GENERAL ELECTION. There is about 90 days left until the General Election when Missouri voters will vote on two of the most important constitutional amendments in recent years. These initiatives “the slum landlords bill of rights” masked in eminent domain dress, require a massive education program in order to inform citizens of the danger. Don’t wait until someone else takes the lead. Now is the time to act. Please get involved.

NEW MMAA OFFICERS. The Missouri Municipal Attorneys Association recently elected the following new officers: President, City Counselor Terry McVey of Kennett; Vice President, City Attorney Chris Williams of Oak Grove; and Treasurer, City Attorney John Mulligan of University City.

BUSHYHEAD AND THOMPSON RECEIVE CZECH AWARD. Belton City Attorney Christine Treat Bushyhead and Raytown City Attorney Nancy Thompson received the Missouri Municipal Attorneys Association’s Annual Lou Czech Award for outstanding contributions to municipal law. Congratulations to both who have spent countless hours training city officials at MML Conferences.

LABOR AND EMPLOYMENT LAW SEMINAR. The Lowenbaum Partnership will conduct a Legal Update Seminar on labor law, employment law, and employment benefits law. This free Seminar will be held on September 25, 2008, at the St. Charles Convention Center. The Seminar will start with a continental breakfast at 7:30 a.m. You may bring individuals from your city and individuals from other cities that you feel will benefit from the Seminar. For more information or to register, please contact Sarah Leonard at 314-746-4891 or e-mail at sleonard@lowenbaumlaw.com; or Maggie Fuhr at 314-746-4824 or e-mail at mfuhr@lowenbaumlaw.com.

CASE OUTLINES (MISSOURI)

BLIGHT REPORT WAS SUFFICIENT. Cortex West Redevelopment Corporation (Developer) sought to condemn property owned by Station Investments #10 Redevelopment Corporation (Owner) that had been blighted by the city of St. Louis (City), for a project to develop a bioscience and biotechnology industry in the project area as a life science business park. The circuit court ordered the property condemned and the Owner appealed the condemnation order alleging that the City has not properly blighted the property. The Eastern District reviewed the evidence of blight and determined there was substantial evidence to support the finding of blight. The blight report showed that sidewalks were broken, streets in disrepair, pooling of water, broken windowpanes, razor wire protecting property, and other evidence of physical blight. Based on the evidence of blight, the Eastern District affirmed the order of condemnation. Cortex West Redevelopment Corporation v. Station Investments #10 Redevelopment Corporation et al., (ED90935, 06/24/08).

Comment Howard. If you are looking for what a blight report should contain with respect to the types of evidence this is a good case. The court contrasts the evidence in this case to the recent case involving Centene Plaza. With the new rules allowing for expedited appeals of the order of condemnation when property has been blighted, we can expect to see more appeals of the condemnation order.
RETIREE HEALTH BENEFITS FOR ST. LOUIS POLICE MUST BE EQUIVALENT TO ACTIVE POLICE OFFICERS. Prior to 2006, retired police officers of the city of St. Louis received health insurance coverage without having to pay any premiums. In 2006, the Board of Police Commissioners of the city of St. Louis (Board) altered the plan for retired police officers by providing a very basic plan for free with the right to a buy additional coverage for a monthly premium of $251. Retirees challenged the new plan based on Section 84.160.8(3) that provided that the Board “shall provide” health insurance to police retirees. They alleged that the new insurance plan violated 42 U. S. C. 1983 by depriving the retirees of a vested property right without due process of law under the United States and Missouri Constitutions. The circuit court found for the retirees based on evidence that the new plan offered less coverage at a higher premium than any other available group health plan thereby forcing the retirees to pay $251 per month for health benefits that were equivalent to active duty employees. On appeal, the question was what did the phrase “shall provide” health insurance coverage mean since the general assembly provided no guidance. Other sections of state law require that the Board provide police officers who are currently employed health insurance benefits which are provided at no cost to the employee. The court interprets the language to mean that the Board is required to provide retirees health insurance benefits at substantially the same level as active employees. St. Louis Police Officers’ Association et al., v. Board of Police Commissioners of the City of St. Louis, (SC88954, 06/30/08).

SEAL OF ENGINEER MEANS ENGINEER TAKES RESPONSIBILITY FOR THE ACCURACY OF THE PLAN. Can an engineer seal a set of plans prepared by an architect without having to supervise the work of the architect who prepared the original set of plans? In Bird v. Missouri Board of Architects, Professional Engineers, Professional Land Surveyors and Landscape Architects, (SC88710, 06/10/08) the Missouri Supreme Court discusses the obligation of the Missouri Board of Architects Professional Engineers, Professional Land Surveyors and Landscape Architects to protect the public while not becoming an economic weapon to protect licensed professions. The Court held that the seal of the engineer on the plans means that the engineer takes full responsibility for the entire set of plans and that he did not have to supervise the architect who prepared the initial set of plans although the engineer by sealing the plan is responsible for the work of the architect. Bird v. Missouri Board of Architects, Professional Engineers, Professional Land Surveyors and Landscape Architects, (SC88710, 06/10/08).

Comment Howard. This case is of interest since city ordinances require plans to be sealed by an architect or engineer before the city reviews the plans. Occasionally, disputes arise over who can sign the plans and who has ownership of the plans as was the situation in this case. The holding in this case takes the city out of the middle of these dispute by allowing the city to rely on the seal of the architect or the engineer as vouching for the accuracy of the plans. Who owns the plans was a separate matter litigated in another lawsuit.

STATUTE ONLY REQUIRES OFFICER TO ALLOW ARRESTEE TO CALL ATTORNEY. Police officer arrests driver of motor vehicle on suspicion of driving while intoxicated. The officer proceeded to read the driver his rights including the implied consent law and Miranda rights. Section 577.020 provides that when a person is requested to submit to the blood alcohol test he/she shall be granted 20 minutes in which to attempt to contact an attorney. Prior to requesting that the driver submit to the test, the officer had on several occasions provided the driver an opportunity to contact an attorney. Officer, after he told the driver that he was going to administer the test, did not tell the driver he had the right to an attorney although he waited the full 20 minutes. Driver tested over the limit and his license was revoked by the director of revenue. The circuit court reinstated the driver’s license on the grounds that the driver was not informed of his right to contact an attorney after the officer told the driver he was going to administer the test. The Eastern District reversed on the grounds that Section 577.020 did require the officer to tell the driver of his right to call an attorney but only states that if the driver asks, he shall be allowed to call his attorney during the 20 minutes. This case is in direct conflict with a Western District case. Paxton v. Director of Revenue, (ED89595, 06/16/08).
EQUAL PROTECTION CLAUSE IS NOT VIOLATED WHEN PENSION PLAN IS DIFFERENT FOR ELECTED PROSECUTOR. Statute that has a different contribution rate for full-time prosecutor who is elected than non-elected prosecutor in third class counties, did not violate the equal protection clause of the United States or Missouri Constitutions because there was a rationale basis for the distinction. Missouri Prosecuting Attorneys and Circuit Attorneys Retirement System v. Pemiscot County. (SC88956, 06/30/08).

PERSEVERANCE PAYS OFF. The city of Berkeley (City) appealed a circuit court judgment entered in favor of Elbert Walton for more than $349,700 for back pay and expense reimbursements as the former city attorney for Berkeley. The Eastern District reversed holding that the law of the case controls his wrongful removal and precludes relitigation of the issue and subsequent appeal. Generally, this doctrine controls the case for “all points presented and decided, as well as all those matters that arise prior to the first adjudication that could have been raised but were not.” In the first adjudication, the Supreme Court recognized that the trial court found that Walton was not unlawfully discharged. Walton v. City of Berkeley, (ED90211, 07/08/08).

 Comment Howard. This case involved four judgments and four appeals finally resulting in the vindication of the City. I guess this proves that the most determined opponent in a case is a lawyer who has a personal interest. Congratulations to the city of Berkeley for persevering.

INFORMATION OBTAINED UNDER LAW THAT IS UNCONSTITUTIONAL SHOULD BE EXPUNGED. In 2006, plaintiff was informed he was required to register as a sex offender. After plaintiff registered, the Missouri Supreme Court in Doe v. Phillips held that Megan’s Law violated the Missouri Constitution that prohibited retrospective laws. Plaintiff sought to have his registration information expunged from the records. The sheriff and the prosecutor of Greene County contended that they should be able to continue to keep this information even though the law does not apply to the plaintiff. The circuit court held that the information was unlawfully coerced from the plaintiff since the law, as applied to plaintiff, was unconstitutional. On appeal, the Southern District affirmed and required the record to be expunged. Doe v. Merritt, (28882, 07/03/08).

UNCONTROLLED INTERSECTION ON COUNTY ROAD IS A DANGEROUS CONDITION. This case involved an uncontrolled intersection on a county road. The driver of a vehicle was going some 20 miles over the speed limit and had a serious accident with another vehicle at an uncontrolled intersection. Cass County (County) was sued under theory that the unmarked intersection was a dangerous condition. The County appealed its denial of “JNOW” and the grant of a new trial to the plaintiff. The Western District held that the plaintiff presented sufficient evidence to allow a jury to determine that the intersection was dangerous. There was evidence of lack of adequate site lines, notice to the County, and there was a failure of a duty to warn. Boney, et al., v. Worley, et al., (WD67897, WD67911, 06/24/08).

 Comment Howard. If you are looking for cases involving dangerous conditions at uncontrolled intersections this is a good case to start with.

LANDMARK CASE CLARIFIES THE LAW WITH RESPECT TO OFFICIAL IMMUNITY, THE PUBLIC DUTY DOCTRINE, AND SOVEREIGN IMMUNITY. A high-speed chase of a person who robbed a store at gunpoint by Farmington (City) police officers (Officers) resulted in the death of two innocent bystanders and serious injuries to two children ages one and five. These facts provided the backdrop to a landmark Missouri Supreme Court to clarify the doctrines of official immunity, the public duty doctrine, and sovereign immunity as applied to police officers, city officials, and the City. Plaintiffs, the survivors of the two women killed during the high-speed chase sued the City, two supervising officers, and one policeman who caused the accident. The trial court granted motions for summary judgment after examining voluminous submissions and determining that there was no evidence
of any negligence of any kind by any individual defendant, that the defendant officers’ acts were protected by the public duty doctrine and by official immunity, and that the City was not liable because there could be no underlying cause under the doctrine of respondent superior for the negligence against the City. An appeal was taken to the Missouri Supreme Court which after discussing and explaining in detail the law in Missouri of official immunity, the public duty doctrine, and sovereign immunity, the Court applied these principles to the facts in this case. The Missouri Court examined the liability of Officer Ratliff who was following behind the other police cars when the automobile containing the two women pulled out and the accident occurred. Officer Ratliff was engaged in an emergency chase in violation of the department rules governing high-speed chases and was going around 67 mph on a two-lane street with a 35 mph speed limit. Officer Ratliff was following some distance behind the other two police cars engaged in the chase. When the first two police cars passed, the vehicle pulled out and was hit by the third police vehicle, Officer Ratliff. The Court determined that Officer Ratliff was protected by the doctrine of official immunity and the public duty doctrine unless his actions fell within an exception to the application of the doctrines. With respect to the City’s liability for the actions of Officer Ratliff, there was no immunity protection because official immunity is personal to the officer and the statutes provide that the immunity protections of the City are waived. With respect to the police chief and the supervising officer they were protected under the doctrine of official immunity and the public duty doctrine. The City was protected under the doctrine of sovereign immunity with respect to the allegations against the police chief and the supervising officer allegations unless a waiver of immunity applied which could occurred if the city purchased insurance covering these employees. Unlike the actions of Officer Ratliff the supervising officer’s liability did not fall under the statutory waiver in Section 536.600.1 (1). These facts provided the backdrop to a landmark Missouri Supreme Court decision that clarified the doctrines of official immunity, the public duty doctrine, and sovereign immunity as applied to police officers, city officials, and the City. The Court reversed the trial court’s decision that the City was fully immune from respondent superior liability. "Southers et al., v. City of Farmington, et al.," (SC88612, 06/10/08).

Comment Howard. This case is not only a must read case but also a must understand case as it sets forth the Court’s quantum theory for municipal liability under the doctrine of official immunity, the public purpose doctrine, and sovereign immunity. While much in the opinion is not new, the Court’s opinion makes it very clear that it is intended to provide guidance to lawyers in these areas of the law and goes to great length to show how the three doctrines are interrelated.

**CASE OUTLINES (FEDERAL)**

**RAILWAY SPEED AND PREEMPTION.** The state of Minnesota passed a special law for the city of Orr (City) that established a speed limit of 30 mph inside of the City for trains. However, 49 C. F. R. 213 allows the railroad company to set train speed on a track. The railroad increased the speed for 49 mph - 60 mph. The railroad challenged the 30 mph speed limit in district court which determined that the state law met the conditions for an “essentially local safety hazard” as set forth in 49 C. F. R. 213. The 8th Circuit reversed holding that the record did not support the conclusion that any of the five conditions were unique to the City. "Deluth, Winnipeg and Pac Railway Co. v. City or Orr," (8th Cir. No. 07-2689, 06/20/08).

**DISABILITY BENEFITS THAT ARE HIGHER FOR YOUNGER EMPLOYEES DID NOT VIOLATE THE ADEA.** Licking was an employee over 55-years-of-age who worked in a county sheriff’s office but became disabled and retired at age 61. His pension was based on years of service. The pension plan also provided that if an employee was disabled when the employee was younger the employee’s pension enhanced the disability pension based on an imputed number of years of service. Licking claimed that the practice of added benefits imputed to employees who did qualify for a disability pension discriminated against older employees who were similarly situated based on age and violated the
ADEA. The United States Supreme Court upheld the practice because the differences were “analytically distinct” concepts. When an employer adopts a pension plan that includes age as a factor, it is necessary to show that the differential treatment was “actually motivated” by age not pension status. Kentucky Retirement Systems v. EEOC (No. 06-1037)

TEXT MESSAGING. A recent case in the 9th Circuit provided some insight into the application of federal law to text messaging in the context of public employment. Quon was a sergeant with the city of Ontario’s (City) swat team. The City contracted with Arch Wireless for text messaging services and pagers. Employees were allowed to text message for personal reasons but were obligated to pay, under the City’s informal policy, for all texting over 25,000 characters per month. The City became concerned about the use of text messaging and audited Quon’s as well as other employees’ text messaging use. The City as the subscriber showed that Quon had exceeded his monthly usage by 15,158 characters and that “many of the messages were personal in nature and sexually explicit.” Quon and other employees sued the City for violation of their right of privacy under the California and the Federal Constitutions and the Stored Communications Act (SCA). The district court granted partial summary judgment for the City and a jury considered the police chief’s intent holding that the chief intent was limited to determining the efficacy of the character limit. On appeal, the 9th Circuit held that the SCA prohibited the disclosure of any message in electronic storage by the service provider unless the addressee consented. In addition, there was a right of privacy under the Fourth Amendment and the California Constitution. Quon v. Arch Wireless Operating Co., (No. 07-55282, 06/18/08).

Comment Howard. There has been a lot of publicity about text messaging regarding the mayor of Detroit getting into all kinds of trouble for his steamy text messages sent to several of his girlfriends and lying to cover up this practice. Text messaging is very common and one of the preferred methods of communication with the younger set. Since this is a 9th Circuit case and a case of first impression, no one is assured if this case will be followed by the other circuits. Still it is pretty obvious that there may be efforts to obtain this information and make it public. This complicates the ability of anyone to get the text while at the same time illustrates the problem of allowing personal use of government resources.

COMMENTS AND CONTRIBUTIONS

MMAA member David Barrett writes in response to the summary of Virginia v. Moore in the June MMAA Newsletter that held there was no cause of action for a violation of the Fourth Amendment when an officer makes an arrest and seizes property. While there may not be a cause of action under the Fourth Amendment, David states that police officers still need to be concerned since there may be liability in tort. Thank you David for this comment.

HOW TO OBTAIN OPINIONS

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 to locate information. If you have questions or comments please feel free to e-mail me at howardcwright@mchsi.com or call us at 417-569-0386.

Missouri: http://www.courts.mo.gov/courts/pubopinions.nsf,
Federal: http://www.ca8.uscourts.gov/onestop.html,
Supreme Court: http://www.supremecourtus.gov/

The opinions cited in this Newsletter may be subject to revision or withdrawal prior to publication.