michigan Legislature (HB 6181). The bill encountered controversy, did not progress, and died in the 2009-2010 session of the Legislature that ended in December. The bill was intended to create a State-funded Delinquent Special Assessment Revolving Loan Fund from which money could be loaned to eligible local government units to assist them to make payments on certain troubled special assessment bonds. This remains a serious problem for municipalities with troubled or failed special assessment districts, and so a similar new bill may be introduced in the new legislative session.

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Updates on Federal Tax Laws Affecting Municipal Bonds

This chart lists noteworthy federal income tax-related bond provisions that were enacted in the American Recovery and Reinvestment Act of 2009 (ARRA) or other past federal tax legislation. Many of the provisions had been scheduled to expire Dec. 31, 2010. The right-hand column shows their status as of Jan. 1, 2011, reflecting the effects of the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010, enacted into law at the end of 2010, or other recently-enacted federal tax legislation.

Specific provisions before 2010 year-end federal legislative activity	After 2010 year-end legislative activity
Build America Bonds (BABs) Allowed issuance of bonds (until Dec. 31, 2010) bearing federally taxable interest but subsidized through federal tax credit payments that enabled state and local governments to issue debt attractive to purchasers who were not themselves taxpayers, thereby increasing the supply of bond buyers and pushing down their yields.	Efforts in 2010 tax legislation to extend the BABs program beyond Dec. 31, 2010 sunset date failed. New issuances of BABs are not allowed in 2011. There may be efforts in the new U.S. Congress to resurrect the BABs program in a revised format, but prospects are speculative.

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Specific provisions before 2010 year-end federal legislative activity	After 2010 year-end legislative activity
AMT exemption for Private Activity Bonds: Interest on private activity bonds (PABs) issued in 2009 and 2010, including bonds that refunded prior bonds (if originally issued during 2004 - 2008), were exempted from Alternative Minimum Tax (AMT) preference calculations for individual owners. Corporate owners were permitted to omit this interest in calculating their current earnings adjustment.	Not extended beyond Dec. 31, 2010 sunset. Tax-exempt interest on PABs issued after 2010 is a tax preference item for AMT purposes. This affects industrial revenue bonds and other PABs, but not governmental bonds or qualified 501(c)(3) bonds. Corporate owners include such interest in calculating their current earnings adjustment.
Bank Deductibility and Holding Subject to Dec. 31, 2010 sunset, allowed more bonds to be bank qualified (BQBs) & hence not subject to interest deduction disallowance for bank holders, by increasing $10,000,000 annual issuance limitation on issuer's BQBs to $30,000,000 and treating 501(c)(3) conduit borrowers as direct issuers of BQBs. Banks also were allowed to invest up to 2% of their assets in tax-exempt bonds without a portion of that interest expense deduction being disallowed under §265 of the Internal Revenue Code (IRC).	These provisions were not extended beyond Dec. 31, 2010 sunset date. Bonds issued after 2010 are subject to the old BQB rules. This includes reverting to the $10,000,000 annual issuance limitation, and counting qualified 501(c)(3) bonds issued after 2010 against the governmental issuer's limit.
Recovery Zone Economic Development Bonds	Not extended beyond Dec. 31, 2010 sunset.
Recovery Zone Facility Bonds	Not extended beyond Dec. 31, 2010 sunset.
Guaranteed by Federal Home Loan Bank An exception from general prohibition of federally guaranteed bonds permitted bonds guaranteed by Federal Home Loan Bank to be issued until Dec. 31, 2010 and be treated as federally tax-exempt	Not extended beyond Dec. 31, 2010 sunset
Clean Renewable Energy Bonds (CREBs)	For bonds issued after 2010, the CREB credit rules no longer apply.

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Specific provisions before 2010 year-end federal legislative activity	After 2010 year-end legislative activity
Qualified Zone Academy Bonds (QZABs)	Extended for one year (2011 only) and with $400 million new volume allowed nationally for 2011.
Empowerment Zone Bonds Empowerment zone and enterprise community provisions, enacted in 1993.	Extended for one year (2011 only).
Qualified School Construction Bonds	Except for carryovers, there is no calendar year volume cap after 2010.
Qualified Public Educational Facility Bonds Allows for financing of public elementary and secondary schools run pursuant to public-private partnerships	Extended through 2012.
Manufacturing Facilities Definition Subject to Dec. 31, 2010 sunset, ARRA expanded definition of "manufacturing facilities" to include facilities used in production of intangible property; and ARRA expanded definition of the facilities.	Not extended beyond Dec. 31, 2010 sunset.
Qualified Mortgage Bonds to refinance sub prime loans Allowed issuance (until Dec. 31, 2010) of federally tax-exempt qualified mortgage bonds to refinance sub-prime loans (IRC § 143(k)(12)).	Not extended beyond Dec. 31, 2010 sunset.
Private activity bonds for housing purposes Provisions enacted prior to ARRA for a volume cap increase and set-asides for private activity bonds issued for certain housing purposes, contained in IRC §§ 146(d)(5) and 146(f)(6).	Not extended after 2010.
Water and Sewer Exempt Facility Bonds	Efforts in 2010 tax legislation to exempt such private activity bonds from requiring a state unified volume cap allocation failed. Such "exempt facility bonds" remain subject to state volume caps.

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***Practice Group Leader**

ASK A LAWYER -
MTA Business Solutions Session

DATE
Wednesday, January 26, 2011

TIME
12:15 to 1:15 p.m.

LOCATION
2011 MTA Annual Conference and Expo in Grand Rapids.

The Foster Swift "ASK A LAWYER" session is your chance to connect with Foster Swift attorneys – through a convenient and informal roundtable discussion format. It is a chance to ask or talk about municipal issues affecting your area or topics not covered in conference programming.

In short, there will be about five or six roundtables set up during the session. Each will be assigned various municipal topics. One or more Foster Swift attorneys will be at each roundtable ready to talk about the municipal issues you want to discuss or respond to other questions you have. Attendees are encouraged to visit multiple tables during the hour-long session.

Lunch will be provided!

Among others, expected roundtable topics will include the following:

- Labor & Employment Matters
- Municipal Litigation Matters
- Municipal Prosecution
- The Freedom of Information Act and Open Meetings Act
- Municipal Finance and Bond Matters
- Land Use, Zoning, and Land Division
- Property Tax and Tax Tribunal Proceedings
- Ordinance Drafting and Enforcement
- Library Law
- Condemnation

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