

BEIER HOWLETT

PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

200 EAST LONG LAKE ROAD, SUITE 110
BLOOMFIELD HILLS, MICHIGAN 48304-2361

TELEPHONE (248) 645-9400

DANIEL C. DEVINE, SR.
LAWRENCE R. TERNAN
STEPHEN W. JONES
FRANK S. GALGAN
KENNETH J. SORENSEN
JEFFREY K. HAYNES
MARK W. HAFELI
TIMOTHY J. CURRIER
MARY T. SCHMITT SMITH
THOMAS V. TRAINER
JOSEPH F. YAMIN
JOHN D. STARAN
LAURA M. HALLAHAN
PHYLLIS AIUTO ZIMMERMAN
P. DANIEL CHRIST
PATRICIA E. KEFALAS DUDEK
MICHAEL C. GIBBONS
MICHAEL P. SALHANEY
C. LYNN GATES
MARY M. KUCHARAK
L. RIDER BRICE, III
ELIZABETH LUCKENBACH BROWN
JEFFREY S. KRAGT
TIMOTHY P. BERGLUND
KEITH C. JABLONSKI
VICTOR A. VEPRASKAS, IV
ROXANNE J. CHANG

OF COUNSEL
DEAN G. BEIER
JAMES L. HOWLETT
ROBERT G. WADDELL
ROBERT R. SHUMAN
KATHERINE B. ALBRECHT

SPECIAL COUNSEL
DONALD H. GILLIS

PONTIAC TELEPHONE
(248) 338-9903

FACSIMILE
(248) 645-9344

beierhowlett.com

March 22, 2004

Mayor Pat Somerville
City of Rochester Hills
1000 Rochester Hills Drive
Rochester Hills, MI 48309

Re: Rochester Hills Ordinance Section 70-321 et seq

Dear Mayor Somerville:

I wanted to bring to your attention a recent court decision that may affect the above ordinance, and specifically Section 70-323(e). The U.S. District Court issued an opinion on November 18, 2003, in the case of *Spencer v City of Bay City*. This case concerned a Bay City ordinance that is very similar to the Rochester Hills ordinance pertaining to whether a police officer can require a person under 21 years of age to submit to a preliminary chemical breath test (PBT) without a warrant.

The provision of the ordinance in question is identical to Section 70-323(e), which reads as follows:

A peace officer who has reasonable cause to believe a person less than 21 years of age has consumed alcoholic liquor may require the person to submit to a preliminary chemical breath analysis. A peace officer may arrest a person based in whole or in part upon the result of a preliminary chemical breath analysis. The results of a preliminary chemical breath analysis or other acceptable blood alcohol test are admissible in a criminal prosecution to determine whether the person less than 21 years of age has consumed or possessed alcoholic liquor. A person less than 21 years of age who refuses to submit to a preliminary chemical breath test analysis as

Mayor Pat Somerville
March 22, 2004
Page 2

required in this section is responsible for a state civil infraction and may be ordered to pay a civil fine of not more than \$100.

Rochester Hills' ordinance is nearly verbatim to the state statute [MCL 436.1703(5)]. Many communities are in a similar position to Rochester Hills and enacted this ordinance patterned directly after the state statute.

While the plaintiff in the Bay City case did not challenge the state statute, it is, nonetheless, important for us to consider its ramifications. It is my understanding that Bay City did not appeal this federal court decision. In fact, I have come to out find out that this lawsuit was recently settled with Bay City paying to the plaintiff approximately \$30,000 in damages based on the alleged violation of civil rights prohibiting unlawful searches and seizures.

The portion of the Bay City ordinance that was under scrutiny was the above cited section, not the entire ordinance. The court determined that the taking of breath samples to test for blood alcohol concentration in the circumstances of that case constitutes a search within the meaning of the 4th Amendment. As such, since the ordinance allowed peace officers to administer the PBT without a warrant, it is considered a "warrantless search" in all cases. The court went through the exceptions to the warrant requirement, but determined that none exist. Another problem aspect of the ordinance is that there is an infraction (\$100.00 fine) for refusing the PBT when requested. In sum, the Court statement that a peace officer must obtain a search warrant before administering a PBT or other chemical analysis. Keep in mind that consent would eliminate the need for a warrant, however.

As stated above, Rochester Hills' ordinance is the same as the one in Bay City. It is a very common practice for the Sheriff's Department to come upon gatherings of minors, such as a house party, and administer PBT's to them and issue citations for ordinance violations. This conduct, while previously unsuccessfully challenged in Rochester Hills, now has support for being a constitutional violation if a warrant is not obtained. I am concerned that the continued practice, may expose the City to liability if a similar lawsuit is brought. I have recently been told that two defendants will be filing a motion to dismiss the charges against them under the above Rochester Hills ordinance based on this Bay City case. While an individual dismissal of charges is not in and of itself problematic, the concern is whether or not the City will be sued civilly based on the administration of the PBT pursuant to this ordinance. I am aware of a few municipalities that have already revised their ordinance.

Mayor Pat Somerville
March 22, 2004
Page 3

My recommendation is to revise the ordinance, allowing the Sheriff's Department to request rather than require the suspect to take the PBT if suspected of having consumed alcohol. This would be seeking consent, which would alleviate the need for a search warrant. If refused, then the deputies will have to decide whether to issue the citation without a PBT reading or seek a warrant. The proposed changes would not prevent the officers from issuing a citation for those who are caught possessing alcohol under this ordinance because proof of consumption is not required. The amendment has no affect on the officer's ability to pursue persons under age who are operating a motor vehicle while under suspect of having consumed alcohol as this situation falls under MCL 257.625, which is unchallenged and falls under a completely separate authorization to pursue alcohol determination.

I have drafted an amendment to the ordinance for your review and consideration. The amendment removes the language making it mandatory that the minor take the PBT and removes the penalties for refusing to do so. I believe that these changes address the concerns raised in the Bay City case. I request a response from your office as soon as practical, considering the potential liability to the City if the current practice is continued. I look forward to hearing from you. As always, I am available to discuss with you any outstanding issues you may have.

Very truly yours,

BEIER HOWLETT, P.C.

Jeffrey S. Kragt

JSK/jmh

cc: Captain Robert Smith
John D. Staran, Esq.