MUNICIPAL ATTORNEYS NEWSLETTER
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NEWS AND EVENTS

Local Government Bar Committee Meeting. The Local Government Bar Committee is hosting a meeting on November 20 at the Capitol Plaza in Jefferson City at 9:30 a.m. in the Lincoln Room. Barbara Birchicht, chair of the committee, from the St. Louis Counselor's office has scheduled several topics which are timely and of interest. Susan Phelps, from the St. Louis Counselor's office will present on the St. Louis Behavioral Nuisance Ordinance. Mat Larsen from Shook, Hardy & Bacon L.L.P., will discuss federal law applicable to Missouri statutes and strategic issues as several Missouri cities face litigation claiming violation of the federal law governing U.S. Department of Agriculture loans to rural water districts. The Committee will adjourn at 11:00 a.m. and everyone is invited for a free lunch at noon. If anyone has a topic they would like to discuss please contact Barbara at BirkichtB@stlouiscity.com.

NEW PENALTY FOR FAILURE TO FILE ANNUAL TAX INCREMENT FINANCING REPORT – NOVEMBER 16, 2009 DEADLINE APPROACHING.

- H.B. 191 Update … The TIF Act (defined below) now penalizes cities that fail to file an annual report with the Missouri Department of Economic Development. **The deadline for filing this year's annual report is November 16, 2009.**
- History of TIF Reporting … Prior to the 2009 legislative session, municipalities were required to "prepare a report concerning the status of each redevelopment plan and redevelopment project" and to submit the report to the Missouri Department of Economic Development (DED), **annually**. § 99.565.1 RSMo. The reporting period in the annual report can be for any 12-month period ending prior to September 30, 2009.
- Recent Changes … Changes implemented by H.B. 191 from the 2009 legislative session, effective August 28, 2009, revised portions of the Real Property Tax Increment Allocation Redevelopment Act, §§ 99.800.99.865 RSMo (TIF Act), to include a potentially severe penalty provision for cities that fail to file the above described annual report with DED.
- Penalty Provision … Specifically, "[a]ny municipality which fails to comply with the reporting requirements … shall be prohibited from implementing any new tax increment finance project for a period of **no less than five years**," § 99.865.7 RSMo. Thus it is imperative to prepare and file these annual reports in a timely manner to ensure your city's ability to utilize the TIF Act for future redevelopment projects. Moreover, if your municipality has not in prior years completed and filed annual reports respecting the status of your municipality's redevelopment plan and projects, it is recommended you do so at your earliest convenience.
- Additional TIF Act Requirements … In addition to the annual reporting requirements described above, the TIF Act also imposes responsibilities on municipalities that utilize tax increment financing including without limitation, the following:
  (1) each municipality shall publish **annually** in a newspaper of general circulation within the municipality a report showing payment in lieu of taxes (PILOTS) received and expended during that year, the status of the redevelopment plan and all projects therein, the amount of outstanding bonded indebtedness, and any additional information deemed necessary by the municipality;
  (2) each municipality shall hold a **public hearing** beginning five (5) years after the establishment of the redevelopment plan and every five (5) years thereafter, to determine whether each redevelopment project is making satisfactory progress toward completion under the time schedule set out in its approval plan; notice of each such public hearing must be published in a newspaper of general circulation in the area served by the commission once a week for four (4) consecutive weeks immediately prior to the hearing;

(3) municipalities, or their respective commissions, shall send copies of **all hearing notices** required by §§ 99.825 and 99.830 RSMo to DED; and
(4) municipalities shall report to DED by the last day of February each year the name, address, phone number, and primary line of business of any **business that relocates to any redevelopment area**. §§ 99.810.1 and 99.830.4 RSMo.
This article was submitted by Dan Vogel with Cunnigham, Vogel & Rost, P.C. Thanks Dan!

CASE OUTLINES (MISSOURI)

OFFICIAL IMMUNITY PROTECTS EMPLOYEES FOR DISCRETIONARY ACTS. Plaintiffs filed a lawsuit against the Special School District of Saint Louis County (District) seeking damages for the wrongful death of their son. When their son was enrolled in school, the District was placed on notice that the child had severe functional limitations and medications caused him to be a danger to himself and others from a number of conditions that could cause him to choke, gag, and overfill his mouth while eating edible and inedible objects. While at school, the child ate food left within his reach and began chocking that led to his death. Plaintiffs sued the District and three teachers alleging that the District and the teachers failed to properly monitor and supervise the child and that they had an unqualified duty that was not discretionary to provide the child with constant care, supervision, and monitoring. Defendant's motion to dismiss for failure to state a cause of action was sustained and plaintiffs appealed. The Eastern District held that the doctrine of official immunity protects the three teachers because the teachers were not acting in a ministerial capacity. In order to be liable for their acts, a public official must breach a ministerial duty required by statute or regulation. Plaintiffs failed to plead any statute or regulation, and failed to allege any facts establishing an exception to the official immunity doctrine. In addition, the doctrine of official immunity not only protects the teachers for their discretionary acts and functions but also their omissions. The District did not waive its sovereign immunity by creating a dangerous condition of its property because the conditions were not physical in nature. Open and unattended food was not a dangerous condition within the meaning of the statute. The allegations in the petition showed that the actions were based on a failure to supervise. Even though the District had insurance, sovereign immunity protected the District because its insurance policy had an endorsement that excluded coverage for all acts that fall within the Districts sovereign immunity defense. *Boever v. Special School District of St. Louis County*, (ED92698, 09/22/09).

Comment Howard. This is a very powerful case particularly in light of the Missouri Supreme Court's earlier decision in *Southers v. City of Farmington*, 263 S. W. 3d 603 (Mo 2008). One of my fears, until the decision in *Southers* was that plaintiffs would be able to back door sovereign immunity for the political subdivision by finding employees liable. Let us face it, local government has to defend its employees and in certain situations there would be no caps on damages. This case and S*outhers* make it clear that municipal employees are protected while performing discretionary duties. Read, enjoy, and pray that this case stands.

EMERGENCY MEDICAL SERVICES BY CITY ARE PROTECTED BY SOVEREIGN IMMUNITY AND EMPLOYEES ARE PROTECTED BY OFFICIAL IMMUNITY. Plaintiff's husband went into emergency respiratory distress. The responding individual (Employee) was employed by the St. Louis Fire Department that provides emergency medical services. The Employee applied an endotracheal tube to the husband's esophagus instead of his tracheal, causing anoxic brain injury and death. The wife sued the city of St. Louis (City) and the fire department's Employee for wrongful death in the treatment of her husband. Defendants moved to dismiss on the grounds of sovereign immunity, official immunity, and the public duty doctrine. The motions were sustained with respect to the sovereign immunity and official immunity and the plaintiff appealed to the Eastern District. In a case of first impression, the court held that the City was protected by sovereign immunity when providing emergency medical services even though it charged for these services. Sovereign functions are "performed for the common good of all." This service protects the public health and serves the public. The fact that the City charged a fee for the service is not determinative based on cases from other jurisdictions. Plaintiff's pleadings alleged facts sufficient to show that the function was governmental. With respect to the

Employee's defense of official immunity, even though it is an affirmative defense and must be plead by the defendant if the pleadings show on their face that the Employee is entitled to official immunity, it is subject to a motion to dismiss. Official immunity shields public officials when engaged in a discretionary act. A discretionary act requires the exercise of reason in the adaptation of means to an end whereas a ministerial duty is an act performed in a prescribed manner in obedience to a mandate of legal authority. The court distinguishes this case from a case holding that a physician working for a municipal hospital is subject to malpractice claims. Other grounds for distinguishing the physician's case are that Employee was acting in an emergency room environment. In the recent Missouri Supreme Court decision in *Southers,* notwithstanding the extensive discussion of official immunity, the Court remands the case since the pleadings were not sufficient to support the motion to dismiss. *Richardson v. City of St. Louis*, (ED91995, 09/22/09*)*.

Comment Howard. This case, *Southers* and *Boever v. Special School District of St. Louis County* discussed previously covers the waterfront on official immunity. One concern that I have is that the definition of a discretionary act is very broad and a ministerial act is very narrow, which might give an opening for the Missouri Supreme Court to take up this question.

TEACHERS UNION DOES NOT HAVE A CONSTITUTIONAL RIGHT TO EXCLUSIVE REPRESENTATION. The Greene County Circuit Court recently entered a judgment ruling on a claim by the Springfield NEA (SNEA) against the R-12 School District of Springfield (School District) with respect to its collective bargaining policy. SNEA filed a lawsuit claiming that the School District's policy on bargaining over pay and other conditions of employment with two separate unions who represent teachers (the parties agreed that the Teachers Unit covered some 1,640 full-time teachers or teachers who work 50 percent of the time and librarians except supervisors), violated the obligation to engage in collective bargaining under the Missouri Constitution, its right of equal protection and due process Clause. Policy HH adopted by the School District provided that members of the Teacher Unit would first vote to determine if they wanted exclusive representation, multiple representation, or no representation. If a majority of the members in the Teachers Unit voted for multiple representation, then a second election would be held and each union that got at least 30 percent of the vote would be entitled to represent their members at negotiating sessions where all authorized unions representing their members who are in the Teachers Unit would negotiate with the School District. SNEA represented some 829 teachers and SMSTA represented 581 teachers. If a majority of the teachers voted for exclusive representation, there would be a second vote to determine which union would be the exclusive representative of the Teachers Unit. After adoption of this policy the SNEA challenged the policy asking for a declaratory judgment. Following a bench trial the trial court held in a 21-page opinion that Policy HH did not violate the rights of SNEA or its members as alleged. The court found that under the Missouri Constitution, collective bargaining for teachers does not require exclusive representation nor have their rights been violated under the Equal Protection Clause or the Due Process Clause of the Missouri Constitution. The court does not equate public sector labor negotiations with private sector labor negotiations. *Springfield National Education Association v. The School District of Springfield, R-12, Greene County Circuit Court*, case No. 0931-CV08322.

Comment Howard. It would appear the decision in this case will be appealed by SNEA giving the appellate courts an opportunity to flesh out some of the issues under the *Independence School District* case. This is a well-written opinion and since there has not been any appellate decision since the *Independence* decision, it may help to provide some guidance in this new area of the law. I would think that most governmental agencies would not want to follow the lead of the Springfield School District in bargaining with several unions who represent the same unit. A copy of this opinion can be obtained on the MML Website at www.mocities.com, under Attorneys Newsletter/MMAA materials..

SMOKE FREE ORDINANCE NOT PREEMPTED BY STATE LAW. The Missouri Supreme Court recently refused to consider the Kansas City smoke free ordinance thereby making the decision in *City of Kansas City v. Carlson* decided June 23, 2009, by the Western District final. This is very good news for those who want local government to adopt additional regulations that go beyond state tobacco regulations in order to create smoke free environments.

STEALING OF SEWER SERVICE. Defendant constructed an elaborate system of lateral sewer lines on his property that served several buildings that allowed wastewater from the buildings to flow to one building known as the Blue House. The Blue House was the only building connected to the city of Carthage's (City) sewer system and the connection occurred after it was annexed into the City. Only the Blue House was authorized by the City to be connected to the City's sewers and only this building paid for sewer service. The City discovered the connection and ran dye tests that showed wastewater from the other buildings went to the Blue House and were discharged from the sewer system serving the Blue House into the City's sewer system. The defendant was charged by the County with stealing by appropriating sewer services with a value at least $500 and was convicted by a jury. The trial court sentenced the defendant to seven years in the Missouri Department of Corrections with execution of that sentence suspended. He was placed on supervised probation for five years and ordered him to make restitution to the City of $24,489. The defendant appealed to the Southern District, which affirmed the decision on the grounds that the evidence was sufficient for the jury to find the defendant guilty. Defendant's argument that just because he was connected to the City's sewer system did not show he actually "used" the sewer service, was rejected since a jury could logically infer that connection to the City's system resulted in the use of sewer services. *State of Missouri vs. Hagensieker*, (SD29261, 09/28/09).

Comment Howard. While this case does not stand for any great principle of law it is noteworthy that the jury and judge took a strong stand against the defendant's actions although the facts in this case were egregious. This is the first case to my knowledge that applies the state law to stealing sewer service although it has been applied to the stealing of other utilities. The idea that a community could ratchet up the stakes with petty criminals should help deter this type of activity.

BAC TEST SUPPRESSED WHEN NO PROBABLE CAUSE TO MAKE THE ARREST. Defendant, driving an extended cab pickup, was stopped for speeding while driving on Highway 50 late at night in Cole County. As the officer approached the vehicle, he saw two cases of Bud Light in the bed of the truck. There were four people in the truck, two in the front seat and two in the back seat. The driver was the only person who was over 21 years of age. Defendant who was sitting in the back seat was 20 years of age. One passenger in the front seat had a bottle of spiced rum. Everyone was ordered out of the vehicle and at that point the officer noted on defendant's breath a slight odor of alcohol. The officer arrested the defendant for minor in possession of alcohol. The defendant was taken to jail where he was tested – the result showing the defendant had a .058 percent BAC. The defendant was charged with the crime of minor in possession of intoxicating liquor. The trial court suppressed the BAC test sample on the grounds that the officer did not have probable cause to make the arrest and that the administration of the BAC test did not fall within an exception to a warrantless requirement. The defendant was found not guilty and the State appealed to the Western District, which affirmed the decision. The court determined that at the time of the arrest, there was no probable cause to warrant the belief that the defendant was in possession of alcohol since the spiced rum was in the front seat, the two cases of Bud Light were in the truck bed, and the defendant had only a minor smell of alcohol and was coherent, not visibly intoxicated, and was cooperative with the officer. *State of Missouri v. J.D.L.C.*, (WD70769, 09/01/09).

DATAMASTER TESTING MACHINE RESULTS DO NOT REQUIRE TESTIMONIAL EVIDENCE. The maintenance of the results of the Datamaster Testing Machine without the analysts testimony does not violate defendant's right to confront a witness under the 6th Amendment because the maintenance report was not created in preparation for trial since Missouri considers the report non-testimonial. The report is mandated by state law and is for the purpose ensuring the accuracy of the reports prior to the use of the report and must be performed every 35 days regardless of whether or not the machine had been used. *State of Missouri v. Marrone*, (SD 29077, 09/15/09).

RIGHT TO WRIT OF MANDAMUS IS DETERMINED AT THE TIME WRIT IS FILED AND REQUEST FOR A BUILDING PERMIT DOES NOT CREATE VESTED RIGHT. Plaintiffs had a 800-square-foot home in the city of Grain Valley (City) and wanted to build a modular home of 1,600

square feet to replace their existing home. The City informed plaintiffs that the residential structure on the property was prohibited under the zoning ordinance of the City. Plaintiffs contended that they submitted "building permit papers" to the City for their contemplated home but that the City would not accept their application, which was disputed by the City. The plaintiffs filed a zoning variance with the City's board of adjustment, which was denied after a hearing on June 13, 2007. On June 25, 2007, the City rezoned a swath of property that included plaintiff's property to "transitional," which did not allow residences. On August 9, 2007, the plaintiffs filed a petition for a writ of mandamus contending that the property was zoned commercial, that they just wanted to add to their existing home, and that they were entitled to a building permit. The trial court heard the evidence that included testimony that neither the City nor the plaintiffs could locate the ordinance that zoned the property "commercial." The trial court denied the writ and the plaintiffs appealed to the Western District, which affirmed the decision of the trial court. The Western District held that the plaintiff's rights to a building permit were established at the time when they filed the lawsuit and that the undisputable evidence showed that the property was zoned at the time the lawsuit was filed as "Transitional." Judgment was affirmed. In addition, plaintiffs did not have any vested rights to the issuance of a building permit based on an application for a building permit. *State of Missouri, ex rel., Richard Lee, et al., v. City of Grain Valley*, (WD70059, 09/15/09).

Comment Howard. Based on the facts in this case, the decision is of little consequence; however, the court took great length to discuss a number of reoccurring and important municipal law issues making the opinion very useful. The court makes the point that the right to the issuance of a writ of mandamus is determined at the time the petition is filed, which plaintiffs totally failed to appreciate by arguing in vain the wrong facts. In addition, the court goes to great length to examine when rights are vested for the purpose of the determining if a person has a vested right and what actions or inactions are sufficient to create vested rights. This discussion is one of the better discussions on the topic of vested rights serving as a very good primer on this issue.

CASE OUTLINES (FEDERAL)

NO DEFAMATION BY WESTBORO BAPTIST CHURCH. We have been following forever the actions of the Westboro Baptist Church in picketing the funerals of war veterans who have been killed in action. The family of the deceased war veteran tried another approach and sought damages based on violation of state law claims including defamation and recovered a very substantial jury verdict against the church, which was set aside by the Fourth Circuit that recently ruled that the First Amendment right of Free Speech protects the Church and its officers from a defamation suit filed by the father of the deceased war veteran. *Phelps v. Jane Doe*, (4th Cir. No. 08-1026, 09/24.09).

Comment Howard. This case illustrates again the difficulty of overcoming the First Amendment defense to Westboro Baptist Church actions in picketing the funeral services of deceased war veterans.

HOW TO OBTAIN OPINIONS AND PAST NEWSLETTERS

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

Missouri:**http://www.courts.mo.gov/page.asp?id=12086&dist=Opinions**
Federal: **http://www.ca8.uscourts.gov/onestop.html**.
Supreme Court: http://www.supremecourtus.gov/
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