

community watch

MONITORING LEGAL ISSUES THAT AFFECT MICHIGAN MUNICIPALITIES

2.11.08

A Municipality Cannot Require Environmental Insurance from Telecommunications Provider

By Kristen Bricker Kolb

In a published opinion issued January 22, 2008, the Court of Appeals placed limits on a municipality's ability to require environmental contamination insurance from a telecommunications provider as part of a Metropolitan Extension Telecommunication Rights-of-way Oversight ("METRO") Act permit.

In *Charter Township of Commerce v Michigan Public Service Commission and McLeod USA Telecommunication Service, Inc.*, Commerce Township appealed a ruling of the Michigan Public Service Commission ("MPSC") holding that the Township could only require McLeod (a telecommunications provider) to provide environmental contamination insurance if McLeod decided to "place any new or existing telecommunications facilities underground within the rights-of-way of the Charter Township of Commerce."

McLeod had sought an updated permit for its existing facilities under the METRO Act in 2004. The permit form, which was prepared by the MPSC, required a provider to obtain liability insurance for sudden and accidental environmental contamination in the amount of \$500,000.00, including coverage for claims discovered within three years after the term of the policy. Since McLeod was not planning any actual work on its lines at the time, they requested a waiver of this requirement from the Township. The Township refused, and McLeod requested appointment of a mediator under the METRO Act to resolve the dispute. The mediator recommended that the MPSC revise the environmental contamination provision to make it contingent upon McLeod placing any new or existing facilities underground. The Township then requested the MPSC to review the matter and resolve the dispute.

SECRET WARDLE NOTES:

Although this decision appears to further erode local control over public rights-of-way, the Court of Appeals has provided some flexibility in negotiating METRO Act permits with telecommunications providers. By clarifying that the permits are not set in stone, there is an incentive for the parties to negotiate *reasonable* terms and avoid the time and expense of the dispute resolution process through the MPSC. However, municipalities need to keep in mind that the state of the law in Michigan is such that any action that is seen as impinging on state law will likely be found to be unreasonable.

CONTINUED...

The MPSC adopted the recommendation of the mediator, finding that the parties could agree on different terms than those contained in the standard permit forms it had developed. Further, it revised the form permit provision requiring environmental contamination insurance to be contingent upon the provider's facilities located underground within the public rights-of-way, finding that work associated with aerial lines did not have the same environmental contamination concerns as work on underground installations.

The Township then appealed the ruling of the MPSC and raised four arguments. The Court of Appeals ruled against the Township on all counts. The Court determined the Township was "cherry picking" those provisions of the METRO Act that suited its case, to the exclusion of equally applicable, yet unfavorable, provisions. The Court further found a significant difference between possible environmental hazards associated with work on telecommunications facilities installed above-ground, versus those installed underground. Due to the potential risks associated with underground installations, the Court found it was reasonable of the MPSC to differentiate these situations for purposes of determining when environmental contamination insurance could be required. Finally, the Court invoked the holding in *City of Taylor v Detroit Edison Co.* to find that a municipality's right to reasonable control of its rights-of-way cannot impinge on matters of statewide control. Because the METRO Act specifically governs the issuance of right-of-way permits by telecommunications providers, the Township cannot rely on the constitutional provision governing control of public rights-of-way to "trump" state law.

Ultimately, the Court of Appeals ruled that the MPSC's "standard" permit forms may be amended by agreement of the parties, by appointment of a mediator, or through the dispute resolution process at the MPSC. In other words, while the forms are "standard," they are by no means set in stone.

CONTACT US

Farmington Hills

30903 Northwestern Highway, P.O. Box 3040
Farmington Hills, MI 48333-3040
Tel: 248-851-9500 Fax: 248-851-2158

Mt. Clemens

94 Macomb Place, Mt. Clemens, MI 48083-5651
Tel: 586-465-7180 Fax: 586-465-0673

Lansing

6639 Centurion Drive, Ste. 130, Lansing, MI 48917
Tel: 517-886-1224 Fax: 517-886-9284

Grand Rapids

2025 East Beltline, S.E., Ste. 209, Grand Rapids, MI 49546
Tel: 616-285-0143 Fax: 616-285-0145

Champaign, IL

2919 Crossing Court, Ste. 11, Champaign, IL 61822-6183
Tel: 217-378-8002 Fax: 217-378-8003

www.secrestwardle.com

SECRET
SW
WARDLE

Copyright 2007 Secrest, Wardle, Lynch, Hampton,
Truex and Morley, P.C.

This newsletter is published for the purpose of providing information and does not constitute legal advice and should not be considered as such. This newsletter or any portion of this newsletter is not to be distributed or copied without the express written consent of Secrest Wardle.

CONTRIBUTORS

Municipal Practice Group Chair

William P. Hampton

Senior Editor

Steven P. Joppich

Editor

Erene Golematis

We welcome your questions and comments.

OTHER MATERIALS

If you would like to be on the distribution list for Community Watch, or for newsletters pertaining to any of our other practice groups, please contact Secrest Wardle Marketing at marketing@secrestwardle.com, or 248-539-2850.

Other newsletters include:

Benchmarks – Navigating the hazards of legal malpractice

Blueprints – Mapping legal solutions for the construction industry

Boundaries – A guide for property owners and insurers in a litigious society

Contingencies – A guide for dealing with catastrophic property loss

Fair Use – Protecting ideas in a competitive world

In the Margin – Charting legal trends affecting businesses

Industry Line – Managing the hazards of environmental toxic tort litigation

Landowners' Alert – Defense strategies for property owners and managers

No-Fault Newslines – A road map for motor vehicle insurers and owners

On the Beat – Responding to litigation affecting law enforcement

On the Job – Tracking developments in employment law

Safeguards – Helping insurers protect their clients

State of the Art – Exploring the changing face of product liability

Structures – A framework for defending architects and engineers

Vital Signs – Diagnosing the changing state of medical malpractice and nursing home liability

Update Illionois - Current trends in Illinois law