Skidmore Script

A legal newsletter presented to you by ... Skidmore & Associates
A Legal Professional Association

Fall, 2002

Ohio Enacts Anti-terrorism Legislation

By: Eric E. Skidmore, Esq.

As a youngster, I remember my first vivid impressions of "terror" when I witnessed media coverage of the successive assassinations of Martin Luther King, Jr. and Robert F. Kennedy in the spring of 1968. I was eight years old. There is nothing more wretched than the age of innocence being shattered by the realities of the day. I witnessed "terrorism" for the first time while watching the events unfold at the Olympic village in Munich, Germany during the games in 1972. Eleven Israeli athletes were senselessly murdered by eight Palestinian gunmen. Interwoven into the fabric of those times was the tumult of the civil rights movement, the meandering Vietnam War, the Kent State shootings and the constitutional threat of an American presidency with "blind ambition".

Throughout American history, Americans fought each other in times of civil strife within our own territorial boundaries. Americans fought foreign foes on foreign soil. Except for the Revolutionary War and Pearl Harbor, there have been few instances wherein Americans combated a foreign foe on American soil. A formidable foreign foe now exists within our country, consisting of active and dormant cells of the Al-Qaeda terrorist network. Changes occur in our laws and governmental institutions, with the acknowledgment of real and actual threats to civilized populations. Changes have come to the state of Ohio in the form of new anti-terrorism legislation.

Prior to September 11th, most states within the Union were unable to identify terrorism as a threat to our communities, let alone prepare for it.

I. Ohio Responds To The Threat of Terrorism: An Overview

Prior to September 11th, most states within the Union were unable to identify terrorism as a threat to our communities, let alone prepare for it. The Ohio Senate introduced Senate Bill ("S.B.") 184 on November 18, 2001 approximately two months after the terrorists' acts of September 11th. S. B. 184 passed the Ohio House on February 20, 2002 and was signed by Governor Taft on May 15, 2002. S. B. 184 created the criminal offenses of terrorism, soliciting or providing support for an act of terrorism and making a terrorist threat. It also expands other offenses to increase the penalty for any obstruction of justice involving terrorism and expands the offenses of contaminating a substance for human consumption. Ohio amended the criminal law in this manner to envelop terrorist activity so that perpetrators can be charged and prosecuted.

S. B. 184 changes the way government will administer itself with regard to terrorism. Certain security-related information is excluded from the Ohio Public Records Law to prevent disclosure of security sensitive matters to the general public. Amendments to the Open Meetings Law allow governmental bodies to conduct executive sessions outside the view of the public and press to consider security matters associated with a terrorist attack. S. B. 184 tapers the public's "right to know" so the government

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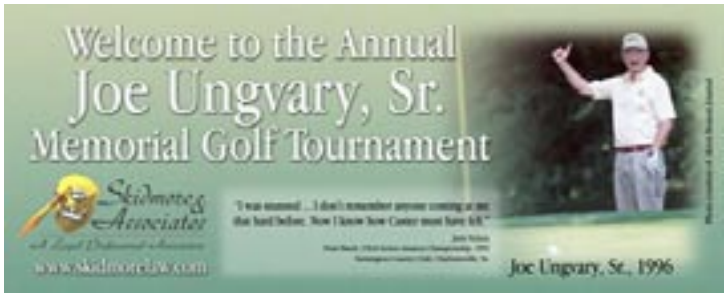
Skidmore & Associates Sponsors Local Athletics

In June-July, 2002, Skidmore & Associates sponsored a T-Ball little league team within the Copley-Fairlawn Athletic Association. The "White Sox" consisted of twelve boys and girls, ages 5-6. "This is the first year of our sponsorship, and it was an outstanding experience for our kids and coaches."

The CFAA White Sox and parents attended little league night at Canal Park on Thursday, July 25, 2002 compliments of Skidmore & Associates. "Our kids listened to instructions and gave 100% effort, sometimes in 90° weather … attending an Aeros game is a perfect appendage to an enjoyable season," Skidmore concluded. ■

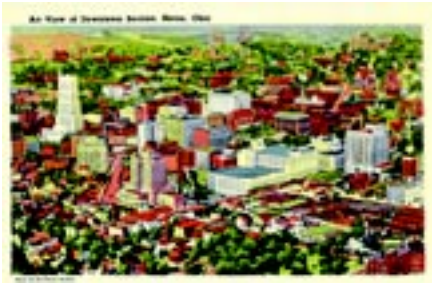


Skidmore & Associates also sponsored this year's ADGA "Joe Ungvary Sr. Memorial" Golf Tournament. The tournament took place on Saturday, June 29, 2002 at Good Park Golf Course located in Akron, Ohio.

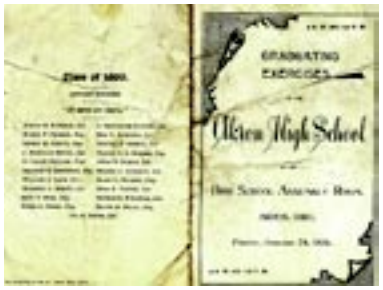
The ADGA is a non-profit organization that has promoted amateur golf competition in the greater Akron area for 72 years. Joe Ungvary Sr., was an outstanding amateur golf talent who participated in ADGA golf events between 1970 and 1997. ■

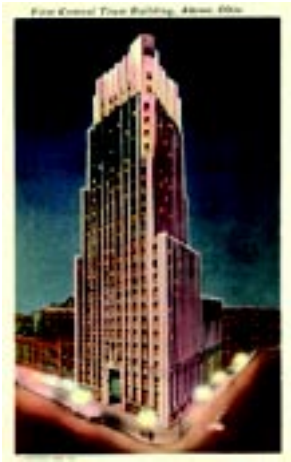
For the winter season, Skidmore & Associates is proud to be a sponsor of St. Vincent/St. Mary High School athletics. ■

S&A Creates Christmas Tree of Akron Nostalgia



This year, Skidmore & Associates is sponsoring a Christmas tree that will be donated to the Holiday Tree Festival hosted by the volunteers of Children's Hospital Medical Center of Akron. "This is the first year for our entry and our aim is to create a holiday tree that will provide a maximum yield to help Children's Hospital," said Brian K. Skidmore. "A prerequisite to our entry is that the decorations and theme are to be created by the friends and families of the Firm … we wanted to personalize this small contribution," he added. The theme of the tree is "Vintage Akron". It is apparent that downtown Akron is going through a civic renaissance and Vintage Akron is to reflect the old and new of this All American City. The Firm wanted to decorate the tree with mementos and memorabilia from Akron's past. The Firms' primary tree decorators are Lauran Kunze and Jeanne Jordan. Ms. Kunze, who was a native of Akron for 28 years, is a homemaker and currently resides in Mogadore, Ohio. Ms. Jordan is a graphic designer, born and raised in Akron and presently residing with her family in Marietta, Georgia. The two Akronites commenced this project last December and searched the Internet for the needed items. "On several occasions Lauran or Jeanne would call me for bidding instructions when the bidding got close on Ebay … I told them 'If you want it – go get it!' They had the green light all the way", said Eric Skidmore. Vintage Akron will be displayed at the Holiday Tree Festival at Quaker Station from November 23 through December 1, 2002. ■





Secular laws are made by judicially determined precedent and legislative enactment. Each issue of Skidmore Script includes summaries of recent court decisions and legislative activity that may be relevant to the areas of real estate law, construction law, corporate law, employment law, probate and estate law, litigation and alternative dispute resolution (arbitration/mediation). Members of our staff brief the cases and bills to provide a concise preview of the law and highlight areas of developing concern. If you would like to obtain the full text of these materials, please call or email Tracy L. Maciel at 330.253.1550 or tlm@skidmorelaw.com.

RECENT CASES:

COMMERCIAL LAW: Arbitration. Credit card company issued a credit card to cardholder. The credit card Agreement did not contain an arbitration provision. The Agreement allowed amendment upon furnishing proper notice. Company sent notice of its intent to amend the Agreement to include an arbitration clause. Cardholder was given an opportunity to "opt out" or reject the amendment. Cardholder did not reject the amendment. A dispute arose wherein cardholder alleged the company failed to investigate a vendor transaction, failed to credit the account and failed to correct a billing error. Cardholder sued under Regulation 2 of the Federal Truth in Lending regulations. The company invoked the arbitration clause and requested a stay of the proceedings. The trial court agreed and ordered arbitration. The cardholder appealed. The Court of Appeals affirmed concluding that the company properly amended the Agreement to provide for arbitration of disputes and covered the cardholder's claims. *Joseph v. M.B.N.A. Am. Bank, N.A.*, 148 Ohio App. 3d 660 (8th Dist. 2002).

COMMERCIAL LAW: Contracts. An alcoholic beverage distributor decided to sell its wine division. Purchaser had the exceeding bid and an agreement was executed. Seller was required to secure the prior consent of the beverage providers for the franchise rights to distribute respective products. A competitor of purchaser approached a provider and convinced them to do business with competitor. Seller entered into an agreement with competitor to sell the franchise rights of the provider that would not consent to the transfer of such rights to purchaser. Purchaser sued seller and provider claiming interference with prospective economic contract and provider unreasonably withheld consent to the transfer of the franchise rights. Competitor sued seller for indemnification for costs and expenses in defending itself against purchaser's claims. Trial court granted a motion for summary judgment concluding that the indemnification clause in the seller-competitor agreement was unenforceable as against public policy. Court of Appeals affirmed concluding that Ohio law prohibits indemnification for damages caused by intentional torts. *Diamond Wine & Spirits, Inc. v. Dayton Heidelberg Distrib. Co., Inc.*, 148 Ohio App. 3d 596 (3rd Dist. 2002).

COMMERCIAL LAW: Contracts. Homeowner sued concrete construction company alleging breach of contract to install concrete driveway. The contract called for concrete thickness of 4.5 inches and the use of wire mesh. There were defects with the driveway, such as cracking, sealing and pitting. The defects were due to the contractor's failure to perform in a workmanlike manner in finishing the driveway with proper techniques. There was a misplacement of the wire mesh and an uneven sub base. The thickness varied between 3.4 and 4.6 inches. The homeowner argued for an amount of $23,860, consisting of the amount necessary to completely replace the driveway. The contractor argued for the cost of repairs. The Court concluded that the contractor had substantially performed under the contract in that the driveway had not failed in its essential purpose. The cost of repair of $1,206 was the proper measure of damages for construction defects. *Hansel v. Creative Concrete & Masonry Const. Co.*, 148 Ohio App. 3d 53 (10th Dist. 2002).

ENERGY AND UTILITIES: Water and Sewer. State agency lends funds to other government agencies to assist in the purchase or construction of water supply and distribution projects. Local water district develops and provides potable (drinking) water to residential and commercial areas. State agency agreed to lend up to $510,000 to water district to implement its developmental plan. Water district agreed to repay the state agency. Both agreed that if the project did not proceed to construction, the funds would be repaid by levying a property assessment on property owners within the water district. Upon expending the funds on engineering studies and other plans for development of a water system, the water district was forced to conclude that construction could never commence because no suitable water source could be identified. State agency filed an action seeking an injunction to obligate the water district to pass a special assessment to generate the income to repay the loans. The trial court concluded that the state agency could not require the water district to use either general resources or new assessments to repay the loan but the water district could voluntarily do so. The Court of Appeals reversed the trial court concluding that the contract language was clear that the water district had an obligation to repay the loan whether from general resources or special assessments. In the absence of such general resources resulting from the failure to construct the water system, the obligation to impose special assessments against landowners within the water district was found within the contract. The trial court committed err by failing to issue an injunction obligating the water district to pass a special assessment to generate income to repay the loans owed to the state agency. *Ohio Water Dev. v. W. Res. Water Dist.*, 149 Ohio App. 3d 155 (10th Dist. 2002).

ESTATE PLANNING AND PROBATE: Attorney Fees. An attorney served as both attorney and executor of a will. The attorney filed an application for payment of his attorney fees. A local rule provided that a fiduciary who desired to also be compensated for providing professional services to an estate must have the contract pre-approved by the Probate Court. O.R.C. 2113.36 provides that if an attorney has been employed in the administration of an estate, reasonable attorney fees shall be allowed. The trial court disallowed the attorney fees based upon the attorney's failure to acquire the Probate Court's pre-approval. The Court of Appeals reversed stating that the local rule was an additional restraint conflicting with O.R.C. 2113.36.

The issue was remanded and the Probate Court was instructed to address the issue of reasonableness of the attorney fees. *In Re Estate of Duffy*, 148 Ohio App. 3d 574 (11th Dist. 2002).

ESTATE PLANNING AND PROBATE: Survivorship Rights. A CD was issued in the name of decedent and her son with right of survivorship in the amount of $10,000. The son possessed a power of attorney over her affairs. The CD matured days before decedent's death. The son deposited the funds into a payable on death (POD) account, which named decedent as sole owner and son as the named beneficiary. Decedent's estate did not list the POD as an asset and son's brother and sister contest the inventory. Probate Court concluded that the POD was an estate asset. Appeals Court reversed, holding that the POD account belonged to the son. *In re Estate of Platt*, 148 Ohio App. 3d 132 (11th Dist. 2002).

ESTATE PLANNING AND PROBATE: Trusts. An inter vivos trust was the subject of a declaratory judgment action pending in a probate court. A beneficiary of the trust requested the trust's trustee to file an accounting. The accounting was filed and the beneficiary filed exceptions. The trustee filed a motion to dismiss the exceptions stating that the Probate Court had no jurisdiction to rule on the exceptions. The Court overruled the motion to dismiss and removed the trustee. Trustee filed an action seeking a writ of prohibition against the Court to prevent the removal. The Court of Appeals concluded that the writ of prohibition was not warranted because R.C. 2102.24(B)(1)(b) provides the Probate Court with concurrent jurisdiction to determine actions that involve inter vivos trusts. *State ex rel. Sladoje v. Belskis*, 149 Ohio App. 3d 190 (10th Dist. 2002).

LITIGATION: Alternative Dispute Resolution. A car buyer brought an action against a dealer alleging the dealer turned back the odometer. The trial court denied the dealer's Motion for Stay, so the action could be referred to arbitration pursuant to the terms of the sales contract. The trial court also concluded that the arbitration clause was adhesive and unconscionable. The Court of Appeals reversed, concluding that a preprinted contract that contains an arbitration clause as a condition precedent to the final sale, without more, fails to show unconscionability of the arbitration clause. *Harper v. J.D. Byrider of Canton*, 148 Ohio App. 3d 122 (9th Dist. 2002).

LITIGATION: Choice of Law. An Ohio seller of used cars sold them to a North Carolina buyer for resale. The seller and buyer would agree as to price and the seller would ship the cars to the buyer wherein acceptance was contingent upon an inspection. The cars were delivered upon an elevated portion of buyer's lot on the afternoon that a hurricane had been forecasted. The newly arrived shipment of cars was damaged by the floodwaters. Ohio law provides that delivery by a seller to a buyer transfers ownership of a car. North Carolina law states that a buyer does not own a car until title has been transferred. The outcome of the case largely depends upon determining which of the conflicting state laws is applicable. The trial court applied North Carolina law because the final act necessary to make the contract binding was to occur in North Carolina. The "place of contracting" for purposes of choice-of-law analysis was North Carolina. The Court of Appeals affirmed. *Bobb Chevrolet, Inc. v. Jack's Used Car, L.L.C.*, 148 Ohio App. 3d 97 (10th Dist. 2002).

MUNICIPAL CORPORATIONS: Immunity. A village sued a city asserting damages resulting from the city's pumping of groundwater from its well field to operate its municipal water system. The city filed a Motion for Summary Judgment requesting dismissal of the case based upon sovereign immunity (O.R.C. 2744.02 (A)). The trial court granted summary judgment in favor of the city and the village appealed. The village contended that the unreasonable harm that resulted from the pumping of groundwater by the city constituted the negligent performance of a governmental proprietary function under O.R.C. 2744.02(B)(2). The village argued that actions that set policy are entitled to immunity but not actions that are ministerial or merely carry out policy. The issue of the city's negligent implementation of policy (deserving no immunity) was not considered by the trial court when it ruled on summary judgment. The Court of Appeals reversed and remanded it back to the trial court to determine whether or not a city employee negligently performed a proprietary function by unreasonably withdrawing groundwater. *Brady Lake v. Kent*, 143 Ohio App. 3d 429 (11th Dist. 2002).

MUNICIPAL CORPORATIONS: Litigation (Discovery). A township filed action against a city regarding an amphitheater financing dispute. The township served the city with several requests for production of documents. The city filed a Motion for Protective Order, which was partially granted. The township filed a Writ of Mandamus ordering the city to provide certain public records available for inspection by the township. The Court of Appeals denied the writ stating that a litigant cannot improperly use the Public Records Law (O.R.C. 149.43) to circumvent the discovery process in pending litigation. Once the lawsuit was filed, the township subjected itself to the discovery process to obtain information rather than the Public Records Law. *State ex rel. Perrysburg Twp. v. Rossford*, 148 Ohio 72 (2002).

REAL PROPERTY: Eminent Domain. Property owner's land was zoned for single-family residence and was unsuitable for residential use. Owner requested that the land be rezoned to permit multi-family residential development. Owner initially challenged the classification of the single-family zoning by filing a declaratory judgment action on March 19, 1992. Owner voluntarily dismissed the action in June of 1995. In June of 1995, the owner refiled the declaratory judgment action requesting the land be rezoned to permit retail use. The city's residential use restriction on the land had an adverse economic impact on the owner, which interfered with the owner's reasonable investment-backed expectations. Owner filed an action for mandamus to compel the city to commence appropriation proceedings to determine the amount of the city's temporary taking of the owner's land. The Ohio Supreme Court initially held the period of the reasonable compensable taking as being from March 19, 1992, the date the owner initially filed the declaratory judgment action challenging the application of residential use zoning. City filed a motion of reconsideration concerning the compensable period of the taking. The Motion was granted concluding that the appropriate starting date for the taking was June of 1995, when the owner specifically requested the land be rezoned to permit retail development as opposed to the owner's request to permit multi-family residential use in March of 1992. The Ohio Supreme Court reduced the compensable period of the taking. *State ex rel. v. Mayfield Hts.*, 96 Ohio St. 3d 379 (2002).

REAL PROPERTY: Landlord and Tenant. Landlord entered into lease providing an apartment to tenant. The unit leased was in a rent-subsidized building subject to rules and regulations set forth by HUD and state landlord-tenant law. Tenant engaged in repeated acts of harassing the property manager, custodian and other residents. The landlord served tenant with a notice of termination and a notice to leave. Landlord filed a Forcible Entry and Detainer Complaint for possession of the unit. The trial court entered judgment in favor of the landlord concluding that although none of the individual incidents constituted a material breach the continuing notice of the conduct constituted a breach of the lease under state and federal law. Tenant appealed. The Court of Appeals affirmed concluding the notice to terminate was sufficient. *Forest City Mgmt., Inc. v. Tackett*, 148 Ohio App. 3d 667 (11th Dist. 2002).

REAL PROPERTY: Premises Liability. A woman went to visit her ill friend who lived at an apartment complex. The woman observed that the parking area was "pitch dark" and began crossing the driveway when the heel of her shoe slipped into a sewer grate and broke off, causing her to fall forward. The woman injured her arms, right knee and right ankle. The trial court identified the woman as a "licensee", therefore, the landlord owed no duty. The Court of Appeals classified the woman as an "invitee" wherein the landlord must exercise ordinary care to protect her by maintaining the premises in a safe condition. On appeal, the court concluded that the woman's injuries were not actionable because the outcome was foreseeable by the woman given the poor outside lighting. No duty was imposed upon the landlord concerning the condition of darkness because it was a completely predictable event. Darkness itself constitutes a sign of danger and one who disregards a dark condition does so of her own peril. *Mowery v. Shoaf*, 148 Ohio App. 3d 403 (7th Dist. 2002).

REAL PROPERTY: Landlord and Tenant. Kent State University (KSU) solicited bids from food/beverage vendors to operate shops within a food court located at the student center. The request for proposals provided by KSU included the installation and operation of a coffee/pastry shop that featured many flavored coffees and desserts. KSU entered into another lease with a café who sold specialty coffees. Tenant asserts that KSU violated its lease and violated tenant's exclusive right to sell specialty coffees. Tenant requested a reduction in rent, KSU refused. Tenant stopped paying rent. KSU filed a breach of contract action. The Municipal Court concluded that there was no express language in the lease granting the tenant an exclusive right to sell specialty coffee throughout the student center. Judgment for KSU. *Kent State Univ. v. Univ. Coffee House*, 120 Ohio Misc. 2d 9 (Court of Claims 2002).

OHIO LEGISLATIVE UPDATE:

I. BUSINESS

A. H.B. 278 Authority of Directors to Adopt Articles of Incorporation: This bill expands the authority of directors to adopt amendments to the articles of incorporation (i.e. change the name of the corporation); provides the directors the authority to determine that shareholder meetings may be held solely by means of communications equipment. It also addresses some issues as to the legal existence of a corporation, nonprofit corporation and limited liability company. Effective Date: May 16, 2002.

B. H.B. 349 Modification of Uniform Limited Partnership Laws: The Uniform Partnership Law addresses the rights and liabilities of partners, including the requirement that every partner account to the partnership for any benefit and hold as trustee for it any profits derived by the partner without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use of its property by the partner. This bill exempts a general partner of a limited liability partnership from this requirement; addresses merger or consolidation into a domestic general partnership; the written requirements of an agreement of merger or consolidation of entities into a surviving or new domestic general partnership. Effective Date: July 5, 2002.

II. LICENSING

A. H.B. 214 Revision to Landscape Architects Licensure: Under this bill, the definition of "landscape architecture" is substantially redefined and imposes restrictions on persons providing landscape architectural services. It also permits an applicant to complete an internship as a substitute for completion of the three-year general practical experience requirement. Effective Date: July 23, 2002.

B. H.B. 272 Licensing Non-Ohio Real Estate Brokers: This bill allows a real estate broker not licensed in Ohio, but licensed in another state, to transact business on commercial property in Ohio in cooperation with an Ohio licensed real estate broker under specific conditions. Effective Date: April 5, 2002.

C. H.B. 337 Changes Engineer and Surveyor Licensing Laws: Revises the sets of minimum educational and experience qualifications required for a person to become registered as a professional engineer or surveyor; makes other changes in the licensing law. Effective Date: August 6, 2002.

III. MUNICIPAL CORPORATIONS

A. H.B. 329 Local Government Funds – Alternative Distribution – No Municipal Approval: A small amount of

revenue from a number of state taxes (i.e. personal income tax) is earmarked for distribution to counties, townships, municipal corporations or public libraries. Distribution of the revenue is made to three separate funds: Local Government Fund (LGF), the Local Government Revenue Assistance Fund (LGRAF) and the Library and Local Government Fund (LLGSF). This bill removes the requirement that the "largest city" approve the adoption of an alternative method of distributing these funds when the subdivisions adopting the alternative method contains a majority of the county's total population and the largest city's population is 20,000 or less. Effective Date: August 29, 2002.

B. H.B. 458 Construction Contracts, Financial Responsibility: The bill provides that for purposes of determining the financial responsibility of a bidder who bids on a contract that is to be awarded by a state agency or political subdivision to the lowest responsive and responsible bidder, bid guarantee given in accordance with the Public Improvement Law in the form of a bond for the full amount of the bid is considered evidence of financial responsibility. The bond must be issued by a surety licensed to do business in Ohio. The bill also permits a state agency or political subdivision to request additional financial information for review from an apparent low bidder after it opens all submitted bids. Effective Date: September 20, 2002.0

IV. PROBATE AND ESTATE PLANNING

A. H.B. 242 Enacts Uniform Simultaneous Death Act: This bill repeals the current presumption of the order of death provision for purposes of descent and distribution (if one dies without a Will). Under current law when there is no evidence of the order in which the death of two or more persons occurred, neither is presumed to have died first, and the estate of each person passes and descends as though the person had survived the others. This bill generally provides that a person who has not survived another person by 120 hours is deemed to have predeceased that person for certain probate purposes. Effective Date: May 16, 2002.

B. H.B. 345 Transfer on Death Title to Motor Vehicles: This bill authorizes an individual who possesses a certificate of title to a motor vehicle or watercraft to apply for a certificate of title designating a transfer on death beneficiary to take ownership upon the owner's death. Effective Date: July 23, 2002.

V. REAL PROPERTY

A. H.B. 426 Public Land Acquisitions and Appraisals: This bill requires state agencies and other political subdivisions acquiring property by eminent domain, when the Displaced Persons Law applies, to make every reasonable effort to provide a copy of an appraisal to the owner of the real property appraised at more than $10,000 and to update or obtain new appraisals under certain circumstances; the acquisition must be for a defined public purpose that is to be achieved in a defined and reasonable period of time. Effective Date: September 6, 2002.

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Anti-terrorism (cont.)

can operate under a cloak of secrecy when there is a terrorist threat.

Finally, S. B. 184 revises the Emergency Management Law regarding all hazardous emergency operations plans.

II. Criminal Perspective

A. Ohio Defines The New Offense of "Terrorism"

S. B. 184 amends Ohio Revised Code ("O.R.C.") Section 2909.24 to create the specific new offense of "terrorism". The offense of terrorism prohibits a person from committing an act with the purpose to:

1. Intimidate or coerce a civilian population;
2. Influence the policy of any government by intimidation or coercion; or
3. Affect the conduct of any government by terrorism.

B. Ohio Sets Tough Penalties For One Convicted of Terrorism

The new offense of terrorism expands the offense of "aggravated murder" to encompass the prohibited conduct of a person who purposely causes the death of another while committing or attempting to commit the offense of terrorism. Included in the penalty stage are aggravating circumstances and a person convicted of terrorism in concert with aggravated murder could be sentenced to death or life imprisonment. S.B. 184 is not a deterrent to terrorist conduct; however, it updates Ohio's criminal justice law and procedure. It provides a protocol to assist in the charging, prosecution and adjudication of those who commit an act of terrorism.

...a person convicted of terrorism in concert with aggravated murder could be sentenced to death or life imprisonment.

III. Business Perspective

Terrorists exploit the open and public institutions of democratic governing. S.B. 184 creates a new exception to the Public Records Law (O.R.C. 149.333) to reduce public disclosure of sensitive matters concerning security records, infrastructure records, security arrangements and emergency response protocol. Government bodies and their subdivisions should note these provisions.

Construction professionals retained by government should also be aware of these non-disclosure policies. In order to demonstrate the application of O.R.C. 149.333, I provide a fictitious construction project which requires substantial planning, inter and intra governmental participation and the retention of a number of consulting professionals. I then interject a terrorist plot and apply the provisions of S.B. 184 from the public and private business perspective of administering public records.

A. The Hypothetical Project

A municipal corporation exercises its appropriation power to condemn acreage to build a general aviation airport. The public airport is to direct some of the general aviation traffic from the regional commercial airports. Millions of dollars are procured from the federal and state governments to build runways, taxiways, terminals, hangars, navigational equipment and an air traffic control tower. The hosting municipal corporation hires engineers, architects and contractors. A Master Plan and developmental plans are prepared and provided to a multitude of public agencies. All the consultants exchange the plans that detail the infrastructure. The project is to be completed in six years.

B. Terrorists Descend

Two years into construction, agents from Al-Qaeda target the airport. The small metropolitan community is appealing to the agents because they believe their activity will go undetected. The terrorist cell is to remain dormant for five years while becoming acclimated to everyday life in the community. The plan is to inconspicuously enter flight schools at the airport and obtain the aviation skills to steal a corporate business jet from a public hangar and crash it into a nuclear power plant in northwest Ohio. This would require the plans and blueprints of the infrastructure and security systems of many public buildings at the airport. The Al-Qaeda agents make gradual public record requests upon public agencies to obtain the needed plans. The agents also try to acquire staff positions in the engineering

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Anti-terrorism (cont.)

and architectural firms retained to build the airport structures. The entire population of northwest Ohio is reliant upon the municipal corporation and consultants correctly implementing the dictates of S. B. 184. What should happen?

C. New Exclusions From Public Records Law

S. B. 184 excludes "security records" and "infrastructure records" from the Public Records Law. A security record is defined as "[a]ny record ... directly used for protecting or maintaining the security of a public office against [a terrorist] attack, interference, or sabotage ... or prevent, mitigate or respond to 'acts of terrorism'". An infrastructure record is any record that "discloses the configuration of a public office's critical systems such as communication, computer, electrical, mechanical, ventilation, water, and plumbing systems, security codes or the infrastructure or structural configuration" of a public building. Security and infrastructure records are not subject to mandatory release or disclosure. A simple floor plan disclosing only "spatial relationship of components" of a public building is not excluded from the Public Records Law.

D. A Possible Scenario

The municipality should develop and implement procedures to coordinate the internal and external distribution of security and infrastructure records. A list should be maintained to track all individuals and entities that are provided a copy of these sensitive records for each project. When a public records request is submitted to interdepartmental agencies, it should automatically be forwarded to the municipal law department. The law department should establish a protocol to administer the requests and deny disclosure of security and infrastructure records. The public record request for sensitive security and infrastructure records submitted by Al-Qaeda agents would effectively be thwarted by an unassuming public agency by the successful administration of the dictates of S. B. 184.

The engineers, architects and contractors with copies of the records should be contractually required to safeguard and secure the plans. In fact, the municipality should require such security as a part of the bid package submitted by the consultants. The protocol for safeguarding and limiting access to "security records" and "infrastructure records" before, during and after the project should be specifically defined in the consulting contract. The municipality should also coordinate these policies with the federal and state agencies monitoring the airport project. Consulting firms should conduct extensive background checks on their employees to avoid hiring of possible agents. The consultants should update their document retention policy to require the confidential destruction of these records when their retention period ultimately expires. Any Al-Qaeda agents infiltrating the consulting firm would be blocked from accessing the records. The Al-Qaeda network would have to rely on more clandestine methods of obtaining the security and infrastructure records. S. B. 184 only prevents the government's own disclosure of these sensitive records through channels that would be traditionally open to the public.

IV. Conclusion

Although there is little chance of a terrorist attack in Ohio, S.B. 184 will not deter terrorism. Let's be realistic, these people are pathological killers. They will not be repelled by a rejected public document request. However, S.B. 184 is an attempt by a civilized government to address uncivilized conduct. It amends the criminal law to adjudicate and punish this conduct. Other revisions are to avoid public disclosure of sensitive records in a free and open society. History repeats and is cyclic. There will be other terrorist attacks. S.B. 184 is an initial step to combat this foreign foe if and when it should ever appear upon the soils of Ohio. ■

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