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March 8, 2022

Traverse City Commission
c/o Lauren Trible-Laucht, City Attorney
400 Boardman Ave.
Traverse City, MI
City of Walled Lake
4199 E. West Maple Road

PERSONAL & CONFIDENTIAL
ATTORNEY-CLIENT PRIVILEGE

Dear Honorable Commissioners:

You have asked for a legal opinion whether the Agreement between the Michigan State Highway Department (now MDOT) and the City of Traverse City, dated April 22, 1947, is still valid with respect to requiring the City's approval for Grandview Parkway Project (US-31/M-37/M-72) design elements, including but not limited to crosswalks, sidewalks, bike lanes, and landscaping. For the reasons below, our opinion is that the 1947 Agreement is still valid.

1947 Agreement with MDOT

The 1947 Agreement with MDOT involved relocation of US-31, M-22, and M-37, which required land acquisition by the City and by MDOT, removal of some existing buildings, and removal and relocation of railroad facilities. The City had responsibility for a significant portion of the design, construction, land acquisition, and cost of that project. MDOT similarly had certain responsibilities for design, construction, land acquisition, and payment for costs. Notably, the City was responsible for sharing in the cost of maintenance of the improvements after the Project was completed. Thus, there are provisions in the Agreement which required both the City's and MDOT's approval and cooperation.[1] Central to this discussion is the requirement in Section 16 of the 1947 Agreement which states:

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[1] Page 1, last paragraph: "Whereas, under existing law, the City is authorized to enter into contract with the Highway Department, for **participation in** the cost of construction, reconstruction and maintenance of State Trunkline Highways."
Page 3, Section 1: "undertake jointly the construction of the Project…"
Page 4, Section 3 d The City will "**cooperate** with the Highway Department in the acquisition by purchase or condemnation of property needed for the Project; in **cooperation** with the Highway Department…
The City will, in **cooperation** with the Highway Department take the necessary steps to cause the removal of existing buildings…"
Page 5, Section 3 (l) "**where mutually agreed** by the parties hereto, cause the removal or improvement of buildings and facilities."
Page 7, Section 7 "The City and Highway Department hereby **jointly assume** the payment of all abuttal damages, if any ….. The City and Highway Department hereby **jointly assume** to themselves, and agree to pay and assume and indemnify and save harmless the Railroads…"
Page 8, Section 9 "It is agreed that **no construction of any type shall be started without the formal written approval and consent of both the Highway Department and the City**"

> "That the HIGHWAY DEPARTMENT or the CITY may now, or at any time hereafter, and from time to time, at its option, **and at its sole cost and expense**, construct or provide **within the limits of this Project**,[2] additional facilities and betterments, together with the necessary construction and expenditure to adapt the same to the new physical conditions occasioned by such additional facilities and betterments, **provided that no such construction shall be undertaken by the HIGHWAY DEPARTMENT or the CITY without full approval and consent by the other party.**" (Emphasis added).

Section 17 of the 1947 Agreement states that "it is specifically understood that this agreement shall become and be binding upon the parties hereto, their successors and assigns…."

Enactment of Public Act 51 of 1951 and the Michigan Constitution of 1963

Since the 1947 Agreement was executed there have been significant changes to state law. Public Act 51 was enacted in 1951 (commonly and hereafter "Act 51") to provide for the classification of all public roads, streets, and highways in this state. Its effective date was June 1, 1951. MCL 247.651 et. seq. Act 51 provides:

> [a]ll state trunk line highways now or thereafter established as provided by law, shall be constructed, maintained and improved in accordance with the provisions of this act under the direction, supervision and control of the state highway commission. MCL 247. 651a.

There is no requirement in Act 51 for the state to obtain permission from local units of government prior to conducting work on state highways. There is, however, a provision which allows the state Highway Department and the governing body of a city or village by mutual agreement to determine that the width of a state trunk line highway shall be less than the width otherwise prescribed. MCL 247.651c(2).

In addition to vesting the construction of state trunklines solely in the state, Act 51 was amended in 1965 to relieve cities with populations under 30,000 from any contractual obligations with the state Highway Department for contracts entered into prior to July 1, 1957. The state Highway Department assumed all obligations under the terms of the outstanding contracts. 1965 PA 352, MCL 247.651f. However, this provision did not cancel contractual obligations of the state Highway Department; it only relieved cities from contractual obligations for the construction of state trunkline highways, as of the effective date on March 31, 1966.

Act 51 further provided that "[c]ontracts and agreements between the state highway commission and the legislative body of any city or village, approved by the state administrative board, are authorized and approved whether heretofore[3] or hereafter made. All agreements

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Page 9, Section 16 Highway Department and city may each provide additional facilities and betterments… provided that **no such construction shall be undertaken by the Highway Department of the City without full approval and consent of the other interested party**.

Page 10, Section 17 "That it is specifically understood that this agreement shall become and be binding upon the parties hereto, their successors and assigns…" (emphasis added)

[2] For purpose of this Opinion, it is assumed that the current Project falls within the geographical limits of the 1947 Project.

[3] According to the Merriam-Webster Dictionary, "heretofore" means "up to this time."

entered into prior to January 1, 1968, between the state Highway Department and any city or village pursuant to this act may be renegotiated by the state highway commission for the purpose of providing for participation in the cost of construction between the highway commission and the city or village on the basis of the participation provisions of section 1c. The renegotiation shall be authorized only for all or any part or unit of the state trunk line highway projects which have not been placed under contract for construction by the highway commission on January 1, 1968."[4] According to the City's records, neither the 1947 Agreement nor the subsequent 1951 Agreement between the state Highway Department and the City have been renegotiated or terminated.

Important to the central issue in this matter is that more than two months after the effective date of Act 51, the state Highway Department and the City entered into yet another agreement concerning railroad relocation for the Project which once again required the City's financial participation, design responsibilities, utility relocations, and property acquisition. Like the 1947 Agreement, the 1951 Agreement, dated August 15, 1951, required the approval of both the state Highway Department and the City for various tasks.[5]

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[4] MCL 247.651d.

[5] Page 1, Last paragraph "… the City is authorized to enter into a contract with the Highway Department for participation in the cost of construction, improvement and maintenance of State trunkline highways with the City limits…."
Page 4, Section 3 (b) "After **approval of the aforesaid plans and specifications by the Highway Department, the City and the Bureau of Public Roads…"**
Page 10, Section 6 (e) "The Highway Department **jointly** with the City, as between them, will reimburse the Manistee and Northeastern in a lump sum amount of $14,500…."
Pages 11& 12, Section 7 (c) "Acquire, either individually or jointly with the Highway Department, such property as is required for the construction of the relocated highways… The City will convey to the Highway Department by quit claim deed all such property acquired by the City…. The City and the Highway Department, either individually or jointly, will at no expense to the Manistee and Northeastern and Chesapeake and Ohio, secure the right of way and property required… The cost of furnishing such right of way and of removal of buildings as aforesaid shall be borne wholly by the City and the Highway Department."
Page 12, Section 7 (d) "The City **jointly** with the Highway Department will so arrange and maintain any facilities built…"
Page 13, Section 7 (e) "The City **jointly** with the Highway Department hereby assumes all liability for any and all claims, demands, costs, loss, damage, suits, or actions which may now or at any time hereafter arise…."
Page 13, Section 8 "That the title to all property purchased by the City or made available by the City for the Project which is in excess of that shown on the attached exhibits…shall remain with the City."
Page 13, Section 9 "The City and the Highway Department hereby **jointly** assume the payment of all abuttal damages, if any there be…"
Page 14, Section 9 "…wherein the City and the Highway Department are liable under the terms hereof, the City **jointly** with the Highway Department will, on written notice…. settle, compromise, or defend the said claim, demand, or suit…."
"…will be accepted by the City and the Highway Department as a full and complete release…"
Page 15, Section 11 "assumed by either of the Railroads **with the consent of the Highway Department and the City**…that any such payments or liabilities for damages, charge to the Project, shall be made by the Highway Department and the City …."
Page 15, Section 12 "…which in the opinion of the Highway Department and the City render it impracticable to proceed with the construction of the Project…"
Page 16, Section 12 "...and the Highway Department and the City will assume and pay the cost thereof…."

Another significant change to the laws in Michigan came in 1963 when the state adopted a new constitution. As will be explained further below, the Michigan Constitution vested jurisdiction and control for constructing the state trunkline system with the state Highway Department, which is now known as the Michigan Department of Transportation, or MDOT. *Mich Const* 1963 art 5 §28.

Authority over roads

Roads in Michigan are governed by a somewhat overlapping set of constitutional, legislative, administrative, and judicial provisions. This often causes confusion as to which authority governs in a specific case. Resolution of the authority for a particular action depends on the construction and review of several seemingly conflicting constitutional and statutory provisions.

In determining the scope of a City's authority, "[t]he general rule is that these municipal corporations possess and can exercise only such power as are granted in express words or those necessarily and fairly implied or incident to powers expressly conferred by the Legislature." *Huron-Clinton Metro Auth v Attorney Gen*, 146 Mich App 79, 82, 379 NW 2d 474 (1985).

Whether a particular authority exists is influenced by the Michigan Constitution provision which states that "[t]he provisions of this constitution and laws concerning counties, townships, cities and villages shall be liberally construed in their favor." *Mich Const 1963* Article 7, § 34.

The Michigan Constitution in Article 7 § 29 grants a degree of control over rights-of-way to local units of government by requiring that public utilities must obtain permission from local government before placing wires, polies or other utility franchise in highways, streets, and alleys within their community. This constitutional authority over roads is limited through the following provision:

> "Except as otherwise provided in this constitution the right of all counties, townships, cities and villages and counties to exercise reasonable control of their highways, streets, alley and public places is hereby reserved to such local units of government." *Id*.

This constitutional provision reserving the right for local units of government to exercise "reasonable" control of streets did not provide exclusive control to local units. *Jourdin v City of Flint*, 355 Mich 513, 522, 94 NW 2d 900 (1959); *Allen v Zieglar*, 338 Mich 407, 61 NW 2d 625 (1953).

The Michigan Constitution also provides for the state transportation commission:

> "There is hereby established a state transportation commission, which shall establish policy for the state transportation department programs and facilities, and such other public works of the state, as provided by law." *Mich Const* 1963, Article 5 §28.

Page 16, Section 13 "… the cost of the maintenance of the roadway surfacing, roadway slopes, drainage facilities, pedestrian underpass….shall be borne by the City and the Highway Department in accordance with State Laws." (Emphasis added).

The question then is whether Article 5 §28 vests exclusive jurisdiction over the state trunk line highways to the state, or if there is any room for local jurisdiction. In interpreting jurisdiction over state roads, the Court in *Jones v City of Ypsilanti,* 26 Mich App, 574, 580; 182 NW 2d 795 (1970) held:

> "..we believe that municipalities were meant to retain reasonable control over state trunkline highways located within their boundaries so long as that control pertains to local concerns and does not conflict with the paramount jurisdiction of the state highway commission."

The Court in *Jones* indicated that the state has a duty to maintain highways in reasonable repair for safe and convenient travel but that extended only to the improved portion of the highway designed for vehicular traffic but did not include sidewalks, crosswalks, or other installation outside of the portion of the highway designed for vehicular traffic. The court indicated that sidewalks were left to the reasonable control of cities pursuant to Article 7 §29 of the Michigan Constitution. *Jones v City of Ypsilanti,* 26 Mich App, 574, 581.

Another source of authority regarding responsibility for roads is how liability for vehicle accidents is determined under the Governmental Tort Liability Act. 1964 PA 170, MCL 691.1402 et. seq. The general defense of governmental immunity is set forth in MCL 691.1407. Whether a governmental entity is liable for damages pursuant to an exception to governmental immunity depends on whether a road is within its jurisdiction. MCL 691.1402. In cases determining liability for accidents occurring on roads, and whether a governmental immunity is an applicable defense, courts have determined that only the state is responsible for accidents occurring on state highways.

> "[u]nder the Michigan Constitution, the State Transportation Commission and the State Department of Transportation have jurisdiction over state highways." *Lain v Beach,* 177 Mich App 578, 582, 442 NW2d 650 (1989), citing Const. 1963, art. 5 § 28, and *Bennett v City of Lansing,* 52 Mich App 289, 294, 217 NW2d 54 (1974).

The Court in *Bennett v City of Lansing* determined that Article 5, §28 is a "constitutional mandate the State Highway Commission was given jurisdiction and control over all state trunkline highways". Therefore, the City of Lansing was not responsible for the state trunkline and was able to use the defense of governmental immunity in an action for injuries sustained on a state trunkline. *Id.*

The Governmental Tort Liability Act indicates that the duty to repair and maintain highways "extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks or any other installation outside of the improved portion of the highway designed for vehicular travel." MCL 691.1402(1). The duty to maintain public sidewalks adjacent to a municipal, county or state highway in reasonable repair falls on local governments. MCL 691.1402(a)(1). *Glancy v City of Roseville,* 457 Mich 580, 584, 577 NW 2d 897 (1998). The responsibility for sidewalks and crosswalks is on local governments, including cites, which are liable for injuries occurring on sidewalks that abut state highways because of a negligent failure to maintain the sidewalks in reasonable repair. *Robinson v City of Lansing,* 486 Mich 1, 8, 782 NW 2d 171 (2010) quoting *Jones v City of Ypsilanti,* 26 Mich App 574, 581 (1970).

Legal Analysis of the Validity of the 1947 Agreement

As discussed above, changes to statutory and constitutional provisions since 1947 have delegated control over the construction of state highways to the state. These changes apparently formed the basis of a 2017 letter to the City from Richard Liptak, a Michigan Department of Transportation Engineer, which indicates that he consulted with the Attorney General's office concerning the validity of the 1947 Agreement. He states in his letter: "[t]here is nothing in Act 51 that requires MDOT to obtain approval from local agencies to work on its highways. Because the 1947 agreement contradicts Act 51, the agreement is against public policy, therefore violating state law and is unenforceable." In the letter, however, Mr. Liptak indicated a willingness on the part of MDOT to work with the City during the development and construction of road construction projects planned for US-31/Grandview Parkway in upcoming years. While Mr. Liptak is correct that Act 51 does not require local approval for state highway improvements, his statements that the 1947 Agreement is against public policy, violates state law, and is unenforceable are not supported by legal analysis of the well-established body of law concerning contracts and the retroactivity of laws.

First, Mr. Liptak's statement that the 1947 Agreement violates public policy is not supported by the language in Act 51, which expressly provides "[c]ontracts and agreements between the state highway commission and the legislative body of any city or village, approved by the state administrative board, are authorized and approved whether heretofore or hereafter made." Act 51 also states "[t]he governing body of a city or village and the state highway commission may enter into a contract to effectuate joint participation in the cost of opening, widening, improving, including construction and reconstruction, of a state trunk line highway, the terms of which contract, when approved by the state administrative board, shall establish the responsibilities of each party and provide for the method of payment for such joint obligations."[6] These provisions, the first of which expressly approves and authorizes previous contracts, and the second which allows new contracts between the state Highway Department and local municipalities, strongly support the position that the 1947 Agreement is not violative of Act 51 or public policy. To the contrary, invalidation of the 1947 Agreement for which there was a meeting of the minds between the parties, reliance by the City, and valuable taxpayer dollars paid as consideration, would more likely be against public policy and violate state law.

Second, Act 51 did not have retroactive effect. Because Act 51 contains no language granting it such effect, the answer to any question of its retroactivity appears to be firmly negative under well-established case-law in the State of Michigan.

Test for Retroactivity (The General Rule)

Courts require that the Legislature makes its intentions clear when it wishes to pass a law with retroactive effect. *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26, 28; 852 NW2d 78 (2014). In determining whether a law has retroactive effect, the courts keep four principles in mind:

- Whether there is specific language providing for retroactive application;

[6] MCL 247.651d.

- If the statute refers to an antecedent event, it does not necessarily follow that it is operating retroactively;
- In determining retroactivity, a court keeps in mind that such laws impair vested rights acquired under existing laws and may create new obligations and duties with respect to transactions or considerations already undertaken;
- A remedial or procedural act not affecting vested rights may be given retroactive effect where the injury or claim is antecedent to the enactment of the statute.

Id.

"Providing a specific, future effective date and omitting any reference to retroactivity supports a conclusion that a statute should be applied prospectively only." *Id.*

"A statute cannot be retroactive so as to change the substance of a contract previously entered into." *Id.*

"For retroactivity purposes, a statute's statement that the statute will become effective on a certain date does not, by itself, even arguably suggest that the statute has any application to conduct that occurred at an earlier date." *Landgraf v Usi Film Prod*, 511 US 244, 247; 114 S Ct 1483; 128 L Ed 2d 229, 241 (1994).

"[U]nder Michigan law, a statute is presumed to operate prospectively unless there is a clear manifestation of contrary intent." *Frank W. Lynch & Co. v. Flex Techs., Inc.*, 463 Mich. 578, 624 N.W.2d 180, 182 (Mich. 2001). In looking for intent, courts do not find retroactivity simply because a statute relates to an antecedent event and may not find retroactivity if the new law takes or impairs vested rights under existing laws; but courts will find retroactivity from express language in the statute giving retroactive application, and may find retroactivity for a remedial or procedural act not affecting vested rights." *Coulter-Owens v Time Inc*, 695 F App'x 117, 121 (CA 6, 2017), *citing LaFontaine Saline, Inc. supra* at 26.

"The obligation of a contract consisted in its binding force on the party who makes it. This depends upon the laws in existence when it is made. They are necessarily referred to in all contracts, and form a part of them, as the measure of obligation to perform them by the one party and right acquired by the other. The doctrine asserted in that case applies to laws in reference to which the contract is made, and forming a part of the contract." *LaFontaine Saline, Inc., supra* at 28.

"The laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to and incorporated in its terms." *Id.*

In the instant case, Act 51:

- does not include any language providing for retroactive application;
- does not refer to any antecedent event;

- retroactive application would alter a key provision of the 1947 Agreement by eliminating the City's required approval for future construction;
- and such alteration would not be a merely remedial or procedural change; instead, it would eliminate approval authority which the City bargained and paid for.

The Michigan Supreme Court has in other instances ruled that a Public Act lacks retroactive effect. Recently, it relied on the factors set forth in *LaFontaine Saline, Inc., supra* to hold that the amendment to the Governmental Tort Liability Act, MCL 691.1401, which went into effect on January 4, 2017, and allows a municipality to assert common law defenses to premise liability claims, does not apply retroactively. *Buhl v City of Oak Park,* Docket No. 160355, Decided June 9, 2021.

In *Brewer v A D Transp Express, Inc*, 486 Mich 50, 51; 782 NW2d 475 (2010), Public Act 499 (2008), amending MCL 418.845 (a statute related to Workers' Compensation claims), the Court likewise held that "2008 PA 499 contains no language that would clearly manifest a legislative intent to apply [a] new jurisdictional standard retroactively." The Court found that the Act did not fall within any exception for remedial or procedural amendments that might apply retroactively. *Id.* Instead, it was found to have created a new legal burden and to have enlarged existing substantive rights. *Id.* Most significantly, however, the Act contained no language suggesting that the new standard in question applied to antecedent events or injuries. "Therefore," the Court stated, "the amendment applies only to injuries occurring on or after the effective date of the amendment …" *Id.*

Given the absence of language within Act 51 clearly manifesting the Legislature's intent that it would apply retroactively, the statute would only operate prospectively.

Third, basic contract estoppel principles support the validity of the 1947 Agreement.

a. Equitable Estoppel

"Equitable estoppel arises when a party, by representations, admissions, or silence intentionally or negligently induces another party to believe certain facts." *Moore v First Security Cas Co*, 224 Mich App 370, 376; 568 NW2d 841 (1997). "The second party must not only have justifiably relied on this belief, but also must be subject to prejudice if the first party is permitted to deny the facts upon which the second party relied." *Id.* "[W]here the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel." *Rix v O'Neil*, 366 Mich 35, 42; 113 NW2d 884 (1962) (quotation omitted).

It would not appear that there has been any inducement by either party, either negligent or intentional, in the instant matter to cause the other to believe that the 1947 Agreement was or was not expired. Further, inasmuch as the City has an enormous interest in the design and related elements of the Project involving a heavily traveled roadway within its boundary, including ongoing maintenance responsibility and liability for some components, it unquestionably has a vested interest in the final design. It would be severely prejudiced if its approval of those design elements is not required.

b. Acquiescence

"The doctrine of estoppel by acquiescence presupposes that the party against whom the doctrine is asserted was guilty of inaction." *BPAII v Harrison Twp*, 73 Mich App 731, 735; 252 NW2d 546 (1977). In *Sheffield Car Co v Constantine Hydraulic Co*, 171 Mich 423, 450; 137 NW 305 (1912) (quotations omitted), the Court explained the doctrine of acquiescence as follows:

> It may be stated as a general rule that if a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This, it has been said, is the proper sense of the term acquiescence, which, in that sense, may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct.

See also *Thompson v Enz*, 385 Mich 103, 108; 188 NW2d 579 (1971).

In terms of contract law, "If the parties mutually adopt a mode of performing their contract differing from its strict terms, … or if they mutually relax its terms by adopting a loose mode of executing it, neither party can go back upon the past and insist upon a breach because it was not fulfilled according to its letter." *Goldblum v United Automobile, A & A I Workers*, 319 Mich 30, 37; 29 NW2d 310 (1947), *citing Gates v Detroit & M.R. Co.,* 147 Mich 523, 535.

Here, MDOT has cooperatively engaged in discussions with the City concerning the design of the Project and its numerous elements, which is consistent with the joint cooperation and decision-making evidenced in both the 1947 and 1951 Agreements. But for Mr. Liptak's letter, it appears that MDOT has acquiesced to the requirement for the City's approval concerning the design elements of the current Project. And, it is unclear what authority Mr. Liptak had to issue such a letter. It also appears that the City has acted in accordance with the continued viability of the 1947 Agreement by its direct involvement and engagement concerning design elements in the current Project.

c. Reliance

Whether the City relied on MDOT's performance per the terms of the 1947 Agreement is a more fact-based argument. We presume that there has been a great deal of time and effort put forth by City officials and employees to review plans and provide input for the Project. Such would not be the case if the City believed its approval was not necessary for any aspect of the Project. It is further noted that MDOT is actively soliciting "Public Involvement" for input concerning design elements.[7]

[7] https://www.michigan.gov/documents/mdot/US-31_Grandview_Parkway_Presentation_735437_7.pdf

d. Rescission

The 1947 Agreement does not have a termination clause or a specified duration. "Rescission" refers to a mutual agreement to dispense with contractual obligations.[8]

> "The rescission of a contract by mutual consent does not require a formal agreement or release but may result from any act or any course of conduct of the parties which clearly indicates their mutual understanding that the contract is abrogated or terminated, or from the acquiescence of one party in its explicit repudiation by the other." *Holmes v Borowskl*, 233 Mich 407, 411; 206 NW 374 (1925).
>
> "If the parties mutually adopt a mode of performing their contract differing from its strict terms, … or if they mutually relax its terms by adopting a loose mode of executing it, neither party can go back upon the past and insist upon a breach because it was not fulfilled according to its letter." *Goldblum v United Automobile, A & A I Workers*, 319 Mich 30, 37; 29 NW2d 310 (1947).
>
> "A mutual rescission as such requires a meeting of the minds as does the making of a contract." *Gaval v Wojtowycz*, 13 Mich App 504, 510; 164 NW2d 724 (1968), *citing White Pine Lumber Co. v Manufacturers' Lumber Co.* (1916), 191 Mich 390. Rescission requires offer and acceptance, just as does an original contract. *Strom-Johnson Const Co v Riverview Furniture Store*, 227 Mich 55; 198 NW 714 (1924).

A mutual agreement to rescind a contract must involve additional consideration or be in writing. MCL 566.1; *and see Scholz v Montgomery Ward & Co*, 437 Mich 83; 468 NW2d 845 (1991).

Here, there is no agreement in writing between the City and the state Highway Department or MDOT to rescind or modify the 1947 Agreement. To our knowledge, no party has thus far performed contrary to its terms. There is no additional consideration supporting any alleged rescission. From the facts known to us, it does not appear that the 1947 Agreement has been rescinded.

e. Novation

Novation is the consensual replacement of a contractual obligation with a new one. A recognized test of whether a later agreement between the same parties to an earlier contract constitutes a substituted contract of novation looks to the terms of the second contract; if it contains terms inconsistent with the former contract, so that the two cannot stand together, it exhibits characteristics indicating a novation, or substituted contract.

"… if parties to a prior agreement enter a subsequent contract which completely covers the same subject, but which contains terms inconsistent with those of the prior agreement, and where the two documents cannot stand together, the later document supersedes and rescinds

[8] *See* 2-6 Corbin on Contracts § 6.10. 8 M.L.P. 2d CONTRACTS § 281 (2nd 2018).

the earlier agreement, leaving the subsequent contract as the sole agreement of the parties." *Nib Foods Inc v Mally*, 70 Mich App 553,560; 246 NW2d 317 (1976).

A novation requires: (1) parties capable of contracting; (2) a valid obligation to be displaced; (3) consent of all parties to the substitution based upon sufficient consideration; and (4) the extinction of the old obligation and the creation of a valid new one. *Macklin v Brown*, 111 Mich App 110, 112, 314 NW2d 538 (1981). The parties' consent does not have to be in writing but may be implied from the facts and circumstances of the transaction. *Keppen v Rice*, 257 Mich 299, 241 NW 156 (1932).

We have not been made aware of any subsequent agreement between the City and MDOT concerning construction on the same area as the 1947 and 1951 US-31/M-37/M-72[9]/M-22 Agreements. Thus, the elements of a novation are not met.

Conclusion

Based on the information provided to us, it is our opinion that the 1947 Agreement is a valid contract which does not have a termination date. Given the long life-expectancy for newly constructed roadways, the contemplation in the 1947 Agreement of "additional betterments" and "construction" in the future, and the responsibilities and costs borne by both parties at the time, it is reasonable to assume that the 1947 Agreement was intended by the parties to be perpetual. The 1947 Agreement was not invalidated by Act 51, as discussed above and as evidenced by the 1951 Agreement entered into by the parties after Act 51 became law. Act 51 provides that agreements such as the 1947 Agreement may be renegotiated by mutual agreement of the parties;[10] but until that happens, Section 16 of the !947 Agreement, which requires mutual consent of both parties for construction to be undertaken on US-31, M-22, and M-37, remains enforceable. It is consistent with and not in opposition to the provisions contained within Act 51 which encourage mutual cooperation and allow contracts between MDOT and local units of government.

Thank you for the opportunity to review this important matter for the City of Traverse City. If you have any questions, please do not hesitate to contact us.

Very truly yours,

ROSATI SCHULTZ JOPPICH
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[9] M-72 is referenced in the 1951 Agreement, but not in the 1947 Agreement.
[10] MCL 247.651d