

# Briefly

A Publication of the Government Law Section of the State Bar of Michigan

February 2020 ■ Gregory Stremers, Chair ■ Helen Lizzie Mills & Jacob P. Fox, Editors

## See You at the Winter Seminar!

The Henry, 300 Town Center Dr, Dearborn, MI 48216

February 7, 2020

This seminar will focus on the employment setting in municipal government, including investigation and handling of sexual harassment investigations.

8:30-9:00 a.m.

**Registration/Continental Breakfast**

### Morning Session

9:00-10:45 a.m.

**So You've Been Served with a Potential Class Action Complaint**

Speakers: *Mary Massaron and Patrick Lannen*

Plunkett Cooney

Class Actions: Key Defenses, Procedural Pitfalls, Essential Discovery, and Appellate Options

Case Specifics: Building/inspection fees, utilities, tire marking and prisoners

10:45-11:00 a.m.

**Morning Break**

11:00-11:45 a.m.

**Municipal Management of Marijuana: Lessons from Lansing, MI**

Speakers: *Heather Sumner and Amanda O'Boyle*

Office of the City Attorney, City of Lansing

11:45-12:00 p.m.

**Questions and Answers**

12:00-1:30 p.m.

**Lunch**

### Afternoon Session

1:30-3:15 p.m.

**#MeToo is Here—Are you ready?**

Internal Investigations: The Who, What, When & How

Speaker: *Laura S. Amtsbuechler*

Rosati, Schulz, Joppich & Amtsbuechler, PC

Discipline: Post-Incident and Remedial Measures, the Aftermath Management of Employees, and Litigation Tips

Speaker: *Audrey J. Forbush*

Plunkett Cooney

3:15-3:30 p.m.

**Afternoon Break**

3:30-4:15 p.m.

**Facilitation: Trends, Costly Mistakes and the Impact of Attorney Fees**

Speaker: *Kathleen Bogas*

Bogas & Koncius PC

4:15-4:30 p.m.

**Questions and Answers**

4:30 p.m.

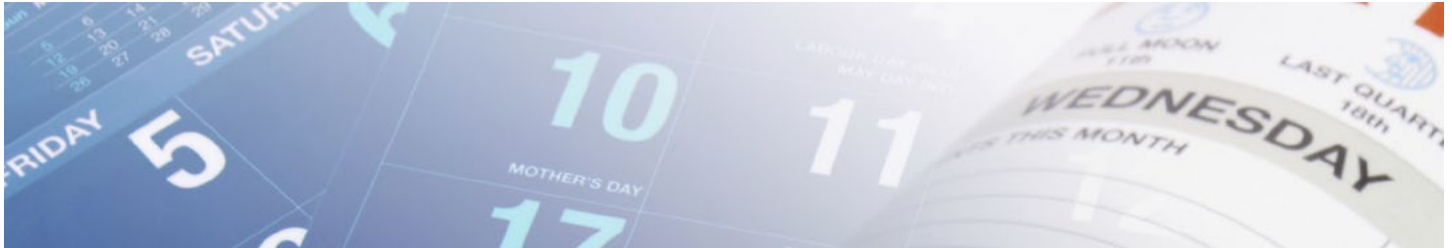
**Networking in the Tria Bar**

# Mark Your Calendars

Summer Seminar - Grand Traverse Resort

June 26-27, 2020

Topics will include economic development, code enforcement, and many other areas of interest to municipal attorneys.



## 2010-2020 A Decade in Review

*Although the decade has only recently passed, it is fair to say it was a formative decade for the State of Michigan. It was a decade that saw Michigan thrust into the national spotlight for a variety of events including: the Emergency Manager Statute championed by former Governor Rick Snyder, Michigan becoming a Right to Work State, and the Flint Water Crisis. Briefly asked multiple experienced attorneys what they believed were the largest changes to government law in Michigan in the 2010s.*

## 2010-2020: A Decade Gone To Pot

By Clyde J. Robinson, Kalamazoo City Attorney

### The MMMA: Michigan's Gateway Ballot Initiative

For years, the decriminalization of marijuana in Michigan was an issue largely confined to the city of Ann Arbor, which had reduced the penalty for possession to a \$5 (later increased to \$25) civil infraction offense. But that changed in November 2008 when Michigan voters approved the citizen-initiated Michigan Medical Marijuana Act (MMMA), MCL 333.26421 *et seq.* While the MMMA created an exemption to criminal prosecution for the medical use of marijuana by registered patients and their caregivers, it was silent on how those individuals could legally obtain marijuana.

Two years later, the first of many appellate decisions interpreting the MMMA, *People v. Redden*, 290 Mich. App. 65; 799 N.W.2d 184 (2010), was issued. Aside from

the legal issues present in the case, the concurring opinion of Judge Peter D. O'Connell highlighted the "confusing nature of the MMMA, and its susceptibility to multiple interpretations," pointing out that a marijuana shop existed less than 100 feet from a school in Lansing and questioned whether the statute was the "first step in legalizing marijuana in Michigan." Since this initial opinion, the MMMA has become a source of a body of law that continues to grow as individuals and local governments attempt to understand and apply the statute.

Attempts by municipalities to regulate the commercialization of medical marijuana have not fared well, largely due to the seminal *Ter Beek v. City of Wyoming*, 495 Mich. 1; 846 N.W.2d 531 (2013) decision. In this case the Supreme Court voided a zoning ordinance which prohibited uses that were contrary to federal law; holding

that the MMMA superseded the Michigan Zoning Enabling Act, MCL 125.3101 *et seq.* and is not preempted by the federal Controlled Substances Act, 21 USC 801 *et seq.*

At this writing the Michigan Supreme Court has heard oral argument in the appeal of *DeRuiter v Township of Byron*, 325 Mich. App. 275; 96 N.W.2d 268 (2018), involving a zoning ordinance, that the lower courts held to be preempted by the MMMA based on the *TerBeek* case, which limited registered caregivers under the MMMA to “home occupations” and prohibited the medical use of marijuana in commercially zoned property. Other cases dependent on the decision in *DeRuiter* include *Charter Township of York v Miller*, 322 Mich. App. 648; 915 N.W.2d 373 (2018) prohibiting outdoor medical marijuana grow operations by a registered caregiver, and *Charter Township of Ypsilanti v. Pontius*, Mich. App. #340487 (unpublished) precluding medical marijuana dispensaries and nurseries as home occupations in single-family residential districts.

Between 2012 and 2015, many Michigan cities sought to fill the gaps created by the MMMA. Ordinances and charter amendments were adopted that decriminalized marijuana by legalizing the possession or transfer of less than 1 ounce of marijuana on private property by persons age 21 and older, making enforcement of marijuana law the lowest law-enforcement priority, or permitting the establishment of commercial medical marijuana dispensaries. In particular, the city of Grand Rapids amended its city charter to make possession, use or transfer of marijuana a \$25 first offense civil infraction, broadened the scope of the health professional defense in the MMMA, and precluded city police from referring marijuana arrests to the county prosecutor. In what was a victory for home rule in *Kent County Prosecuting Attorney v. City of Grand Rapids*, Mich. App. #316422 (unpublished), *lv. den.* 498

Mich. 939; 871 N.W. 2d 720 (2015) the charter provision was upheld on a variety of grounds, while criticizing and distinguishing the result in *Joslin v. 14th District Judge*, 76 Mich. App. 90; 255 N.W.2d 782 (1977) which struck down a similar city of Ypsilanti ordinance that sought to limit the ability of city police to enforce state law.

### The MMFLA: the Legislature Steps In

In 2016, some semblance of order was obtained by municipalities with the passage by the Legislature of the Medical Marijuana Facilities Licensing Act (MMFLA), MCL 333.27101 *et seq.* This legislation created a State licensing and regulatory framework for the commercialization of medical marijuana. Importantly, municipalities were not required to allow any of the 5 permitted classes of licensed businesses (growers, processors, safety compliance centers, secure transporters or provisioning centers) to operate within their borders. Rather, a municipality had to “opt-in” to the act. For those communities that opted in, short of not being allowed to regulate price, purity, or adopt an ordinance conflicting with state administrative rules, local officials were granted broad authority in terms of adopting licensing and zoning regulations pertaining to commercial marijuana businesses.

### The MRTMA: Legalizing Recreational Marijuana

But as predicted by Judge O’Connell in his *Redden* concurrence, the MMMA *was* a precursor for a citizen-initiated proposal to legalize recreational or adult use marijuana in Michigan. Although competing proposals failed to garner enough signatures to put the question on the November 2016 ballot, legalization advocates came together under the umbrella of “regulate marijuana



like alcohol” to put the question to voters in November 2018. Like the MMMA of 10 years earlier, voters overwhelmingly approved the Michigan Regulation and Taxation of Marijuana Act (MRTMA), creating the most generous quantities for personal possession of marijuana by persons 21 and older in the United States.

Although the MRTMA could have, and perhaps should have, more closely paralleled the MMFLA, it did not, but instead imposed specific limitations on the degree of municipal regulatory and zoning discretion. And unlike the MMFLA, the MRTMA requires municipalities to affirmatively “opt-out” if they do not want recreational marijuana commercial businesses to locate in their communities. As of this writing, according to the Marijuana Regulatory Agency (MRA) website within the Michigan Department of Licensing and Regulatory Affairs, 1422 cities, villages and townships have opted out of the MRTMA compared with 33 municipalities (and nearly all with some restrictions) which permit recreational commercial establishments. Like the MMMA, the MRTMA is riddled with inconsistencies and its provisions are given to conflicting interpretations. To this end, Attorney General Dana Nessel has formed a work group to propose curative legislation to the MRTMA.

The MRTMA is noteworthy in several respects. It permits individuals to petition to initiate an ordinance to provide for the number of marijuana establishments allowed within a municipality or to completely prohibit marijuana establishments within the municipality. In 2019, elections were held in 15 communities and commercial adult-use marijuana businesses were rejected in 11 of those instances.

And if a community attempts to limit or cap the number of adult-use marijuana businesses, the MRTMA requires it to use “a competitive process intended to select applicants who are best suited to operate in compliance with (the MRTMA) within the municipality.” Any objective scoring system intended to comply with this requirement is likely an invitation to a lawsuit by those applicants who don’t get a license.

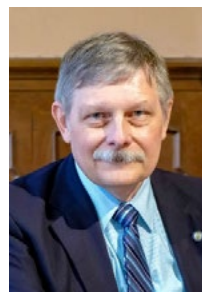
The MRTMA also required LARA to adopt a rule to encourage participation in the marijuana industry by people “from communities that have been disproportionately impacted by marijuana prohibition and enforcement.” The MRA rolled out its “Social Equity” program which waives a portion of the state licensing fees

for residents of 41 identified communities and whether they have a prior marijuana-related conviction and/or were a registered medical marijuana caregiver. However, in direct contrast with this mandate, the MRTMA for the first two years after going into effect largely limits adult-use licenses to those marijuana businesses holding a medical marijuana license.

In addition to creating the “microbusiness” category (a 100 plant grow, processing, and sale operation), the MRTMA permits the State to create additional categories of businesses. The MRA announced that it will also issue the following 4 types of licenses, if permitted by the local municipality, for Excess Growers (limited to Class C Growers), Designated Consumption Establishments, and Marijuana Event Organizers (who in turn may apply for and hold) Temporary Marijuana Events (permitting the onsite sale/consumption of marijuana on dates of the event with the approval of the municipality where the event is being held).

However, municipalities will likely face many of the same legal issues with adult use marijuana that were presented by the implementation of the medical marijuana statute. This has prompted caution on the part of many municipalities, which explains the overwhelming number of “opt-outs”. As put by Kalamazoo Charter Township Administrator Dexter Mitchell concerning local adult-use marijuana business ordinances, “They’re asking people to run down the road at 90 miles an hour with no headlights on and the moon isn’t out. We want to tread lightly.” Because it is very likely that municipalities attempting to implement the MRTMA will be faced with similar legal issues that were encountered with the implementation of the MMMA and MMFLA, treading lightly and carefully is sound advice as we head into 2020.

### About the Author



*Clyde J. Robinson is a graduate of Western Michigan University and the University of Michigan Law School. He has practiced municipal law for nearly 40 years, serving as the City Attorney for Battle Creek (1999-2008) and Kalamazoo (since 2008). He is a past Chair of the Government Law Section of the State Bar and past President of the Michigan Association of Municipal Attorneys.*



# Pension and Retiree Healthcare Reform

By Patrick F. McGow, Miller Canfield

Underfunded public pension plans and retiree healthcare plans causing fiscal stress on municipalities dominated the headlines in the past decade leading to landmark changes to Michigan law in both the Legislature and the courts. In the beginning of the decade, the enactment of the Emergency Manager law, PA 436 of 2012, authorized the Governor to appoint emergency managers to oversee financially distressed communities, many of which were struggling to pay for their retirement plans and retiree healthcare/other post-employment benefit (OPEB) obligations.

In December 2013, Detroit filed for bankruptcy in the largest municipal bankruptcy in U.S. history citing an inability to provide basic services or fulfill its debt obligations of more than \$18 billion of debt – of which \$3.5 billion was for unfunded pension obligations and \$5.7 billion for retiree healthcare obligations. Although the Michigan Constitution protects accrued pension benefits of state and local government employees in public pension retirement plans, the bankruptcy court ruled that Detroit's pension obligations to its retirees can be impaired in a bankruptcy proceeding. The main feature of the Grand Bargain settlement in the bankruptcy was Detroit retirees accepting pension reductions in exchange for over \$800 million in contributions from the State, private foundations and others to shore up the underfunded pension plans.

In 2014 through 2017, the Governmental Accounting Standards Board implemented changes to accounting standards to draw attention to these liabilities by requiring local units to record their pension liabilities (GASB 43 and 45) and their retiree healthcare liabilities (GASB 74 and 75) on their balance sheets.

Local units of government had few tools to address the underfunded pension and OPEB liabilities. In 2012, the Michigan Legislature enacted Act 329 of 2012 authorizing certain local units to issue bonds to pay for unfunded pension liabilities or unfunded accrued healthcare liabilities. Only a limited number of municipalities were qualified to issue the bonds, and to date, 27 Michigan counties, cities and townships have used this statute to issue pension or OPEB bonds totaling approximately \$1.4 billion.

In December 2017, the Legislature passed a package of bills to reform local government retirement and benefits plans, which included Act 202 of 2017, also known as the "Protecting Local Government Retirement and Benefits Act." The purpose was to provide a framework to encourage local governments to address the fiscal stress issues caused by unfunded pension and retirement health care costs. This legislation was the culmination of a multi-year discussion on municipal finance issues and pension reform.

The 2017 legislative reform was not as dramatic as the 2016 or 2017 proposed pension reform legislation. Act 202 requires more transparency and mandated a new reporting system for local units to provide reports to its governing body and the Michigan Treasury Department on its retirement programs. Act 202 requires reporting of the funded status and funding ratios of local unit retirement programs and mandated uniform actuarial assumptions to identify communities with underfunded programs. Local units that have underfunded pension plans (less than 60% funded) or underfunded retirement healthcare plans (less than 40% funded) are now required to prepare a Corrective Action Plan to remedy the underfunded status within a reasonable timeframe (ranging from 5 to 30 years). A



new Municipal Stability Board was created to review, approve and oversee Corrective Action Plans.

Act 202 does not provide any real enforcement power to the Municipal Stability Board other than approving and monitoring Corrective Action Plans. It is possible that future legislatures or administrations might take other punitive actions against municipalities which do not address their underfunded retirement programs such as reduction of revenue sharing payments or mandating closure of existing defined benefit pension or OPEB plans.

Finally, to close out the decade in May 2019, the Michigan Supreme Court ruled in favor of Macomb County in a class action lawsuit by retirees in the case of *Kendzierski v Macomb County*, that collective bargaining agreements “did not provide a vested right to lifetime and unalterable retirement health care benefits.” In the 4-2 decision, the Court held that the County could make reasonable changes to healthcare coverage of retirees after each labor contract expires without the consent of the retirees.

Act 202’s reporting requirements and GASB accounting standards will keep pension and retirement healthcare funding in the forefront of the discussion on municipal finances. As local units continue to wrestle with managing the cost of pension and retiree healthcare benefits, with the recent decision in *Kendzierski v Macomb County*, they may also look to amend benefits for existing retirees as well as future retirees.

### About the Author



**Patrick McGow** is a practicing attorney at Miller Canfield’s Detroit Office, where he is the Public Finance Group Leader. In practice Patrick advises cities, counties, townships, villages and authorities on a broad range of infrastructure financing and related legal matters.

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## Practitioner Profiles

*In this new feature, Briefly shines a spotlight on some of the attorneys shaping government law in Michigan. In its inaugural interview, Briefly editors selected longtime Government Law Section Council Member Carol Rosati of Rosati Schultz Joppich and Amtsbuechler. Rosati, who specializes in Land Use and Zoning Law, offered helpful insights into the current state of government law in Michigan as well as the skills she thought were essential for attorneys.*

### *Why did you decide to become an attorney?*

Carol comes from a family of lawyers—six of them to be exact. Carol’s father was an attorney who encouraged his four children to pursue a legal education. Not to feel left out, Carol’s mother decided to go to law school—graduating when she was 60 years old. Finding a career she was passionate about, Carol’s mother practiced well into her 80s.

One factor that lead Carol to go to law school was her father’s passion for the law. Carol initially aspired to be a Judge but found that she enjoyed private practice.

### *What were some of your formative experiences early in your legal career? Why government law?*

Carol came to be interested in government law while clerking in law school for a firm that represented local government entities. Throughout the 1980s, she watched as the Supreme Court decided some significant cases regarding liability for land use decisions made by government—discovering her passion for land use planning and zoning law. Carol’s interest in land use and zoning law is derived from the complex constitutional issues in this area of law such as First Amendment issues, RLUIPA claims, as well as takings, equal protection and due process challenges.

Aside from her intellectual curiosity in land use and zoning law, one factor that led Carol to practice govern-

ment law was the nature of the clients involved. Interacting with people ranging from elected officials, government employees to the general public, Carol likes the variety of individuals she works, and says there is there is “never a dull moment.”

*What led you to join the Government Law Section? What drove you to participate in a leadership position?*

Like many Section Councilmembers, Carol enjoys attending the educational seminars hosted by the Government Law Section. At the seminars, she has been consistently impressed by the knowledge and experience of the presenting attorneys. A Councilmember since the 1980s, Carol has volunteered with the Government Law Section because of its ability to draw upon a wide range of experienced governmental attorneys and educational seminars that keep practitioners up to date. In addition, Carol has enjoyed conversations with fellow Councilmembers about questions that do not fall neatly into one category of law—a common event for municipal practice.

*What Government Law Section events are you looking forward to?*

Carol is eagerly awaiting the Government Law Section Winter Seminar taking place on Friday February 7, 2020. For each seminar, the Council attempts to cover the issues that are most relevant to governmental entities at the time. The Section identified three relevant topics: class action lawsuits, recreational marijuana relation to zoning ordinances, and sexual harassment in the workplace.

Carol articulated that class action lawsuits against government entities are on the rise in Michigan as the result of 2014 storm events that caused substantial flooding and sewer backups, as well as recent class actions challenging the ability of local government to require rental licensing and inspections. At the seminar, Carol anticipates learning more about the possible defenses to these claims, and how to avoid certification of a class. Next, all municipal attorneys are concerned about the impact of recreational marijuana and its impacts communities. A multifaceted issue, recreational marijuana facilities trigger many issues for local governments including land use and zoning issues, the need to update employee handbooks, and updating local ordinances.

Finally, the afternoon panel will discuss in detail the numerous issues related to sexual harassment in an employment context. Looking forward to what she assured would be an informed discussion of the issues, Carol lamented that sexual harassment was still a problem plaguing many workplaces. Carol speculated that sexual harassment continues to be an issue for government employers because of lack of training and understanding by many municipal employees and officials. Although local governments are aware that sexual harassment is a significant issue, many still do not comprehend that certain off-the-cuff comments, possibly meant as jokes, can be actionable. Carol believes the seminar will point out potential pitfalls for government employers and how to address these issues when they arise.

*What is your advice for young attorneys about what it takes to be a good municipal lawyer? How is the practice Changing?*

You can't be the old dog that doesn't want to learn new tricks. Representing government requires an attorney to be “a jack of all trades” so to speak. Some skills frequently used by municipal lawyers include understanding the governmental structures and powers, drafting and enforcing ordinances, drafting contracts, dealing with budget and financing issues, keeping up with statutory changes and case law that impact government, making sure your client is complying with statutes such as the Open Meetings Act and Freedom of Information Act, handling personnel matters, and attending public meetings to answer questions that might arise. Being a municipal lawyer requires hard work and long hours - you need a strong desire to want to be constantly learning. Representing a governmental entity at the local level is as close as you will get to really representing the people and being a part of the community, and it is extremely rewarding.



**Carol Rosati** is the co-founder and Managing Shareholder of Rosati, Schultz, Joppich & Amtsbuechler, PC. She has devoted her legal career to representing governmental entities, with a specialty in land use litigation. Carol is a frequent speaker on municipal topics. She is also co-author of *Michigan Zoning, Planning and Land Use*, and a chapter author in *Michigan Municipal Law*, both published by ICLE.