

THE POOL CUE

MICHIGAN COUNTY ROAD COMMISSION SELF-INSURANCE POOL

Volume XXIV Issue 2 May 2017

EMAIL COMMUNICATIONS AND THE OPEN MEETINGS ACT



Wendy Hardt, Attorney
Michael R. Kluck & Associates



Recently, the Michigan Court of Appeals had the opportunity to visit the issue of whether email communications among a quorum of Board Members violate the Open Meetings Act (OMA) in the case of Markel v Mackley, 2016 Mich. App. LEXIS 2004. The public entity in that case was the Oakland Township Parks and Recreation Commission (PRC), consisting of seven (7) elected commissioners. The Commission was politically divided, four (4) members to three (3) members. Emails were sent between the four-member quorum to discuss how to handle certain PRC matters, and then decisions would be carried out later at public PRC meetings as a united front.

The Michigan Court of Appeals ruled that deliberations by email among a quorum of public body members violate the OMA. In Markel, the PRC director had emailed three (3) of the Commission members concerning an attempt by Oakland Township's Board of Trustees to seize control of the Land Preservation Fund from the PRC. That email was not problematic. However, after that, one of the Commissioners sent an email to three (3) of the other Commissioners and the PRC Director to discuss how they should handle a legal opinion which had been prepared for the PRC by its attorney on the issue. Three (3) of the Commissioners actively discussed this matter, in the email chain, formulating a strategy for how to handle the issue at their next public meeting. The fourth Commissioner received the

emails, but did not take an active role in the discussion. At the next meeting, a motion was proposed as had been discussed in the email chain and was adopted by a vote of 4-3.

The Court found that the group emails constituted a "meeting" under the OMA because there was a quorum present and deliberations occurred on a matter of public policy. Section 3 of the OMA requires that:

- All meetings of a public body shall be open to the public and shall be held in a place available to the general public; and,
- All deliberations of a public body constituting a quorum of its members shall take place at a meeting open to the public.

The Court concluded that since a meeting was held privately via email, the OMA had been violated.

Continued on Page 2

IN THE CUE

PAGE

1. Email Communications and The Open Meetings Act
2. The Ins and Outs of Communication Service Provider Permits
3. Save the Date: Annual Membership Meeting July 19-20 and 2017 Work Zone Season "Stay In The Zone"
6. Members Learn Tips for Documenting Evidence at Accident Scenes
7. Welcome! Luke Porter, Claims Director

The lesson to take from this is that Board members must be very careful communicating with each other via email about policy and other Board decisions. Generally, two (2) members of a Board (unless they are considered a quorum) are not prohibited from discussing Board issues with one another; however, if a quorum of the Board discusses matters via email, then the Board might find itself in violation of the OMA. For example, if an email is sent to several Board members regarding an issue and Board members were to reply to all recipients of the email, then a “discussion” among a quorum may take place. Even if only one or two members respond, messages and responses from other Board members may make it appear that a deliberation is occurring. The OMA requires that all decisions of public bodies be made in the open. Since there is no notice and no opportunity for the public to participate in an email discussion, this type of “meeting” would violate the OMA. Thus, members of Road Commission Boards must exercise great care to avoid group communications that may constitute an impermissible meeting under the OMA.

The Ins and Outs of Communication

Service Provider Permits



Bill Henn & David Busscher
Henn Lesperance PLC



County Road Commissions throughout Michigan are receiving and addressing permit requests from communication service providers (“CSPs”) for the construction of broadband and wireless network facilities. The proposed facilities are often more numerous or more intrusive than other similar facilities that Road Commissions have dealt with in the past. It has been estimated that there will be hundreds of thousands of these facilities built

nationwide in the next few years, as technology continues to evolve and consumers demand constant wireless access to the internet. Furthermore, the facilities proposed by CSPs often outnumber and dwarf other poles and constructs in the right of way, with some of them towering 120 feet tall.

The proliferation of these communication facilities presents several unique challenges for Road Commissions. Road Commissions receive their authority from a variety of sources, including the state constitution and various state statutes. There are also state laws and federal laws governing CSPs themselves that affect the rules Road Commissions can impose. The intersection of these different areas of law can be confusing, and CSPs at times use that confusion to their own advantage. The issue of these CSP permits also requires communication and cooperation with other units of local government, and it is recommended that Road Commissions implement special permit terms and conditions and policies prepared specifically for the particular challenges associated with CSP permits.

All of these issues can be overwhelming and difficult to understand, especially when approaching CSP permit requests for the first time. For that reason, MCRCSIP and Henn Lesperance PLC have prepared an informative presentation discussing the background for CSP permits, the law involved, and the Road Commission’s role in reviewing applications and issuing permits. This presentation debuted recently during a Board meeting at the Road Commission of Kalamazoo County, and is available to any of MCRCSIP’s members. The information provided in the presentation, which is based in large part on MCRCSIP’s involvement in defending a law suit brought by a CSP against a member, can help Road Commissions act with confidence and clarity in facing the unique challenges presented by CSPs. Any interested Road Commission is invited to contact MCRCSIP for further information.

SAVE THE DATE!
JULY 19-20, 2017
ANNUAL MEMBERSHIP MEETING



SOARING EAGLE CASINO & RESORT
MT. PLEASANT, MICHIGAN

The workshop on Wednesday is from 1 - 4:30 p.m., and will focus on the issue of **Cybersecurity** featuring:

- Dr. Jared DeMott, a former NSA and a Microsoft BlueHat Prize winner,
- Kevin Thatcher, owner and president of Thatch Computer Consulting in Okemos, MI, and
- SSA Jason Bilnoski, head of the FBI's Detroit Computer Intrusion Squad.

Our goal is to help our members become aware of internet security threats and learn how to manage their personal devices and business operations to minimize exposure.

We will also have news about a cybercrime program being developed by MCRCSIP to help our members rest easy....

The business meeting is Thursday, starting at 8:30 a.m.



2017 WORK ZONE SEASON
"Stay In The Zone"

By Mike Shultz, Assistant Administrator
Director of Loss Control



Spring is here in Michigan, and orange traffic signs, barrels and cones are in full bloom around the state. As in previous years, special safety precautions should be followed by the work crews as well as motorists on our state highways and local roads. For road crews, routine safety training is important and always recommended. Work Zone Safety Awareness training is available in-house upon request by MCRCSIP members. Communicating with the public is another important measure for preventing work zone accidents. Sometimes we forget to share the safety message within our communities and, generally, motorists do not think about the risks and necessary precautions. As a road commission, take advantage of your local newspapers, radio, television and community events. A drivers' education program is a great place to start. National campaigns promote work zone safety.

Road commission crews working on local roads require the same level of safety awareness as those working on state highways and interstates. Just one vehicle crashing into a crew on a local county road can be just as devastating, deadly, and disruptive. Never assume motorists see you and will make the proper judgment calls such as slowing down.

Continued on Page 4....

Provide them advance warning sign messages whenever possible is a measure worth taking whenever necessary. An extra 20 minutes setting up signs can help prevent a lifetime of anguish and regret.

ROAD CREWS

Road Crews should be properly trained and closely monitored by supervisors to ensure all the necessary precautions are taken. This includes the wearing of all the necessary personal protective equipment. Other areas include:

- 1. Lights:** Using warning lights and flashers on vehicles and off road equipment. Always activate them when performing work activities. Keep your truck lights on even during the daytime.
- 2. Positioning:** Monitor vehicle positioning in/near the roadway. Avoid leaving trucks and equipment in the road unless the road or traffic lane is closed off. Rear-end collisions often occur when trucks are stopped without advance warning. If you can park on the shoulder, that should be your first option.
- 3. Traffic Control Devices:** Use of advance warning signs, arrow boards and cones/barrels should be considered whenever possible or practical. Traffic control devices do not guarantee against an accident but greatly reduce the risk. The MMUTCD Part 6 will guide you in selecting the proper set-up. If you need a few copies, contact your local MDOT - TSC office. Remember, TCD's are part of the job, not something additional...
- 4. Road Closures:** Use of Type III barricades can be very helpful in reducing collisions in a work

zone. Closures help reduce unnecessary traffic out of your work area. Remember to close off roads having work activities per the MMUTCD requirements.

- 5. Traffic Regulating:** Traffic regulating at work sites requires special knowledge and personal protective equipment. Initial and annual training is very important and should be accomplished. Training helps address any new information and serves as an important reminder to work procedures that might have been forgotten or misunderstood. A video link to a new thirteen minute video, “MDOT - How to Safely Regulate Traffic In Michigan” is available on the MDOT website. Questions? Contact Mike Shultz. www.michigan.gov/mdotworkzones
- 6. Traffic Control Plans:** Traffic control plans provide important details (the setup of work zone) and comes from the MMUTCD Part 6. Guiding employees with a plan helps ensure what is necessary based on the location of the work site.
- 7. Vehicle Manuevering:** Vehicle/equipment operations require the utmost communication with people on the ground. Make sure dangerous areas are identified, and keep foot traffic away whenever possible. Many blind spots are on trucks and equipment that cause serious risks. Never assume that it is safe to back up or move ahead without taking all the necessary precautions. Spotters, back up alarms, and sounding the horn are just a few safety measures.
NOTE:
Backup cameras can be helpful



on trucks and equipment. Contact Mike Shultz or Mike Phillips if you need additional information. Workers on the ground should be in visual contact with drivers operating the equipment. Keep in mind that safety precautions and control measures should be in place for motorists and pedestrians.

MOTORISTS

Motorists play an important role in maintaining a safe work zone and have many responsibilities. It has been reported that 85-90% of accidents and fatalities involve drivers and passengers. One life lost in a work zone is one too many! To help motorists “Stay In The Zone”, listed are a few (but not exhaustive) safety tips that can be shared with drivers:

DO...

- Pay attention to the orange diamond-shaped warning signs or electronic message boards posted in advance of a road construction project.
- Stay alert and slow down. Dedicate your full attention to driving.
- Minimize distractions. Avoid changing radio stations, using a cell phone, etc. while driving in a work zone.
- Drive carefully and slowly through the construction site; always obey the posted speed limits in the work zone area. When workers are noted, the maximum speed is 45 mph.
- Pay close attention and heed directions on work zone warning signs. Signs and work zone traffic regulators (i.e., flag persons) are there to save lives. Follow their instructions!
- Watch for stopped or slowing traffic. *Do not tailgate.*

- Expect the unexpected. Anticipate potential dangers from road conditions, placement of traffic control devices, and maneuvering of equipment.
- Watch how the traffic ahead is flowing. Taking a sudden evasive maneuver could endanger you and workers on the ground.
- Keep an eye out for construction workers, their equipment and vehicles, as well as the vehicles around you. Workers should be wearing high visibility vests and possibly hard hats. If you see this attire, please bring your travel speed down below 45 mph or less.
- Use extra caution when driving through a site at night. Maneuvering through the night time work activities can be challenging, especially during rainy/foggy weather.
- Watch for detours and lane diversions. Warning signs are there for your benefit. Black and white regulatory signs will be enforced by police agencies.

DO NOT...

- Speed up or slow down significantly while going through a work zone.
- Slow down to look at the construction work being done. Adjust your speed when workers are noted.
- Resume normal speed until after you emerge completely out of the work zone area.
- Tailgate. Most of the accidents within a work zone are rear-end collisions.
- Change lanes within a work zone.

Remind motorists that the state of Michigan has instituted laws regarding speeding and careless driving in work zones. In the event that the accident kills or injures a worker, fines and imprisonment may result.

Members Learn Tips For Documenting Evidence at an Accident Scene

The collection of proper documentation at an accident scene can help prepare road commissions for potential litigation. That was the key takeaway at MCRCSIP's Crash Assessment Training II, held April 26 in Mount Pleasant. More than 100 county road commission leaders gathered to hear Accident Reconstructionist David Sallmann and Attorney Bill Henn identify the evidence that should be preserved at an accident scene, and how such evidence should be documented.

WHY DO YOU NEED TO DOCUMENT?

- Conditions change rapidly following any accident as the accident is cleared, materials are moved, etc.
- You cannot rely on the documentation of other responders – even those who may seem inherently reliable. Sometimes photographs from others are lost. No one will look out for your road commission like you will.



Using a tape measure and level in close-ups can help provide objective evidence.

- Spoliation of evidence occurs when a party fails to preserve crucial evidence when it is under a duty to preserve evidence that it knows or reasonably should know is relevant to the action. Sanctions of spoliation can be severe – up to and including awarding the other party a default on the issue of liability

- Your defense can be strengthened by the quantity and quality of contemporaneously documented evidence. Just like fish tales in which the size of the fish grows with every retelling, sometimes the farther a witness gets from the date of an accident, the larger and deeper the pothole becomes.

WHAT EVIDENCE SHOULD BE PRESERVED?

- Vehicle Rest Positions
- Vehicle Impact Positions
- Tire Marks, Scrapes, Gouges, Furrows/Ruts (On an off traveled portion of roadway)
- Tree Scars
- Guardrail/Post/Utility Pole Damage
- Damage to Buildings and other Structures
- Road Surface Conditions
- Temporary Barricades/Signs and Construction Road Markings
- Crash Debris
- Sightlines and Sightline Obstructions
- Liquids/Liquid Stains from Crash Vehicles
- Body Fluids

HOW SHOULD EVIDENCE BE PRESERVED?

- Photographs
- Video Recording
- Measurements using tape measures, a wheel, or survey instrument
- Surveillance video recordings
- Important: Close-up pictures of evidence, while important, often do not provide context. Remember to take additional photos

showing with tape measure how deep the pothole is, or how far from the center of the road, or from an intersection, site line, etc. the accident occurred.

VEHICLE INSPECTION EVIDENCE

- Vehicle data recorders are generally admissible and an objective source vs. what someone told the responding officer, local paper, or wrote on Facebook
- VIN Identification Label
- Photograph 8 Views of Vehicle
- Record Tire Tread, Size, Brand, Model
- Image/Record ACM (airbag module) Data
- Photograph Direct and Induced Damage
- Photograph Vehicle Interior
- Lap and Shoulder Restraints
- Measure Crush Deformation
- Heavy Truck Air Brake Systems

MOVEMENT OF A VEHICLE FROM AN ACCIDENT SCENE

- Photograph before movement
- Document damage before movement
- Do not remove parts or modify condition unless necessary for movement
- Store vehicle in the condition found immediately after accident

WITNESSES

Audience members at the Crash Assessment Training were given a demonstration of the unreliability of witnesses when the session was

MCRCSIP MISSION STATEMENT

"The Mission of the Michigan County Road Commission Self-Insurance Pool is to administer a self-insurance program and to assist members with risk management efforts."

WELCOME!



Introducing our new Claims Director, Luke Porter. Luke has been in the insurance industry for 12 years, and has obtained the CPCU, Associate in Claims, and Associate in General Insurance designations. He has undergraduate degrees from Capella University (Business Administration) and Grand Canyon College (Insurance and Risk Management), and an MBA from Sam Houston State University. Luke is from East Lansing, Michigan.

interrupted by a protester who took to the stage to vent her disgust with the legal profession. The audience later learned the protest was part of the program when Henn handed out a questionnaire to measure their recollection of the incident, such as the color of the protester's shirt, how long the incident lasted, and what she had said. The "protester" (a.k.a., Henn Lesperance Attorney Andrea Nester) later shared the results of the survey with the audience.

Henn used the varied responses to point out the unreliability and bias of witness accounts and to underscore the theme of the day: the necessity for road commissions to collect proper, objective documentation at an accident scene.

If you would like our Loss Control Department to present this training at your Road Commission, please contact Mike Shultz, mshultz@mcrcsip.



**Michigan County Road Commission Self-Insurance Pool
417 Seymour Avenue, Suite #2
Lansing, Michigan 48933**

**The Pool Cue is published quarterly by the
Michigan County Road Commission
Self-Insurance Pool
417 Seymour Avenue, Suite #2
Lansing, Michigan 48933**

Past and current issues of the Pool Cue are available on the MCRC SIP website – www.mcrcsip.org.