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Employment Requirements for Building Officials

The Michigan Attorney General has interpreted a recent law requiring municipal building officials to be "employed" by a municipality to mean that building officials cannot be private independent contractors. The question of whether a worker is an employee is based on the "economic realities" of the arrangement, with consideration of the following factors: (1) control of the worker's duties; (2) payment of wages; (3) right to hire, fire, and discipline; and (4) performance of the duties as an integral part of the employer's business toward achieving a common goal. The Attorney General opined that state law does not permit arrangements where a private entity trains and oversees the building official, provides all of the official's compensation and benefits, and retains authority to fire and replace the individual performing the building-official function.

In light of the Attorney General's opinion, municipalities that use a private contractor as the building official face a number of legal risks. For one, the Department of Licensing and Regulatory Affairs could initiate enforcement actions against it. Also, property owners could challenge a building official's decision if the official is unlawfully employed.

Municipalities have several options to comply with this new employment requirement. One cost-efficient option is to partner with neighboring communities to share a single building official. So long as the head building official is a municipal employee, the law permits private contractors to perform building-related services like inspections and plan reviews.

Speech Regulation After *Gilbert*: From Yard Signs to Panhandling and Beyond

The U.S. Supreme Court's recent *Reed v. Town of Gilbert* decision involved a dispute over yard signs, but its consequences reach far beyond for local governments. Prior to *Gilbert*, many believed that the 1st Amendment permitted separate regulatory schemes for different types of messages, so long as each category was regulated reasonably without hostility to particular types of speech. The court in *Gilbert* rejected that understanding, holding that any regulatory scheme that categorizes speech based on content is subject to "strict scrutiny," and is therefore presumptively unconstitutional. In other words, if a sign ordinance requires reading the sign to determine which regulations apply, it violates the 1st Amendment unless the regulations are narrowly tailored to a compelling government interest. The court struck down the ordinance at issue in *Gilbert* because it established three categories of noncommercial signs (political, ideological, and directional) and treated each category differently without sufficient justification.

Lower courts are beginning to apply *Gilbert's* understanding of the 1st Amendment in other contexts, overturning existing case law on speech regulation. At least two federal courts in other jurisdictions have recently held that any ordinance that establishes special regulations for people soliciting donations is subject to strict scrutiny. If extended to Michigan, this reasoning could be used to challenge "aggressive panhandling" ordinances that regulate specific methods of

panhandling (such as standing near ATMs) that are most likely to cause offense or create safety hazards. A federal district court in Colorado recently ruled that ordinances that prohibit panhandling near ATMs do not withstand strict scrutiny, because not all requests for money near ATMs are threatening in nature. Any community with an aggressive panhandling ordinance, or any ordinance that takes the message of speech into account, may wish to consider the impact of the *Gilbert* decision.

Freedom of Information Act: The Personal Privacy of Criminal Suspects

In *ESPN, Inc. v. Michigan State University*, the Michigan Court of Appeals issued an important decision regarding incident reports of uncharged crimes. The case involved a Freedom Of Information Act request for all incident reports mentioning one or more student athletes on a 301-person list. The university released the responsive reports, but used the "personal privacy" exemption to redact the names and identifying information of suspects who were never charged with crimes. The Court of Appeals deemed the redactions were improper in this context because the public interest in disclosure clearly outweighed the interest in nondisclosure. The court found that the public had a strong interest in knowing whether student-athletes were treated more favorably than the general student population, and in knowing whether the university accurately reported certain incidents to the news media.

Prior to the *ESPN* case, many police departments routinely redacted the names of uncharged suspects under the guidance of a Michigan Attorney General opinion. The Court of Appeals decision in *ESPN* indicates that, in at least some cases, the importance of a news story outweighs a suspect's right to privacy and requires disclosure. Michigan State University has requested leave to appeal to the Michigan Supreme Court.

New HUD Regulations Impose Additional Requirements on Program Participants

The U.S. Department of Housing and Urban Development (HUD) has recently issued new regulations applicable to recipients of certain types of HUD funds. The new regulations mandate that recipients of certain funding – Community Development Block Grant funds, Emergency Solutions Grant funds, Home Investment Partnership funds, Housing Opportunities for Persons with AIDS funds, and Public Housing Agencies – engage in a four-step process to set fair housing priorities and goals every five years. The process, known as an Assessment of Fair Housing (AFH), is designed to replace the current "analysis of impediments" process (AI).

The AFH process includes questions designed to assist participants in better identifying fair housing issues, as well as the contributing factors for those issues. Once completed, HUD reviews the AFH for a determination as to whether the fund-recipient's programs are consistent with fair housing and civil rights requirements. Unlike the AI process, AFH's must receive HUD approval. The goals identified in the AFH must then be incorporated into various action plans, which also have extensive regulatory requirements.

Although it is unclear how the new regulations will be implemented, HUD could use the AFH process to investigate whether municipal housing and land-use regulations have a "disparate impact" on protected classes like race, religion, sex, familial status, national origin, and disability. This type of implementation could affect housing and zoning policies like minimum lot-size requirements, home density requirements, and caps on the number of homes that may be rented in a certain area. HUD's implementation of the new regulations should be closely tracked. In the meantime, careful consideration should be given to accepting HUD funds.

Sixth Circuit Upholds Municipal Grass-Mowing Fees

In *Shoemaker v. City of Howell*, a federal appeals court issued an important decision regarding the legality of municipal fees. The ordinance in Shoemaker required property owners to maintain the grassy area in the public right-of-way between the sidewalk and the street. When the property owner refused to mow that area, the city performed the work at the owner's expense and then placed a lien on the property for the unpaid fees.

The 6th Circuit Court of Appeals rejected two constitutional challenges to the ordinance. First, the court said municipalities can lawfully require property owners to maintain the grassy area in adjacent public right-of-ways, since the property owner has a partial ownership interest in that area. The court also rejected the property owner's procedural due-process challenge, holding that municipalities are not required to initiate ordinance prosecutions or offer formal appeal proceedings before imposing grass-mowing fees. In reaching that conclusion, the court emphasized the relatively low monetary amount of the fees, as well as the relative urgency of abating the ordinance violation.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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