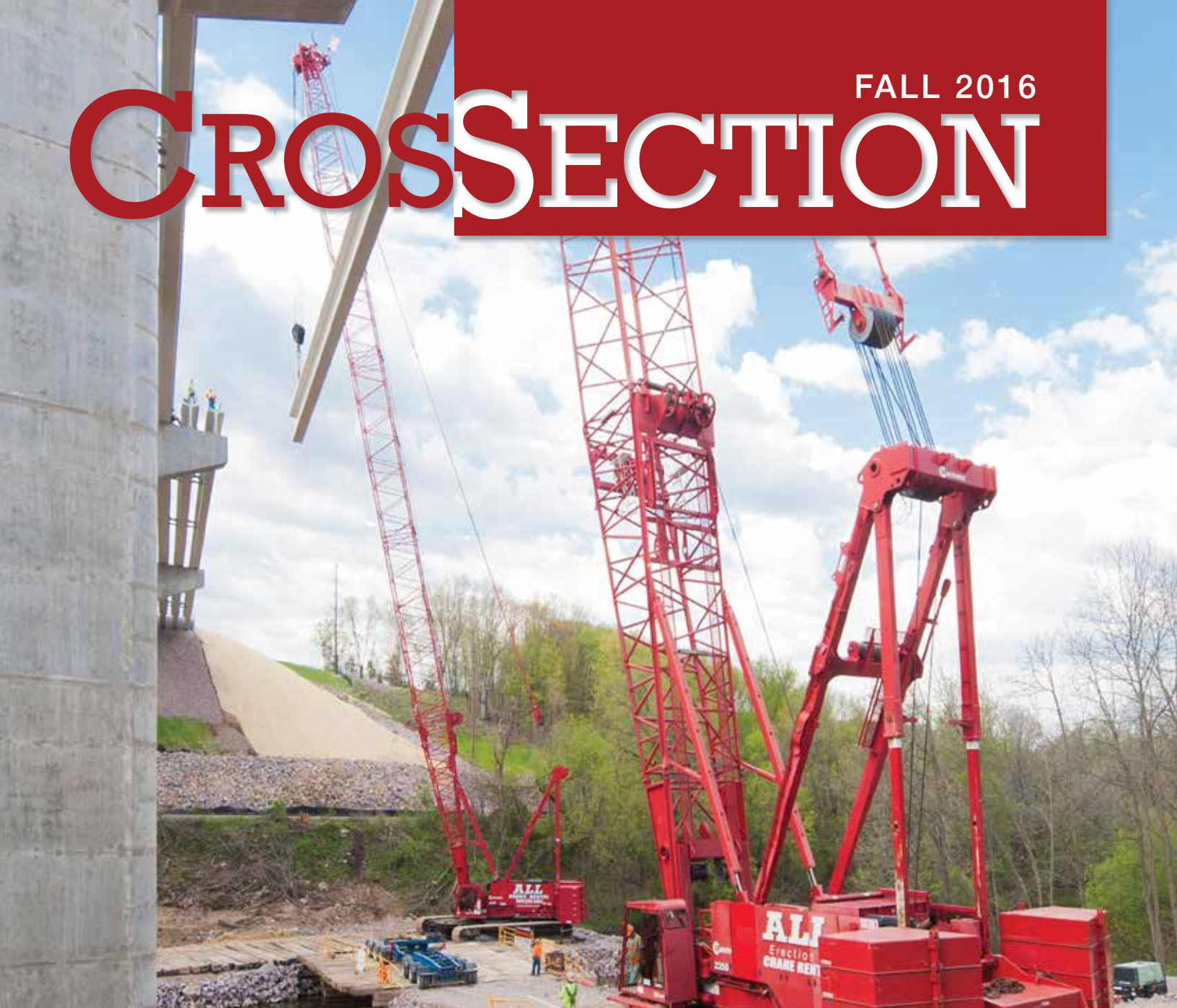


FALL 2016

# CROSSSECTION



Page 8 **Member Profile: Champagne & Marx Excavating, Inc.**

Page 10 **Associate Member Profile: Jeffers Crane Service**

Page 42 **DBE Profile: Gian Taneja, MDOT**



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## EXECUTIVE VICE PRESIDENT



Mike Nystrom

**I**t has been a long, productive year at MITA, as we have worked tirelessly on behalf of the industry. Problem Solver on page 57 discusses just one of the hundreds of issues MITA has dealt with this year. In this case, which MITA resolved, a contractor was running into a situation where a common practice for them was being questioned by a regional government official for the state. Remember, we are always here to help you, so don't hesitate to contact the MITA office anytime.

Glenn Bukoski, P.E., our vice president of engineering services, discusses on page 15 a process that MITA is already addressing for our members: the MDOT Standard Specification Review. At our Summer Conference in July, MDOT leadership announced that they have initiated the next review process, with the goal of releasing the 2019 edition of the MDOT Standard Specifications for Construction in early 2020. MITA will be looking out for the best interests of the industry as this lengthy review moves forward.

Speaking of your best interests, the Legal Issues on page 16, "Squeezing Contractors Again," discusses whether cities can shift costs from utility companies to contractors. Eric Flessland and Paul Mersino of Butzel Long discuss the legality of utility relocation contract provisions in great detail.

On the lighter side, MITA hosted a "wildly successful" Wild Game Dinner in September, thanks to the support of our sponsors. You can see photos from the event and sponsor logos starting on page 30.

We hope you plan to join us for the upcoming MITA holiday parties, which are outlined on page 58. Please also mark your calendars for the 12th Annual MITA Annual Conference. Details are on page 58, and watch your emails for a complete schedule and registration information. See you January 18-20, 2016 at the Soaring Eagle Resort and Casino! 🏔️



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A group photo of the Spartan Barricading & Traffic Control Inc. staff. The group consists of approximately 15 people, mostly men, standing in front of a construction site. They are wearing red shirts and are surrounded by orange and white traffic barrels and signs. The signs include a 'WORK AHEAD' sign, a 'WHERE WORKERS PRESENT 45' sign, and a sign with a person working with a shovel. The company name 'SPARTAN BARRICADING & TRAFFIC CONTROL INC.' is prominently displayed at the top of the image. Below the photo, the address '1560 CEDAR ST., HOLT, MI 48842' is listed.

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## MEMBER PROFILE

CHAMPAGNE &  
**MARX**  
EXCAVATING, INC.



SAGINAW, MICHIGAN

# Champagne & Marx Excavating, Inc.

**I**f you walk, drive or build on it, Champagne & Marx Excavating, Inc., based in Saginaw, Mich., strives to be a one-stop shop for it.

That is how Anne Coursey, president of the woman-owned, MDOT DBE certified company likes to sum things up about the business she has been involved with since she began cleaning the office at age 12. Her sister, Christine, who began working for the business at age seven, is still by her side today and is serves as secretary/treasurer. Their brother, David, is the vice president of the Saginaw-based company that does heavy work in road prep, foundation digging and other commercial and industrial projects.

With 55 staff members, including other family members, the company has been busy this year with projects that include Maankiki Marsh at Shiawassee National Wildlife Refuge; Mason Street and Hemmeter Road in Saginaw (both MDOT projects); Saginaw Valley State University Intermural Soccer Complex; plus

projects for Caro Public Schools and Consumers Energy.

“We take pride in all of our projects,” said Anne, who is a member of the MITA Board of Directors and holds bachelor’s degrees in business administration, and computer programming. “I’m particularly fond of the projects that have had an impact on the community. This spring we completed a very small playground located at the City of Zilwaukee boat ramp. I like to see the children enjoying the park. We have constructed many sports complexes in the past 43 years. Every time I attend a game, it brings a smile to my face knowing our crews had a hand in making the community a fun place to play.”

She jokes that the secret to success of Champagne & Marx as a tightly run family business is the fact that each of the siblings brings a different skill set to the business. She handles the finances as well as the day to day operations; David focuses

on the equipment maintenance; and Christine, a certified occupational safety specialist, fills the role of safety director.

“Safety is no secret,” Christine said. “Anyone who gets hired, we tell them if you have ideas, let’s talk about it. Safety is everyone’s responsibility. They are responsible for their own safety and they need to watch out for each other. Anyone on the job can stop a job if it is not safe.”

In addition to safety, the company focuses on giving customers the best project for the best price, Christine added. “We don’t cut corners,” she said. “If it can be more efficient, we do it. We talk about it up front to give them the best product. If we spot engineering problems with a project, we give them our input into how they can change the design ahead of time so at least they have the option.”

Champagne & Marx is also well known for giving back to the community, in projects that include but are not limited to “Pushing for a





*Champagne & Marx holiday card photo,  
from Christmas 2015*

From left to right: Christine Davis, Anne Coursey, and David Marx

## Champagne & Marx Excavating, Inc.

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Anne Coursey – President  
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Christine Davis – Secretary/Treasurer  
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Cure” to end MS. They also established a foundation for engineering students at Saginaw Valley State University, known as the Marx Family Endowed Engineering Scholarship.

“It is my sister Christine’s own fight with MS which led us to raise awareness and funds to help battle the disease,” Anne said. “Every year, to thank those people who donate to MS events in our area, we host a fish fry at the end of June. It used to be held at my parent’s house, when there were just 10-12 people attending. Every year it grew and grew, and this year we had to rent a hall for the 225 people in attendance.”

The company also has a rolling champion in calling attention to MS—a Kenworth T800 and double trailers with a graphics package that can’t be missed. “Join the Movement” is splashed on one trailer, while the MS logo and “OrangeYaCurious.com” on the other.

“We came up with the special truck idea, along with our Kenworth dealer,” Anne said. “We’ve had nothing but wonderful comments about our MS truck and it has driven awareness and donations, for our MS Walk and Bike Event, which typically raise about \$50,000 for the National MS Society Michigan Chapter.”

While the MS truck differentiates the company from others, it is their service, which they hope makes them stand out from their competitors.

“Our competitors can buy the same equipment, materials and parts that we can, at the same prices we can,” Anne said. “Our only edge is our people and their capacity for delivering outstanding performance. Everyone who works here knows we need to maintain a high standard of quality, complete projects on schedule and pay attention to detail. That’s what wins customers and leads to repeat business.” 

## A BRIEF HISTORY OF CHAMPAGNE & MARX EXCAVATING, INC.

In 1973, Frank Champagne had a bulldozer and Tom Marx had a road grader. The two had experience doing excavating work, and they also both wanted to form their own business. Instead, they joined forces and formed a company together, and by 1978 they incorporated.

Champagne retired in 1986, and the Tom and his wife, Ginger, ran the business and expanded into demolition and site development services. Today, the company is run by the children of Tom Marx: Anne (Marx) Coursey, Christine (Marx) Davis, and David Marx. When their children started working for them, Champagne and Marx became a third-generation family operation.



# Jeffers Crane Service

*Part of the ALL Family of Companies*

**W**hat started as a small family business became a large family of companies. ALL Erection & Crane Rental Corp. was founded in Cleveland, Ohio in 1964, and now acts as the corporate office for the entire ALL Family.

The ALL Family of Companies is proud to be the largest privately held crane and lift equipment rental and sales enterprise in North America, with branches operating under the ALL, Central, Dawes, Jeffers, and ALT Sales names.

But it didn't start that way. The Liptak brothers (Mike, Larry, and Jake) founded the company in Cleveland with just one crane and a lot of hard work. Now, the ALL Family of Companies, led by Michael L. Liptak (Mike's son), is recognized around the globe with strategic locations from Canada to the Gulf

Coast. ALL employs more than 1,500 people throughout the company.

Jeffers Crane Service has a similar story, just in a different part of the state. In 1948, Paul R. Jeffers opened a small crane rental company near Toledo in Oregon (OH) with two cranes. The company prospered and grew, moving to a larger location in 1982. The excellent reputation and western Ohio location of Jeffers caught the attention of ALL, who purchased it in 1995.

Today, Jeffers has a presence in Oregon and Lima (OH), and Detroit (MI) and operates a fleet of more than 300 pieces of equipment consisting of cranes, aerials, and forklifts. The company concentrates on crane and aerial lift rental, as well as sales and service of new and used equipment.

As a member of the ALL Family, Jeffers' equipment is part of one of the largest and most diverse fleets

in the equipment rental industry. The fleet represents the most technologically advanced cranes, from Manitowoc, Grove, Link-Belt, Terex/Demag, Terex American, Tadano, Liebherr, Broderson, and Shuttlelift, and forklifts including Lull and Gradall. In addition, Jeffers' is an authorized dealer for Terex, Shuttlelift, Manitex, and Skycrane. Jeffers is the only servicing dealer for Terex throughout western Ohio and all of Lower Michigan. Terex makes a number of excellent, heavy-duty crawler cranes that are ideally suited for bridge building and repair, and come complete with one of the best warranty packages in the business.

"Jeffers, sharing the resources of the ALL Family of Companies, can offer customers a fleet that really sets us apart," said Vince Voetberg, Michigan sales. "Some people may have one or two machines available

*Service is the backbone of Jeffer's business. From left to right, Vince Voetberg (Michigan sales representative), Chris Hanselman (aerial work platform service manager), and Rex McKee (crane service manager).*

for your job, but because of the size of our fleet we can mobilize dozens, and can pull additional equipment from other locations whenever needed.”

Vince said that because Jeffers is the region's top source for rental and sales of virtually any lift equipment, they have been involved in almost every major transportation project in Michigan for more than a decade.

“From the interchange work at I-96 and US-23 in Brighton Township, which finished up a couple weeks early in September,” Vince said, “to work for C.A. Hull Co., Inc. on the west side of the state, we assist statewide in bridges, roads and ramps.”

In addition, Vince said, Jeffers has probably touched 75 percent of all the wind turbines in Michigan, with either working to erect them or having maintenance contracts for the units already standing.

“We do a lot of work in power plants throughout the state as well,” he added. “There is a good bit of new plant construction work that we are involved in. We're also involved in electrical work throughout the state of Michigan. When there are new power lines going in or old ones being replaced, our cranes are often involved.”

Being involved as a member of MITA since 2005 has been extremely valuable, Vince said, especially because of MITA's annual conference. A lot of business is conducted online these days, he continued, and it becomes a faceless price game.

“But three generations of hard work and experience is hard to share

over the Internet,” he said. “The ALL Family is really about people and like us, MITA puts a tremendous value on people who service the country's infrastructure – including underground workers, road builders and line workers.”

At MITA's annual conference in January, Jeffers appreciated the carefully selected guest speakers, classes and meetings with representatives from other businesses, and great booth traffic. Vince sees it as a chance to offer that personal touch with decision makers – the estimators, the vice presidents and the engineers. “We get attention at that show,” he said. “It's a very valuable experience.”

What Vince likes best about his experience working in the industry is working with big equipment, a career that began for him in 1980 while driving a truck while still attending high school. He enjoys the diversity of the work, and how it is interesting and challenging every day. One day the company is working on bridges, the next day underground, the next day might be electrical line work, power plant work or infrastructure repair.

Jeffers stands out from similar companies, Vince said, because the service attitude is second to none. When any piece of equipment on a job site goes down, “and they are machines, after all, so it's going to happen,” it is critical to get that machine back in service.

“I believe our service managers have a sense of proactive urgency like no one else in the industry,” Vince said. “What is proactive urgency? I'll tell you, we service constantly to prevent downtime. Then, if something does happen, we have a massive parts inventory and a field service team trained like a NASCAR crew. Many of the principals of MITA companies have come to respect us

## CONTACT INFORMATION

**ALL Family of Companies**  
800-232-4100

**Jeffers Crane Service**  
888-758-8041  
[www.allcrane.com/Jeffers](http://www.allcrane.com/Jeffers)

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[Rex.McKee@allcrane.com](mailto:Rex.McKee@allcrane.com)

*Member of MITA since 2005*

for the service we provide.”

Vince said that overall, Jeffers and the ALL Family have a commitment to service excellence that he believes is truly unique. While working with them, companies have access to their impressive fleet, and it means locations across North America so that service can be handled quickly and efficiently “wherever you are, maximizing uptime.”

“Our service includes dedication to proactive, rigorously maintained machines,” Vince said, “so that the best machines in the fleet are always ready to serve. We offer continuous training for operators and mechanics. Careful, thoughtful, and experienced planning. Overall, we offer a comprehensive approach to service excellence that I believe cannot be found elsewhere.” 

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# Letters to MITA

Dear Mike:

Just a quick note of thanks for taking time from your busy day to come to the Urban Core Mayors meeting today. I greatly appreciated it and I know those in attendance did as well. Look forward to continuing to work with you.

**Arnold Weinfeld**

Director, Urban Policy Initiatives  
University Outreach and Engagement  
Michigan State University

Dear Rob:

That was the nicest Wild Game Dinner that I ever went to! I was so impressed with the way they served people, how nice the buffet was, and the fact that they had plenty of staff. Without a doubt, the Wild Game Dinner was better than any sit down dinner I have ever had.

**Lynn Harmala**

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# MDOT Starts Standard Specification Review Process

**F**or those of us who were involved in the process to review standard specifications, it seems like not that long ago when we were involved in reviewing and making industry recommendations for revisions to the 2003 Standard Specifications as a part of MDOT's recurring standard specification review process. In reality, that review process started in 2008 and ended in 2011 with the publication of the 2012 Standard Specifications for Construction. MDOT initiates the standard specification review process on a somewhat routine basis (typically 5-8 years after the last review) to allow for internal MDOT and industry revision recommendations and for formal incorporation of existing Supplemental Specifications and appropriately matured Frequently Used Special Provisions.

At MITA's Summer Conference in July, MDOT leadership announced they have initiated the next standard specification review process, with the goal of releasing the 2019 edition of the MDOT Standard Specifications for Construction in early 2020. Internally, MDOT is working on identifying the process milestones, finalizing the overall proposed timeline, and making recommendations to leadership for approval of the general chair and each division chair.



Glenn Bukoski, P.E.

Based on MDOT's very preliminary "Draft" timeline, they anticipate that their internal review should be completed in the first quarter

of 2018, with the industry review subsequently following and being completed in the third or fourth quarter of 2018. As with past reviews, it is anticipated that significant parts of the separate MDOT and industry reviews will take place concurrently as the MDOT committees will pass reviewed sections of a division to the industry committees so they can begin their reviews, while the MDOT committees continue working on the yet to be reviewed sections of a division. An MDOT leadership level Impasse Panel will convene at the end of the MDOT and industry reviews to decide the final disposition of unresolved issues coming out of the review process. The preliminary "Draft" timeline anticipates the impasse process should be completed in the first quarter of 2019, with the final edit going to the printer in late 2019.

As with the standard specification review initiated in 2008, MITA will again serve as the industry general chair facilitating and coordinating the delegation of the specific division review chair responsibilities to our appropriate industry partners as follows:

- Division 1 – MITA
- Division 2 – MITA
- Division 3 – MAA
- Division 4 – MITA
- Division 5 – APAM & MRPA
- Division 6 – MCA
- Division 7 – MITA
- Division 8 – MITA

We anticipate that the various industry division chairs will likely begin organizing their respective committees mid-2017, based on MDOT's preliminary "Draft" timeline.

Stay tuned ... there is more to come as MDOT finalizes their plans and review timelines for the 2019 edition of the MDOT Standard Specifications for Construction. ▲

To contact Glenn Bukoski, P.E., email him at [glennbukoski@mi-ita.com](mailto:glennbukoski@mi-ita.com) or call the MITA office at 517-347-8336.

## Squeezing Contractors Again: Can Cities Shift Costs from the Utility Companies to Contractors?



Eric J. Flessland  
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flessland@butzel.com



Paul M. Mersino  
313.225.7015  
mersino@butzel.com

**I**magine bidding on a road resurfacing or new sewer project for a city. The one-inch thick General Conditions contain the usual provisions you have seen 100 times. Buried in those typical clauses, however, you may notice a new provision that has been frequently appearing in contracts throughout Michigan. This new specification provides the *contractor* must relocate all existing underground facilities it encounters in its scope of work, whether such utilities are shown on the plans or not. While the language of these specifications vary, they generally provide such work will be incidental to major items of construction. There is no pay item for utility relocation; the contractor is merely expected to include the cost of relocation in its bid, yet remain competitive in its pricing.

If you are asking yourself, “That cannot be right?” then continue to read further. These specifications are wrong from a practical and pragmatic standpoint; wrong from an equitable standpoint; and worse yet wrong from a legal standpoint. Except in limited circumstances, the moving of these underground facilities should remain—as it always has been—the responsibility of the facility owners at their own expense. Any attempts to shift that burden would be struck down and municipalities should abandon the practice. The MITA staff has a White Paper it intends to present to municipalities and consulting engineers to persuade them to issue addendum removing any such specifications from their contracts, and to stop using the clauses in the future. In the

interim, you need to watch for these clauses. This article will provide you with the reasoning you need to address a consulting engineer directing you to move conflicting utilities at your cost.

### I. THE HISTORICAL COST ALLOCATION TO MOVE UNDERGROUND UTILITIES

It has long been recognized for well over a century—in Michigan and throughout the United States—that when new construction mandates that conflicting underground utilities be moved, the utility companies that own those underground facilities must pay and bear the cost to

Continued on page 35





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# What Do The Elections Mean to MITA Members?

**A**s you read this, it is likely that the election season has come and gone. And, like me, I assume you are relieved that it's finally over. With all the mailers, billboards, TV ads and yard signs, it is tough to even keep track of all the races that are going on. It seems like every cycle campaigns spend more and more money in order to get their name and positions out to the public.

It is expected that the Republicans will retain their majority in the House of Representatives, continuing Republican control in the House, Senate and Governor's office. Despite the high probability of retaining majority, it is also anticipated that they will lose a



Lance Binoniemi

few seats along the way, bridging the gap between the two parties. Currently, the Republicans hold control by a 62 to 44 margin with three seats vacant because of one resignation and the unexpected deaths of two lawmakers. It is typical that the closer the margin between Democrats and Republicans, the more bipartisan solutions come out of the respective chambers and the Legislature.

One thing that has already been decided is who will run the Republican caucus in the House starting January 1 of next year. Representative Tom Leonard has already gained enough public support, and his closest competitor has already conceded the race to him. Combined with the likelihood of Republicans retaining majority, he will become the next Speaker of the House. Representative Leonard supported the road funding package last year and MITA staff has worked closely with him over

the past few years he's been serving in the Michigan House.

What does this all mean to the heavy construction industry? It is said that roads don't have an R or a D in front of them and that infrastructure investment isn't a partisan issue. While it is true that both parties have a desire to invest more into Michigan's infrastructure, they often have different philosophies on how to accomplish that. The more conservative members elected to office would rather see more investment come from existing revenues that the state already collects. More liberal members typically call for an increase in taxes to pay for areas like roads and bridges. Our final solution for road funding that passed just one year ago had a combination of new revenues and existing rededicated revenues.

MITA staff and our partners take very careful consideration when working with and supporting lawmakers to ensure that those

Continued on page 18

To contact Lance, email him at [lancebinoniemi@mi-ita.com](mailto:lancebinoniemi@mi-ita.com) or call the MITA office at 517-347-8336.

# COMMENT

VICE  
PRESIDENT OF  
GOVERNMENT  
AFFAIRS

continued from page 17

## What Do The Elections Mean to MITA Members?

policy makers who have a direct influence on legislation affecting our industry know the positions that our association and our members take. However the 2016 election shakes out, regardless of whomever is in control of the state House, the MITA team is constantly keeping up on areas of interest for our membership. As we move into the next legislative session, there will be at least 40 new members of the 110 member chamber. This will require a lot of educating about the issues that concern MITA members. On page 20 you can see that we are encouraging MITA members to get to know their elected officials. The earlier you meet and begin a relationship with them, the more often they will consider you, your family and your business when making decisions that affect your every day life while they serve your community. ▲

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# Know What You're Getting Into?

**M**any regulatory changes have been brewing for the industry over the past year. A new silica rule has been implemented by OSHA and will take effect next summer, rest assured MITA will provide direction on this once it has been finalized by MIOSHA. However, your most immediate concern should be MIOSHA's adoption of the new OSHA standard on confined space. At first, we at MITA have been working hard to provide the answers and tools you will need to be successful with the new standard.

Before anything happens on a jobsite, training and education must occur. That foundation is based around a solid company policy. MITA has always taken a leading role with our members in this area, but it's not as easy as just sitting down and writing. Dozens of unanswered questions concerning the application and enforcement of the new standard



Matt McIntick

existed. This put MITA in the unenviable position of guessing what the new policy should look like. To overcome these obstacles, MITA sat down and talked out the numerous issues with MIOSHA and discussed the various "gray areas" in an effort to get MIOSHA and the industry on the same page. The outcome of this work is what MITA considers to be a very solid policy that all members can be confident with. Will the new policy need some adjustments as we go forward? Absolutely! However, it is a strong document that will keep members in compliance from a policy standpoint. If you need a copy of the new policy, please head to the MITA website ([www.mi-ita.com](http://www.mi-ita.com)).

Now that you have a policy, the next step is to train. MITA and MIOSHA have done a great deal of training on the new standard from the ten-thousand-foot level. Now that we have a policy and many of our questions answered, it is time to narrow the focus of the training and get specific to its application in the field. With this said, MITA will be updating its training for the pending winter to include a module that emphasizes the new requirements concerning confined spaces. If you jump in and out of the training cycle, this is definitely the year to jump back in.

Please contact MITA to schedule this for your crews as soon as possible and keep an eye on the MITA emails and website for the opportunity to jump in a scheduled class at the MITA building.

Last but not least, with assistance monies from a MIOSHA Grant, MITA has been diligently working on the development of a confined space application called Enter Right. This app will be a no nonsense question and answer format, based on policy that will help employees in the field determine what type of space they are dealing with and when that space can be safely entered. Through a series of very specific questions, the competent person can make the proper determination of the confined space in question. The days of test, record, ventilate if needed and re-test are no more.

The last step is yours to take. MITA works hard to try and keep members compliant with the rules and regulations that they face. However, the old adage "you can lead a horse to water" definitely applies when it comes to execution. Do yourself a favor and get ahead of the curve, for the safety of your workers and the thickness of your wallet. The new MIOSHA penalty structure will surely bring you around concerning this newly enforceable standard. 🚧

To contact Matt, email him at [mattmcintick@mi-ita.com](mailto:mattmcintick@mi-ita.com) or call the MITA office at 517-347-8336.

# Outreach Spotlight

Pre & Post-Election

By Mariam Robinson

## Season Tips For Success

**I**t seems redundant to state the obvious, but election season is definitely in full swing, it's picking up speed, and we've now entered what we fondly call the home stretch. The election is around the corner, with lame duck sessions to follow for the state legislature. It's just one of those years.

There is a lot you can do as a member, not only to gear up for and participate in the election, but to also get active once we are passed it. Whether you're reading this before the election or after, it's important to get involved in the process, to take an active role in supporting the candidates who will best represent your needs as a citizen and as an industry member.

We strongly encourage you to participate in debates, rallies and other political activities that give you an inside look at the entire process. These are also excellent ways for you to introduce yourselves to the candidates and to start building potentially valuable relationships early in the process.

When the election is over, it will be equally important (if not more so) to make sure that you give yourself the opportunity

to meet with your elected officials, whether they are re-elected incumbents or brand new legislators without a lot of experience under their belts.

In a state with term-limits, members like you, who have been in the heavy/highway construction business for decades, are excellent educational resources for legislators. You know more about the business and the economic impacts than they ever will during their short time in the legislature. The bottom line, though, is that they have the ability to vote on important legislation. Because of this, it's key to start building those relationships early, so when they have a question about transportation or infrastructure issues, they feel comfortable calling you and picking your brain to get some input and feedback before voting on something that may have a huge impact on the industry.

While election season, pre and post, can be exhausting, daunting and downright frustrating, don't forget the long-term impact that this one season every other year can have on you, your family, your business and your state. A successful member

is one who takes the time to get involved in the process, because they understand that it takes a little extra effort from everyone to make a positive difference. Relationship building is one of the best tools we have as an industry, but it is only as effective as the members who work hard at it.

Don't forget that MITA is always here to help facilitate legislative meetings and to offer tips or advice as you look to get more politically and legislatively active. Please don't hesitate to reach out to Mariam Robinson, Outreach Coordinator, at [mariamrobinson@mi-ita.com](mailto:mariamrobinson@mi-ita.com) or at 517-347-8336 if you have any questions or concerns. Lance Binoniemi, VP of Government Affairs, is also always available to address any issues you have at [lancebinoniemi@mi-ita.com](mailto:lancebinoniemi@mi-ita.com) or at 517-347-8336. MITA's website offers a lot of legislative information, so we encourage you to check that out at [www.mi-ita.com](http://www.mi-ita.com). Keep in mind that legislative coffee hours are updated on a regular basis, and they are a great way for you to introduce yourself to your state legislators! Good luck, and don't hold back on putting yourself out there! 🇺🇸



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A LexMundi Member

### FALL 2016: MITA PAC UPDATE

First Name	Last Name	Company	Donation
Edward C.	Levy	Edw. C. Levy Co.	\$1,000.00
Robert	Wilson	Mid Michigan Materials, Inc.	\$200.00
Kevin	Brenner	Brenner Excavating, Inc.	\$500.00
Rinaldo	Acciavatti	Pamar Enterprises, Inc.	\$500.00
B. Thomas	Stover	Toebe Construction, LLC	\$1,000.00
Gary	Merkey	Jackson-Merkey Contractors, Inc.	\$750.00
Steve	Jackson	Jackson-Merkey Contractors, Inc.	\$750.00
Lester	Lewis	Paradigm 2000	\$200.00
Tom	Wagenmaker	Anlaan Corporation	\$2,000.00
Dan	Eriksson	Hoffman Bros., Inc.	\$7,500.00
Anne	Coursey	Champagne & Marx Excavating, Inc.	\$1,500.00
Hugh	Brennan	Service Construction, Inc.	\$250.00
Doug	Kaltz	M.U.E. Incorporated	\$1,000.00
Tom	DiPonio	Jay Dee Contractors, Inc.	\$10,000.00
Jack	Dykstra	Jack Dykstra Excavating, Inc.	\$1,000.00
Chris	Shea	P.K. Contracting, Inc.	\$2,000.00
Aden	Shea	P.K. Contracting, Inc.	\$500.00
Bradley	Stover	Toebe Construction, LLC	\$1,000.00
Mike	Peake	Action Traffic Maintenance	\$1,000.00
Tom	Peake	Action Traffic Maintenance	\$1,000.00
Bob	Jones	Toebe Construction, LLC	\$1,000.00
Brian	Hoffman	Hoffman Bros., Inc.	\$5,000.00
Lucas	Fleischmann	MI Pipe & Valve, Inc.	\$500.00

First Name	Last Name	Company	Donation
Bob	Adcock	Angelo Iafrate Construction Company	\$4,000.00
Dave	Sturuss	Grand Valley Concrete Products	\$750.00
Mike	Malloure	C.A. Hull Co., Inc.	\$5,000.00
Dale	Klett	Klett Recycle, Inc.	\$2,000.00
Ron	Measel	Ace Cutting Equipment & Supply, Inc.	\$1,000.00
Brent	Gerken	Gerken Paving, Inc.	\$400.00
Brandie	Meisner	M&M Excavating Co., Inc.	\$500.00
Ken	Nowicki	M&M Excavating Co., Inc.	\$500.00
John	Landrie	M&M Excavating Co., Inc.	\$500.00
Dave	Pytlowany	AIS Construction Equipment Corporation	\$1,200.00
Darrell	Kaltz	Kaltz Excavating Co., Inc.	\$1,000.00
Ron	Acciavatti	Pamar Enterprises, Inc.	\$2,500.00
Angie	Greenslade	Old Republic Surety Group, Inc.	\$100.00
Mark	Campbell	GM & Sons, Inc.	\$500.00
Karl	Schweitzer	GM & Sons, Inc.	\$1,000.00
Tom	Larabel	Ferris State University	\$300.00
Frank	DiPonio	DiPonio Contracting, Inc.	\$2,500.00
Pete	Scodeller	Scodeller Construction, Inc. & Fonson Companies, Inc.	\$1,000.00
Heather	Cunningham	Lounsbury Excavating, Inc.	\$450.00
Jeff	Stover	Toebe Construction LLC	\$1,000.00
Brian	Olesky	Pamar Enterprises, Inc.	\$250.00
Chad	Listerman	CL Trucking & Excavating	\$2,000.00

## FALL 2016: MITA PAC UPDATE

First Name	Last Name	Company	Donation
Mike	Kavanagh	Cardinal Fabricating, Inc.	\$500.00
Anne	Coursey	Champagne & Marx Excavating, Inc.	\$2,000.00
Christine	Davis	Champagne & Marx Excavating, Inc.	\$1,000.00
Fred	Meram	F.D.M. Contracting, Inc.	\$2,500.00
Brian	Dodds	D & R Earthmoving, L.L.C.	\$500.00
Derrick	Arens	Anlaan Corporation	\$100.00
Nate	Wagenmaker	Anlaan Corporation	\$100.00
Bruce	Morren	Nagel Construction	\$400.00
Tom	Wagenmaker	Anlaan Corporation	\$2,000.00
Irene	Zannis	Seaway Painting, L.L.C.	\$100.00
Donn	Ellis	CSI/Geoturf	\$150.00
Ryan	O'Donnell	Anlaan Corporation	\$2,000.00
Jim	Urban	Butzel Long	\$250.00
Eric	Morris	HNTB Michigan, Inc.	\$200.00
Robert	Hentkowski	Dan's Excavating, Inc.	\$500.00
Jim	Doescher	Dan's Excavating, Inc.	\$1,000.00
Malcolm	Chartier	M. L. Chartier, Inc.	\$2,500.00
Irvin	Rupersburg	Dan's Excavating, Inc.	\$500.00
Dennis	Rozanski	Dan's Excavating, Inc.	\$500.00
Jason	McLelland	VTC Insurance Group	\$250.00
Terry	Griffin	VTC Insurance Group	\$250.00
Mike	Miller	VTC Insurance Group	\$500.00
Joe	Goodall	Dan's Excavating, Inc.	\$500.00
Brad	Poggi	HUB International	\$500.00
Amy	Hall	Ebony Construction Co., Inc.	\$500.00
Denny	Scully	Mapes Insurance Agency	\$250.00
John	Zito	Zito Construction Co.	\$250.00
Lee	Johnston	Johnston Contracting, Inc.	\$1,000.00
Jack	Dykstra	Jack Dykstra Excavating, Inc.	\$1,000.00
Nick	Baker	Anlaan Corporation	\$2,000.00
Doug	Walls	Eagle Excavation, Inc.	\$10,000.00
Bob	Nobbs	Edw. C. Levy Co.	\$500.00
Paul	Navetta	Dan's Excavating, Inc.	\$1,000.00
Virgil	Klebba	Dan's Excavating, Inc.	\$1,000.00
Jacque	Katterman	Katterman Trucking, Inc.	\$300.00
Brian	Schember	Dan's Excavating, Inc.	\$1,000.00
Paul	Hurley	Guy Hurley, LLC	\$1,000.00
Lynn	McGregor	Guy Hurley, LLC	\$1,000.00
Leslie	Loftus	Veritas Benefits Group, LLC - Div. of Guy Hurley, LLC	\$100.00
Ron	Wey	Pro-Tec Equipment	\$500.00
Dan	Fredendall	OHM Advisors	\$250.00
Chris	Peyerck	Dan's Excavating, Inc.	\$6,000.00
Kurt	Shea	P.K. Contracting, Inc.	\$500.00
Mark	Madden	Guy Hurley, LLC	\$1,000.00
John	Kloet	Upper Peninsula Concrete Pipe Co.	\$750.00
Katie	Darrow	Darrow Bros. Excavating, Inc.	\$150.00
Kevin	McNeilly	Spartan Barricading & Traffic Control	\$500.00
Kenneth	McNeilly	Spartan Barricading & Traffic Control	\$500.00
Tom	Pratt	Milbocker & Sons, Inc.	\$1,000.00
J.W.	Fisher	Fisher Contracting Company	\$1,000.00
Rod	Mersino	Mersino Dewatering, Inc.	\$2,000.00
John	MacInnis	JRM Consulting, LLC	\$100.00
David	Maas	Diversco Construction Co., Inc.	\$1,500.00

First Name	Last Name	Company	Donation
Troy	Broad	Elmer's Crane & Dozer, Inc.	\$5,000.00
Paul	Marsh	Peninsula Prestress Co.	\$300.00
David	Marsh	Peninsula Prestress Co.	\$300.00
Keith	Rose	Rieth-Riley Construction Co., Inc.	\$5,000.00
Brent	Sandborn	Sandborn Construction, Inc.	\$2,500.00
Ron	Lammy	Modern Concrete	\$500.00
Dan	Cortis	Cortis Brothers	\$200.00
Edward	Levy	Edw. C. Levy Co.	\$1,000.00
Robert	Wilson	Mid Michigan Materials, Inc.	\$500.00
Andrew	Ross	Utility Contracting Company	\$300.00
Scott	Miller	Davis Construction, Inc.	\$1,000.00
William	Litz	Aristeo Construction	\$500.00
Alan	Chandler	VTC Insurance Group	\$500.00
M. Todd	Chartier	M.L. Chartier Excavating, Inc.	\$2,500.00
Blake	Zapczynski	Z Contractors, Inc.	\$500.00
Brooke	Zapczynski	Z Contractors, Inc.	\$500.00
Melvin	Stein	BCT Benefits LLC	\$500.00
Bob	Brannan	HYMMCO, LLC	\$1,000.00
Jeffrey	Sment	ISC, Inc.	\$1,000.00
Doug	Kaltz	M.U.E. Incorporated	\$1,000.00
John	Fortier	Bacco Construction Co.	\$1,000.00
Rusty	Rathburn	Rathco Safety Supply	\$1,000.00
Mark	Davis	Davis Construction, Inc.	\$1,000.00
Heather	Hendges	Hendges Diversified Management	\$500.00
Rachel	Snyder	BCT Benefits LLC	\$500.00
Toni	Vandenbos	Pete's Contracting, Inc.	\$200.00
B. Thomas	Stover	Toebe Construction LLC	\$1,000.00
Scott	Bazinet	Lowe Construction Company	\$2,000.00
Michael	Davis	Davis Construction, Inc.	\$1,000.00
Jason	McLelland	VTC Insurance Group	\$250.00
David	Marx	Champagne & Marx Excavating, Inc.	\$1,000.00
James	Zalud	The Isabella Corporation	\$1,000.00
Jim	Canham	Alfred Benesch & Company	\$200.00
Kevin	Brenner	Brenner Exc., Inc.	\$500.00
Linda	Schuring	J.L. Milling, Inc.	\$200.00
Steve	Maranowski	Spartan Specialties, LTD.	\$2,000.00
Joan	Shaffer	E.J.D. Transport, Inc.	\$500.00
Jeremy	Lemke	Give 'Em A Brake Safety	\$1,000.00
Marc	Van Til	Give 'Em A Brake Safety	\$500.00
Kathleen	Day	K. Day Excavating, Inc.	\$200.00
Lee	Johnston	Johnston Contracting, Inc.	\$500.00
Lisa	DiLisio-Lia	DiLisio Contracting, Inc.	\$1,000.00
Patrick	Dunigan	Dunigan Bros., Inc.	\$2,500.00
Jim	Kloote	J.E. Kloote Contracting, Inc.	\$1,000.00
Lynn	Harmala	Lawrence M. Clarke, Inc.	\$1,500.00
Mike	Pittiglio	Florence Cement Company, Inc.	\$2,000.00
Scott	Bazinet	Lowe Construction Company	\$800.00
Anthony	Rau	Rauhorn Electric, Inc.	\$1,000.00
Fernando	Casasanta	C & P Construction Co., Inc.	\$500.00
Darrell	Kaltz	Kaltz Excavating Co., Inc.	\$1,000.00
Doug	Kaltz	M.U.E. Incorporated	\$5,000.00
Tom	Wagenmaker	Anlaan Corporation	\$5,000.00
Gary	Merkey	Jackson-Merkey Contractors, Inc.	\$750.00
Steve	Jackson	Jackson-Merkey Contractors, Inc.	\$750.00



## Partnership Announcement

**Michigan Infrastructure Transportation Association (MITA) Members are now eligible for savings through the Enterprise Fleet Management Affinity Program for the 2016 model year.**

Enterprise is a full-service fleet management business that helps MITA members streamline their fleet, improve cash flow and optimize operations every step of the way. From acquisition and risk management, to maintenance and remarketing, Enterprise provides MITA members with quick, easy and personal access to a local account team who will handle all of the day-to-day fleet needs.

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**Penny Kirk**

Senior Account Executive  
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**Program is accessible to all BITCO agents that are members of MITA.**



# Underground Spotlight: **CAN YOU DIG IT?**

By Rob Coppersmith

**I**t should be understood that if it affects the heavy construction industry, MITA is involved with the issue. Damage prevention of underground facilities is a prime example of this. As part of my duties for MITA, I chair the Michigan Damage Prevention Board (MDPB), a group of stakeholders that meets monthly to discuss, react to and promote positive practices as they relate to working underground facilities. The Board was formed in 2000 to work on what is now Public Act 174 of 2013. Yes, it took 13 years to come to terms on a new "MISS DIG Act." Is it perfect? No. But it is far better than its predecessor PA 53, which essentially held contractors responsible for all damages.


The MDPB fields comments/questions and discusses happenings, good and bad, from the field and from time to time we weigh in on the subjects in the form of Best Practices that are posted on the MISS DIG website ([www.missdig.com](http://www.missdig.com)). The idea behind these interpretations is to provide direction concerning the topic at hand and how the MDPB feels it relates to PA 174. While they are not legal interpretations and can be challenged in court, the MDPB works on these to provide direction in an effort to keep damages down and everyone out of the courtroom. The current list of Best Practices is as follows:

#### MDPB Best Practices (from [www.missdig.com](http://www.missdig.com))

- MDPB Best Practice Requirements for Inactive Facilities DRAFT
- MDPB Best Practice March 2015 Appurtenance FINAL
- MDPB Best Practice January 2015 Fence Post Exemption FINAL

- MDPB Best Practice October 23, 2014 Detection of New Facilities FINAL
- MDPB Best Practice October 23, 2014 Offset Staking FINAL
- MDPB Best Practice October 23, 2014 14 Day Rule FINAL
- MDPB Best Practice Process FINAL
- MDPB First Amended and Restated Bylaws FINAL
- MDPB Recommended Marking Guidelines
- MDPB New marking guidelines - samples
- Positive Response Definitions as of 3-1-2015 FINAL
- Positive Response Colors as of 3-1-2015

These best practices go through an extensive committee review process that requires full Board approval prior to making it on the MISS DIG website. Many more are currently in the works in an ongoing effort for clarification and training purposes. MITA members are encouraged to contact me concerning any and all issues as they relate to Public Act 174, including damages. Damages and the aftermath they create occupy a great deal of my daily work life. MITA's goal through this process is to keep your employees safe via training and understanding of good work processes, and improving the integrity of the marks, with a net gain of reducing damages. I believe all involved would echo the same sentiment, but from time to time want to take different paths to get there.

If you have questions, please contact me at [roboppersmith@mi-ita.com](mailto:roboppersmith@mi-ita.com) or call the MITA office at 517-347-8336. 



Dick, Scott or Tim  
(517) 529-9406

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Scott (517) 206-5423 (cell)  
Tim (734) 552-2667 (cell)  
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## Pro-Tec Equipment

*Pictured here is the Pro-Brace system. With the photo there are four levels of the Pro-Brace Hydraulic Frame, along with four of the 165-ton struts. This photo is of the boring pit (the thrust block can be seen in the middle right).*



By Tommy Marciniak

**E**ight hundred, ninety-five feet. That was the distance Chicago based contractor James McHugh Construction Company had to install 84" reinforced concrete pipe (RCP) as part of the WB 290 Flyover Project (Contract 60W28). McHugh subcontracted Dynamicx Enterprises (Chicago, Ill.) to install the shoring, and tunneling contractor LJ Keefe Company (Mt. Prospect, Ill.) to do the pipe jacking/tunneling. Keefe planned to use a 102" diameter tunnel boring machine (TBM). This is simple enough on the surface, but below the surface is where things get interesting.

In order to do the tunneling, LJ Keefe required a jacking pit with an inside dimension of 20' wide x 40' long x 32' deep. They needed 24' clear (minimum) in the front bay of the pit to bring in pipe and remove spoil. The tunneling also required a thrust block 12' high x 22' wide x 8' thick. The receiving pit had an inside dimension of 21' 1/4" wide x 29' 4 1/4" long x 25' deep.

"For a project like this, normally we would quote a slide rail system," noted Bill Stanley, sales representative for Lee Jensen Sales, out of Crystal Lake and New Lenox, Ill. "We were within 5' of active traffic

on Westbound I-290 for both the receiving and jacking pits, as well as having a building 65' from the receiving pit; we had to come up with something else. As we started digging into the parameters of the project, it was about as challenging as you'd see for an earth retention system: tight work spaces, deep cuts, poor soils, heavy surcharge loads and large clearances—horizontal and vertical—required. That nearby building proved to be a big area of concern for the whole project. Officials were concerned about building settlement, roadway and bridge support, as well as many active utilities in the area. As such, the requirement that any shoring used could deflect no more than 1."

"When Lee Jensen Sales contacted us about the project, my first thought was it could be done using Slide Rail," mentioned Joshua Thorne, Pro-Tec Equipment's shoring manager, "but when the talk of no more than 1" deflection came up, I knew that could only be done by one thing: sheeting. For Pro-Tec Equipment, that meant the Pro-Brace."

The Pro-Brace System is the only large sheeting and bracing system 100 percent designed and built in the

United States. The system consists of enclosed hydraulic rams and static extensions, which can be stacked and staged on top of each other during initial installation to help speed up installation time.

At the time that Dynamicx contacted Lee Jensen Sales, Pro-Tec Equipment had a Pro-Brace project going on in Utica, Mich. "We [Pro-Tec Equipment] invited Bill from Lee Jensen Sales and Alfonso from Dynamicx to visit the job site to see the system in action," noted Thorne. That turned out to be the key.

"Seeing the system in action was nice," commented Alfonso Arrambide, project manager for Dynamicx, "but talking with the contractor is what really sold me. He told me the amount of time and labor they saved using this system."

Time is saved by the nature of the Pro-Brace Hydraulic Frame. Instead of the traditional cut and weld style, the Pro-Brace system can be hydraulically pumped into position. This action allows the Pro-Brace system to be used in irregular shapes and enables it to account for any sheet bowing that may take place. Each ram in the system can be individually adjusted to fit the need of that side.

Continued on page 28

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## Pro-Tec Equipment

“At first, I had a bit of sticker shock when Bill gave me the quote for the system,” mentioned Arrambide, “but the savings in terms of labor more than made up for it. We cut our labor by about half, compared to doing a traditional cut and weld, or beam and lag job.”

Starting the project in the middle of a cold Chicago winter was not ideal, but after a short adjustment period, both the Pro-Brace system

and the installation crew found their stride. The excavation part of the project was done by Dynamicx using a Link Belt 460 and a Terex TC 50 mini excavator to dig inside the system. The sheets (PZ-27) were installed by Michels Foundations (subcontracted by Dynamicx) using an ABI Mobilram 14-17V hammer. “There were some initial hiccups with the project,” noted Arrambide, “but the system overall worked

better than I had expected.”

After nearly 4 months in the ground (jacking pit for 4 months, receiving pit for 1 month), the system allowed the tunneling crew to successfully tunnel the 895 feet in 6 weeks. When asked if he would use this system again on a pipe jacking or tunneling project, Alfonso Arrambide answered simply, “I would definitely use this system again.” ▲

*Pro-Tec Equipment has been a leading producer and distributor of trench shield and trench shoring products since 1995. With a nationwide network of distributors and three factory locations serving Michigan and Northern Ohio, Pro-Tec Equipment provides contractors an extensive inventory of trench shielding and shoring products for purchase or rent. Contact Pro-Tec Equipment at: 800-292-1225 or [www.pro-tecequipment.com](http://www.pro-tecequipment.com)*



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# MITA's First Annual Wild Game Dinner



See Sponsor Logos on Page 32!



3



4



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1. Wild Game Dinner Legends: Mike Clark and Rod Mersino are all grins at MITA's First Annual Wild Game Dinner.
2. MITA's First Annual Wild Game Dinner was a tremendous success at a fitting location, the Palazzo Grande in Shelby Township on September 29.
3. Jacqueline Kaltz of Kotz Sangster Wysocki P.C., and MITA's Matt McClintick.
4. Robin and Fred Meram of F.D.M. Contracting, Inc.
5. Doug Kaltz of Kaltz Excavating Co., Inc., Dave Pytlowany, of AIS Construction Equipment Corporation, and another guest.
6. Mike Nystrom shows off one of the auction items.
7. David Cowper of Ajax Paving and Mike Malloure, of C.A. Hull Co., Inc.
8. Over 500 people attended the Wild Game Dinner.

Big thanks to all of our Wild Game Dinner event sponsors. Please remember to support those who support us, and thank you to all the attendees who supported this event with their purchases. Proceeds from this fine event will benefit MITA's Safety and Scholarship Programs.

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# What are the biggest regulatory hurdles you are facing?

Examples: Permits, trucking, enforcement, local ordinances, etc.

**T**here are so many it is hard to pick the biggest hurdle. The answer changes from day to day and meeting to meeting. There are regulations that we deal with relative to employees from health care, FMLA, workers' compensation,

etc. There are regulations that we deal with for the administration of a project from permits, local ordinances, the DEQ, wetlands permits, etc. There are regulations for actual field construction, such as trucking hours of service, MIOSHA, noise

ordinances, confined space, etc. So, it depends on what your area of responsibility is within your company.

**Kurt Poll**  
Kamminga & Roodvoets, Inc.

Continued on page 34

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## MEMBER VOICE

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**Y**our list has touched on the majority of the regulatory difficulties we have to live with. Adding MIOSHA, taxes and employment rules should cover the majority of all of the regulations we are expected to know with enough knowledge to pass on to our employees and operate within the regulations. Funny how “experts” are hired to create and enforce the rules within each of their own domains, when as business owners we are expected to be “experts” in all of these areas and somehow have time to create a program that employs people to provide services to our customers. When we make good faith efforts to comply with all this regulation we are still penalized for minor infractions. I’m not new at this and understand we must operate under rules for safety and fair business practice. It just seems

to be a continuously changing and growing burden that makes it even more difficult to stay on top of all the regulations.

**Tom Gallagher**  
Harbor Springs Excavating, Inc.

**O**ne of the biggest hurdles I’m facing is the communication between the MDOT Resident/Project Engineers/ TSC Offices, MDOT Lansing Offices, and the Contractor. The contractor is given instructions to file forms a certain way through the MDOT Lansing office. The MDOT Resident/Project Engineers request them differently. Seems we are not all on the same page. EX: 2124A Form reporting. Some TSC offices request them through the system; others request them sent through

the mail or done both ways. It is my understanding that they are to be sent through the 2121A/ARRA Reporting System.

**Mary Montini**  
Central Asphalt Inc.

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move them. Perhaps the consulting engineers or the municipalities who are using these cost-shifting specifications are ignorant of this rule and its source.

A utility company acquires its right to locate its underground facilities in a public road or right-of-way by permission granted by the State or a municipality. Under the Michigan Constitution, no public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for its utility facilities without the consent of the duly constituted authority of the county, township, city or village.<sup>1</sup> Similarly, Michigan adopted a statute in 1925 which authorizes public utilities to enter upon, construct and maintain sewers, gas mains and other utilities upon any public road. Before

the work installing the utilities may commence, the utility company shall obtain the consent of the governing body of the city, village, or township through or along which these lines are to be constructed.<sup>2</sup> These governing bodies may permit this work to proceed by an easement, franchise, plat, or other grant. Regardless of how the utility came to be beneath a municipality's streets, the utility company may use, but does not own the land on which it places its facilities.

Although a utility company may use the public way because it serves a public interest, the utility company's interest in the public way is subordinate to the public's enjoyment of it. Courts have long held a utility company may locate its lines within the public right-of-way as a use secondary to the use by the public.

By extension, the majority of courts hold responsibility for relocating existing utilities conflicting with a new public works project rests upon the owner of the utility, and must do so at their expense.

The U.S. Supreme Court held that "[u]nder the traditional common-law rule, utilities have been required to bear the entire cost of relocating from a public right-of-way whenever requested to do so by state or local authorities."<sup>3</sup> This was merely a reiteration of the Supreme Court's previous holding nearly a century before that held that a gas company had to move its underground utilities in a public right of way at its own expense, because that company "did not acquire any specific location in the streets; it was content with the general right to use them; and when

Continued on page 37

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Kimberly Dohn completed the course recently and commented:

"I was fortunate to be among the first to participate in the Laborers' Productivity Training Course. I am very passionate about the training that was

offered and I feel that ALL laborers will benefit from participating in this course. The skills developed during training will aid them in their daily and future endeavors. I believe that the skills taught throughout this course are invaluable to a person with aspirations of bettering themselves and/or their position in life and it provides real tools to make those things happen.

I am currently employed in a management support position in the construction industry and I feel confident that the skills I learned from the Laborers' Productivity Training Course have prepared me to successfully deal with the challenges that occur on a daily basis. Since completing the course I feel more prepared and I know that the knowledge I acquired has improved my performance and ability to make a positive contribution on any job site."



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it located its pipes it was at the risk that they might be, at some future time, disturbed, when the state might require for a necessary public use that change in location be made.”<sup>74</sup>

This common law rule has almost universally been followed throughout the country. One article has noted that “the common law rule that utilities have been required to bear the entire cost of relocating from a public right-of-way whenever requested to do so by state or local authorities is remarkably well-established.”<sup>75</sup> The author further noted that “[t]he U.S. Supreme Court approved it in 1905, reaffirmed it in 1983, and almost every state in the nation has adopted it.”<sup>76</sup> This analysis noted that the law that utility companies bear the costs for moving their utilities in the public right-of-way is “nearly universal.”<sup>77</sup> And rulings by courts throughout the nation for well over a century affirm this holding.<sup>8</sup>

## II. UNDER MICHIGAN LAW, COSTS TO RELOCATE UNDERGROUND FACILITIES THAT CONFLICT WITH A PUBLIC WORKS PROJECT MUST BE BORNE BY THE UTILITY

Michigan courts have long followed the rule that the “common law states that utilities must pay for relocating their facilities.”<sup>79</sup> In *City of Pontiac v Consumers Power*,<sup>10</sup> the Michigan Court of Appeals stated the general rule in utility relocation cases:

Relocation costs must be borne by the utility if necessitated by the city’s discharge of a governmental function, whereas the expenses must be borne by the city if necessitated by its discharge of a proprietary function. Whether the utility has located its transmission facilities by virtue of an easement, franchise, plat, or other grant is irrelevant; all are treated identically.

A city has two classes of powers—the one legislative, public, governmental, in which it is sovereign and governs its people; the other proprietary, quasi private, conferred upon it, not to govern its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality.<sup>11</sup> Under these rules, a municipality exercises its governmental functions when it undertakes a public

works project. If it becomes necessary to change the location of underground facilities to accommodate the new public work, the relocation costs must be borne by the utility.

In Michigan this line of reasoning has been applied to the situation where a city desired to change the existing grade of a road and requested a trolley car company to remove parts of its railway ties,<sup>12</sup> or where constructing

Continued on page 39

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Continued from page 37

city sewers necessitated the removal of utility poles,<sup>13</sup> or where constructing a sewage treatment facility required the relocation of a utility's equipment.<sup>14</sup> These Michigan courts all noted the right of the utility to use the public road was subordinate to that of the municipality's proposed use. In these cases the activities of the cities which necessitated a relocation of a utility's equipment were for a public purpose—or a governmental function—and the courts ruled the utility was responsible for the relocation costs.

In 1981, prior to constructing the Detroit People Mover, the state's Attorney General was asked who would have to bear the cost to relocate private utilities in the public right-of-way. Attorney General Frank Kelly issued an Opinion of the Attorney General that concluded: "Privately-owned public utilities are responsible for bearing the costs which may be incurred in connection with the relocation or improving of their facilities located within public rights-of-way . . ."<sup>15</sup> The Attorney General cited the Michigan statutes regarding Highway Obstructions and Encroachments that state that nothing in the statutes that permit utilities to use the public rights-of-way should be "construed to grant any rights whatsoever to any public

utilities . . ."<sup>16</sup> Because the utilities "obtain no property rights in a road right-of-way when it places equipment there," the "maintenance of the equipment is subject to the paramount right of the public to make use of the right-of-way."<sup>17</sup> Therefore, "[w]hen some other use of the right-of-way arises, the utility must bear the expense of removing its own equipment."<sup>18</sup> The Court of Appeals later confirmed this opinion.<sup>19</sup> This was always the accepted rule in Michigan.

Unfortunately, our state Supreme Court recently added confusion to this issue by overruling cases that had followed this general rule and replaced it with the rule that "[a] municipality may regulate 'highways, streets, alleys, and public places' to the degree such regulations are consistent with state law."<sup>20</sup> If a state law conflicts with a city ordinance, then the state law will prevail. If, however, there is no state law on point, the city can still exert "reasonable control" to regulate its rights-of-way. While this ruling raised confusion on the general common law regarding utilities, that case is not directly on point because there is no known state law that expressly assigns

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## LEGAL ISSUES

Continued from page 39

responsibility for the cost of removing conflicting utilities on a public works project.<sup>21</sup> The common law rule therefore continues to govern this issue.

### A. Proposed Legislation Demonstrates Utilities are Responsible for Relocation.

Recently, the Michigan House of Representatives proposed a bill that would affect who had to pay to move conflicting cable utilities. That bill would have amended the 1925 statute, which regulates the usage of public right of ways along roads, to require a local unit of government or the MDOT to provide notice one year in advance if relocation is to be requested or required of facilities of an entity holding a license under the Michigan Telecommunications Act, or an entity holding a franchise under the Uniform Video Services Local Franchise Act. While this bill did not pass and is not governing law, that it was proposed is instructive. The bill attempted to legislatively shift the costs of such relocation by mandating that state and local agencies give advanced notice to the utility companies whenever new construction or work would necessitate those utilities being moved.<sup>22</sup> If the municipality did not give that notice, then the municipality must pay half (50%) of the expenses to move the utilities. If the local unit of government gave timely notice, the proposed bill implied the cable or telecommunications company would retain the entire cost to relocate.

The fact this bill was proposed underscores that the burden to pay to move underground utilities is still understood to be on the utility companies. One summary of the proposed bill stated that “[u]nder Michigan law, when a utility’s facilities are within the right-of-way by permit, the highway agency typically does not pay for relocation. The department or a local road agency only

pays for utility relocation when the utility has an easement or actual ownership of the property on which the facilities are placed.”<sup>23</sup> This is because “[w]hile highway agencies typically do not pay for utility relocation costs, except under circumstances described above, utilities typically do

Continued on page 44



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# MITA Members Giving Back: M&M Excavating

**M**&M Excavating has partnered with Gaylord-based non-profit, Huron Pines ([www.huronpines.org](http://www.huronpines.org)), to protect the forests, lakes and streams of Northeast Michigan. M&M and its employees have a goal of giving back to their community while being authentic to causes they feel most passionate about.

Brandie Meisner, chief financial officer, said: “In March we surveyed our employees during our annual Safety Day to better understand both personal and collective beliefs relative to community service, volunteering, free-time, etc. The results were astonishing (I may have underestimated our workforce!).”

## Here are a few of the highlights from the survey:

- 65% of our employees currently donate time/money/resources to charitable organizations.
- 90% of our employees indicated that they would volunteer time to an effort they felt strongly about.
- 60% felt environmental issues (water quality, public land and invasive species) are most important in Michigan.
- Nearly all employees spend time outdoors: hunting/fishing, boating/canoeing, hiking/snowshoeing/trail use, camping, snowmobiling.

“We learned so much about what matters most to our employees,” Brandie said. “With 85% agreeing that the mission of Huron Pines aligns with both our work (underground infrastructure) and conservation of natural resources. We are moving forward! We have committed to several volunteer efforts and sponsorships. But likely the biggest potential impact comes from the new partnership that gets Huron Pines onto our jobsites pre-construction to survey the local ecosystem, identify fragile environments, determine areas needing protection and actively creating opportunities for improvement with respect to water, wildlife, etc.” ▲



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*M&M Excavating employees paused for a photo with Huron Pines staff and AmeriCorps members. M&M is setting a great example of how businesses can give back for natural resources by providing event support and encouraging their employees to volunteer. At the third annual Jack Pine Planting Day this spring, M&M provided a smorgasbord of coffee and baked goods for event participants who were busy planting 2,500 trees to Kirtland's Warblers and other wildlife, such as turkeys, black bears and snowshoe hare.*



*Michigan Infrastructure & Transportation Association*

## Gian Taneja, Michigan Department of Transportation

**W**hen Gian Taneja retires from MDOT in the spring of 2017, one thing is clear: he is going to be missed by everyone whose lives he has touched in his role as a Disadvantaged Business Enterprise (DBE) Engineer in the DBE program.

Gian, who currently serves as operation reviews/DBE field engineer in the construction administration section, is responsible for overseeing and monitoring DBE construction activities and DBE program procedures; monitoring completion of project finals and contractor payments; and overseeing and monitoring contractors' on-the-job training programs. But that mouthful of a job description misses a key aspect of what makes Gian seemingly irreplaceable: his extreme dedication to his work and the kindness he extends to the people he meets along the way.

"He is a very dear friend and my very first MDOT DBE engineer," said Cheryl Hughes, president of C & D Hughes of Charlotte. "He has been everywhere MDOT has sent him. On jobsites, workshops, conferences, and I have even run into him at the mall. He seems to know everything about MDOT, and DBE rules, regulations, important project specs, estimating, reading plans and proposals and just about anything project related. He is always ready, willing and able to communicate his knowledge, experience and expertise. He loves everyone. He is kind, gentle, knowledgeable, caring and a genuine true gentleman. Gian is a first class go-to person if you need help with anything MDOT or DBE related."

Cheryl first met Gian in 1980. He had joined MDOT in 1967, having received his degree in civil engineering from Michigan Technological University (MTU). He had left his home country of India, leaving behind a father and uncle who owned a contracting



Gian Taneja

**"It has been my life building roads and bridges. I know 75 percent of the people in the industry by their first name. My mission has been to help assist with the DBE program, as I guide them through certification and pre-qualification, and assist them as they get jobs as subs or primes. Whatever issues or concerns come up, I have been there to help them."**

— Gian Taneja

business, in order to start his own life. At the time there were only 10 students from his home country. Today, MTU hosts a very diverse student body, with students from many countries.

“Gian and I both were young and eager to do a good job,” Cheryl remembers. “He would come out to my projects. It did not matter where the project was in the state, and he would ask if he could help in any way. He represented MDOT in a very friendly, professional way.”

Glenn Bukoski, P.E., MITA’s Vice President of Engineering Services, said that Cheryl is not alone in her sentiments about Gian.

“He has worked with a lot of contractors to help them understand what they need to do to become DBE certified,” Glenn said. “He has been a great ambassador for the DBE program. Gian is a long-time friend of mine and we will miss him when he retires.”

However, as can be expected, it is not clear that Gian is eagerly looking forward to retirement in the first place. Anyone who knows him will understand that it will be hard for him to sit still. Already, he is making plans.

“After I retire, I still want to help out as a consultant to the industry,” Gian said. “My passion will still be to be working with the industry. I will help advise with my experience. If there is an issue in the DBE area, I can assist the contractor. If the percentages within the federal goals are too excessive, I can help revisit it. Prompt pay is also an issue for contractors and DBEs.”

Gian’s success has brought him many awards and recognition for his devotion to his work, including several MDOT distinguished service awards, an MDOT Vital Innovative Performance Award, and the Robert L. Bradley Distinguished Service Award from the National Civil Rights Symposium.

When MITA honors Gian at the 2017 Annual Conference in January at the Soaring Eagle Resort, his family, including his wife, Shanta, and their three daughters, will be filled with pride, he said. His oldest son, Vikash, will join him in spirit, having passed away in June of this year after a car accident. Gian talks with pride of his son’s accomplishments, having worked in the IT area after earning a bachelor’s degree from the University of Michigan and a master’s from the University of Houston. His oldest daughter, Anu, works at MDOT in aeronautics. Daughter, Seema, lives in



*Gian Taneja’s success working in the MDOT DBE program since 1967 has brought him many awards and recognition.*



Chicago with her husband and their son, Christian, age 3½. Gian calls him Bill Gates junior, because he is already adept on a smart phone and other computer devices. And finally Gian’s daughter, Renu, works in the Lansing area in the human resources field.

“It has been my life building roads and bridges,” Gian said. “I know 75 percent of the people in the industry by their first name. My mission has been to help assist with the DBE program, as I guide them through certification and pre-qualification, and assist them as they get jobs as subs or primes. Whatever issues or concerns come up, I have been there to help them.” ▲

Written by Nancy Brown

Continued from page 40

not pay for occupying public highway rights-of-way. Utilities benefit from this free use of the public right-of-way that would otherwise be very costly to purchase.”<sup>24</sup>

In short, the utility companies get to place their underground facilities in the right-of-way for free, because it benefits both the company and the public. This benefit, however, comes at a cost and a risk: if the underground lines must be moved as part of a public works project, the utility company must pay the relocation costs if there is no conflicting state law or regulation on point. The municipality, therefore, bears no cost for the moving of those lines when it orders the utility companies to do so for the public good.

There is no reason for a municipality to assume this responsibility and cost of moving the underground utilities or to contractually impose those burdens and costs on third-party contractors. Worse, such provisions could have negative consequences on those very municipalities. These unintended consequences make such provisions unwise. Once the consulting engineers and municipalities appreciate these consequences, they should agree to stop writing the provisions in their General Conditions.

**III. THE NEGATIVE CONSEQUENCES AND POOR PUBLIC POLICY OF SHIFTING THE COSTS FROM UTILITY COMPANIES TO THE MUNICIPALITY OR TO CONTRACTORS**

The negative consequences of such cost-shifting provisions are easy to imagine. The municipalities gain nothing by shifting this burden from the utility companies to itself or the contractors who work on its projects. These

costs were already paid for, so any cost-shifting provisions will only lead to higher costs for public works projects, and increase municipality liability risks.

Contractors who bid on these projects will of necessity include the anticipated costs to move these utilities into their bids on these projects. This will lead to higher costs that the municipalities must pay to the contractors, but for no new additional benefit—which means more taxpayer dollars being spent, but with no additional benefit to the taxpayers being realized. Meanwhile, other contractors will not even bid on projects that contain such contract provisions, largely because such risks and costs are not quantifiable—it is difficult to price an unknown. If the contractor must include a large contingency to cover the unknown, the contractor risks the actual costs being greater. Moreover, a large contingency will undoubtedly price the contractor out of contention for the contract. Therefore, contractors are likely to conclude it would be better to spend the time and money to bid better defined work elsewhere. The result will be to decrease competition for the work which increases the costs for those projects. There is no benefit to the municipality or taxpayers, but there could be both a harmful financial and exclusionary effect on contractors.

Under these specifications, the utility companies receive a windfall at the taxpayers’ expense. It has already been noted that utility companies enjoy the free use of the right-of-ways in turn for carrying the risk their utilities may have to be moved. Under these provisions, utility companies receive the benefit with no accompanying risk. Utility companies include relocation costs in their operating expenses and within the rates they charge all of their customers and end-users.<sup>25</sup> So in effect, the end-users (those same taxpayers paying for the new public works projects) already pay that cost; yet now the city resident-taxpayer would be forced to pay those costs again for higher bid prices from contractors. Needlessly spending public improvement dollars,

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particularly when such funds are scarce, is imprudent.

The municipalities gain nothing, the taxpayers are harmed, small business contractors could face drastic impacts, yet the utility companies get a bonus. Moreover, by assuming responsibility and oversight for utility relocation, municipalities expose themselves to potential liability if the facilities are not properly relocated. In this light, it is easy to see these contract provisions are bad policy. It was primarily for these reasons that the proposed bill in 2015 was **not** adopted.

Such cost-shifting mandates also are illegal and unenforceable. Precedent and a new look at some old laws shows us that if such provisions were challenged in court, they likely would not be upheld. Consulting engineers and municipalities are creating needless risk of litigation to strike down these clauses.

**IV. SUCH COST-SHIFTING SPECIFICATIONS ARE LIKELY ILLEGAL AND COURTS SHOULD FIND THEM TO BE VOID AND UNENFORCEABLE**

**A. Mandating Contractors to Bear the Cost of Undisclosed Utilities is Contrary to Michigan Law and Public Policy**

While the cost-shifting contract provisions we

are discussing here are not uniform and differ from municipality to municipality, many provisions mandate that contractors are responsible for the cost to relocate all existing underground facilities, whether or not such facilities are shown on the contract plans and specifications. This violates Michigan law.

For starters, Michigan has passed a Differing Site Condition (“DSC”) statute to cover these very issues.<sup>26</sup> The DSC statute mandates that on public improvement projects over \$75,000, if a contractor finds subsurface or latent physical conditions that differ materially from those indicated in the improvement contract, and those conditions cause an increase or decrease in the cost or time needed to perform the contract, and so long as the proper notice provisions are followed, then an “equitable adjustment shall be made and the contract modified in writing accordingly.”<sup>27</sup> This is a complicated way to say a simple thing: if a contractor encounters undisclosed conditions that materially differ from those shown on the plans and specifications, it can obtain additional compensation to deal with those conditions.

But the cost-shifting provisions do the opposite. These provisions state that even if the contractor encounters

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undisclosed utilities not in the original plans—that is, it encounters site conditions that differ materially from those in the contract documents—it is not entitled to any additional compensation. This squarely contradicts the DSC statute.

The tension between the DSC clause and the effect these specifications would have on claims has been resolved by the courts. Exculpatory clauses and disclaimers on the accuracy of the subsurface conditions represented in contract documents are not enforceable because they violate the public policy embodied in the DSC statute.<sup>28</sup> If the contractor encounters conditions in the field that differ materially from the contract plans, the Legislature has determined that the governmental owner assumes the risk that the construction may cost more. The owner is then required to equitably adjust the contract sum (and time, if necessary) when, for instance, undisclosed

utilities conflict with the work and cause the contractor to incur greater costs. Following that logic, the portion of the specifications that requires a contractor to locate and to move even *undisclosed* utilities at its own expense is contrary to the DSCs statute, and would likely be ruled unenforceable.

Similarly, specifications requiring contractors to pay for the cost of moving even undisclosed utilities is contrary to the policy rationale behind the newly amended Miss Dig Act. That act, amended in 2013, provides the notification system shall establish reasonable procedures for design ticket notification to facility owners of requests for project design or planning services to determine the type, size, and general location of facilities during the planning and design stage of a construction or demolition project.<sup>29</sup> When a municipality or its consulting engineer pulls a design ticket, a facility owner is either to provide

its drawings or records that show the location of its facilities or, if it has no such drawings or records, to mark its facilities.<sup>30</sup> This is to happen before the plans for the project are designed. Yet, cost-shifting provisions that mandate that contractors are responsible for moving even undisclosed underground utilities is contrary to this public policy, passed by the legislature, that mandates that any such underground utilities be disclosed! It potentially exculpates the utility companies and the municipality from ensuring the underground facilities are located prior to planning, and improperly shifts that burden (and the cost for not following the act) to the contractor. Moreover, a City or its Project Engineer may be tempted to short change the location effort the Act requires, relying instead upon the contractor to locate these utilities. This places the contractor and the City residents at risk from gas main explosions, electrocutions, and other calamities that are avoided through diligent location of underground facilities before work commences.

Such provisions should be deemed unenforceable as contrary to Michigan law,<sup>31</sup> and under the theory of *City of Taylor* noted above, that only permits cities to govern their rights-of-way “to the degree such regulations are consistent with state law.”<sup>32</sup>

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**B. Such Cost-Shifting Provisions Violate the Competitive Bid Process**

Nearly every Michigan municipality has adopted an ordinance mandating public works contracts be awarded by a competitive bid process to the lowest responsive and responsible bid. Yet, as detailed in Section III, these cost-shifting provisions will lead to an *increase* in bid prices and project costs. For those communities mandated to follow such a competitive bid process, these cost-shifting provisions violate those laws.

Although there is no known Michigan case law on point, a Florida court has looked at this issue.<sup>33</sup> There, the Florida Supreme Court held that a public contract for a sewer system was void because the task and price of relocating utilities was included in the description of the work being bid. The court held that the “city of Tampa was . . . not authorized directly or indirectly to burden itself or its citizens with the cost of removing and replacing the water pipes, gas pipes, telegraph, telephone and electric light poles, drains, or conduits, or railway tracks that might necessarily have been interfered with in laying its sewers in the streets.”<sup>34</sup>

The Court held this contract provision was improper because the municipality had to award contracts for public works to the lowest bidder, and any contract made in violation of that requirement was illegal and null and void. “The purpose and intent of the law in requiring such contracts to be let or awarded to the lowest responsible bidder for the work is to secure the public improvement at the lowest reasonable cost to the taxpayers.”<sup>35</sup> Incorporating into the bid specifications any unauthorized and unnecessary conditions, such as paying to move the utilities, “will necessarily and illegally increase the cost of the work,” and therefore “is not

a letting of such contract to the lowest bidder . . . .”<sup>36</sup> This “will render the contract illegal and void.”<sup>37</sup>

Just as noted above in Section III, the court noted that “bidders for the work, being advised in advance that they would be required to bear the cost of such removal and replacement,

would increase their bids sufficiently to cover such cost, thereby casting an unauthorized and illegal burden upon the taxpayers, and defeating the purpose and object of the law in having the contracts for such work awarded to the lowest responsible bidder.”<sup>38</sup>

Other courts, not specifically

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relying on competitive bid process laws, have likewise held such cost-shifting provisions are not enforceable. The New York Court of Appeals (New York's highest court) held that New York City could not assess property

taxes on its taxpayers to reimburse a gas company for expenses in removing and replacing gas lines that had to be moved when the street grade was changed.<sup>39</sup> As the court held, the utility "company took the risk of

their location and should be required to make such changes as public convenience or security requires, and at its own costs and charge."<sup>40</sup> The Supreme Court of Maine likewise held that reimbursement to a utility company for relocating its utilities was unconstitutional because the costs were already the utility companies' to bear.<sup>41</sup> The court's reasoning was that where a utility company has no right to be reimbursed for moving its facilities, it conversely means that the municipality has no authority to reimburse them for such acts, absent express legislative authority.

### **C. Such Provisions Are Arguably Unconstitutional and in Violation of Express Michigan Legislation**

Beyond the common-law and common sense observations above, municipalities attempting to force such provisions upon contractors may face even bigger challenges. Such cost-shifting provisions could arguably be unconstitutional. Article 7 of the Michigan Constitution enumerates the general authority and limits of that authority of local governments.<sup>42</sup> Subject to authority granted in the Constitution, local governments derive their authority from the legislature.<sup>43</sup> Michigan courts have held that "local authorities can exercise those [powers] only which are expressly or impliedly conferred, and subject to such regulations or restrictions as are annexed to the grant."<sup>44</sup> Municipalities can only do what the state says they can.

The state grants municipalities the right to control their rights-of-way. Art. 7, § 29 of the state Constitution states that the "the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units

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## ARTBA's 2016 Summer Internship Program Has MITA Ties



**T**his summer, MITA's national affiliate, the American Road and Transportation Builders Association (ARTBA), welcomed six young men and women to the team, including a Michigander with a familiar name. ARTBA's interns held positions in key departments across the association, including government relations, the Transportation Investment Advocacy Center (TIAC), economics, media production, and information technology. Our interns gained the hands-on experience they will need to start a career in the nation's capital, especially as advocates for the transportation construction industry!


This year we were fortunate to have Mitchell Coppersmith, son of MITA's Vice President of Membership Services, Rob Coppersmith, as our government relations intern. Mitch worked closely with the membership development team, government relations team, Contractors and Public Private Partnerships (P3) Divisions, researching online, updating files, and helping with ARTBA events and communications.

Our entire group of interns also took part in a program of events that exposed them to the work we do at ARTBA and some of the activities that Washington, D.C. has to offer, including a "Budget 101" event hosted by the Committee for a Responsible Federal Budget (CRFB), lunches with senior ARTBA staff, a Capitol Hill Reception and a Washington Nationals baseball game. Our interns also attended and assisted with several key ARTBA events during the summer, including our 60th Anniversary of the

Interstate Highway System Luncheon, National Workshop for State & Local Transportation Advocates, and Public Private Partnerships (P3s) in Transportation Conference.

The interns' "Day on Capitol Hill" definitely highlighted their stay in DC. Their itinerary included a tour of the U.S. Capitol Building, a visit to the House of Representatives Gallery, a congressional hearing, and a meeting with the top Democrat on the House Transportation & Infrastructure (T&I) Committee, Representative Peter DeFazio (D-Ore.).

We want to say thank you to all of our interns who joined us this summer. We're grateful for the hard work they brought to the team and wish them our best as they head back to their respective schools for the coming year. Mitch Coppersmith returns to the Virginia Military Institute (VMI) for his senior year to complete his major in International Studies and Political Science and minor in Modern Languages and Cultures (French).

For information on ARTBA's internship program or to apply to future intern positions, please contact Allison Rose, manager of member services and chapter relations, at [arose@artba.org](mailto:arose@artba.org) or 202.289.4434 ext. 213. 

*Pictured left to right are: Mitchell Coppersmith, Tyler Kane, House T&I Committee's Peter DeFazio (D-Ore.), Kylee Nisker, Eric Flandrau, Justin Davis, and Rachel Yang.*



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of government.”<sup>45</sup> The key, however, is the limiting term “reasonable control.” “Reasonable control” has been defined as “such control as cannot be said to be unreasonable and inconsistent with regulations which have been established, or may be established, by the state itself with reference thereto.”<sup>46</sup> These utility relocation provisions contravene laws passed by the state.<sup>47</sup> Such provisions, therefore, are not “reasonable.”<sup>48</sup>

Similarly, such provisions arguably conflict with the Home Rule City Act. This series of statutes provide municipalities with their authority and rights vis-à-vis the state. One such statute grants local municipalities the power to pass “*any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants . . .*”<sup>49</sup> But these cost-shifting provisions

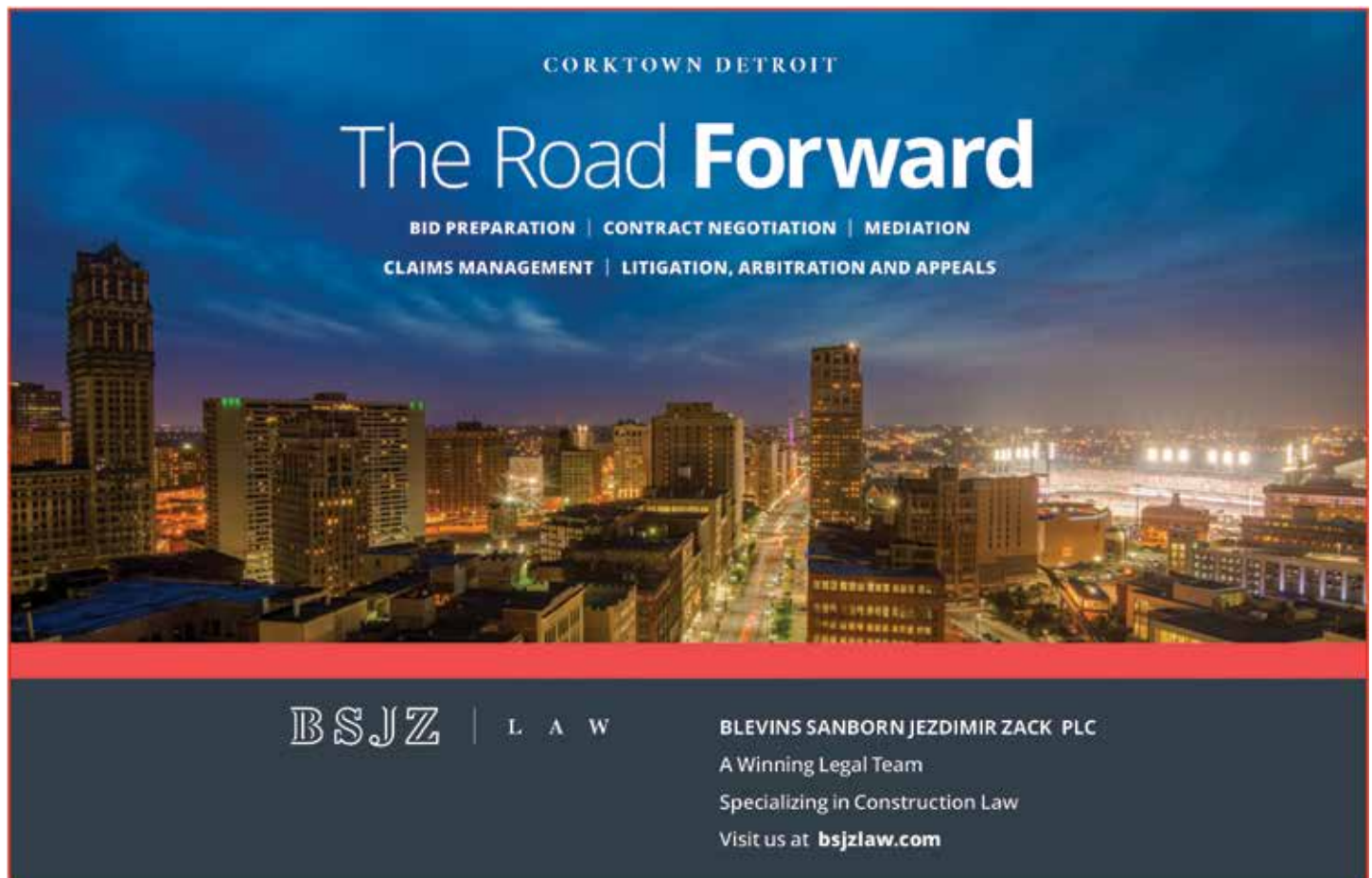
do **not** advance the interests of the cities that utilize them, they **impair** the good government and prosperity of the municipality, and are actually a **detriment** and additional burden on its inhabitants. Because the municipalities have no authority to enact an act that would have the same effect as these contractual provisions, they should not then be able to simply include them in contracts to the same negative impact.<sup>50</sup>

### Conclusion

Utility companies that utilize public rights-of-way to place their underground facilities bear the burden and cost of moving those facilities when necessary, and shifting those costs away from those utilities is a detriment to the municipalities and its taxpayers and a benefit solely to the utility companies.

Such contract provisions will have negative consequences with no additional benefit. And based on existing Michigan law and policy, the nearly universal common law throughout the nation, and even under Michigan’s own constitutional and statutory authority granted to the municipalities, such provisions should be struck down as unenforceable, null, and void. If you see such a clause in your contract, alert the MITA Engineering staff. They are prepared to address the issue with your owner before bid letting, or during the course of your work. If you already have a contract with this type of clause, MITA will assist your company in persuading your owner to abandon such fool-hardy and illegal provisions, and their harmful effects, through a change order. ▲

See References on page 55



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- 1 Article 7, § 29 of the 1963 Michigan Constitution.  
 2 Mich. Comp. Laws § 247.183.  
 3 *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983).  
 4 *New Orleans Gaslight Co. v. Drainage Comm'n. of New Orleans*, 197 U.S. 453, 461 (1905).  
 5 *Stokes*, at 501.  
 6 *Id.*  
 7 *Id.*  
 8 See, e.g., *In re Deering*, 93 N.Y. 361 (1883); *Anderson v. Fuller*, 41 So. 684 (Fla. 1906); *Nat'l Water-Works Co. v. City of Kansas*, 28 F. 921 (W.D. Mo. 1886); *Columbus Gaslight & Cake Co. v. City of Columbus*, 33 N.E. 292 (Ohio 1893); *First Nat'l Bank of Bos. v. Me. Tpk. Auth.*, 136 A.2d 699 (Me. 1957) ("the fundamental common law right applicable to franchises in streets is that a utility company must relocate its facilities in the public streets when changes are required by public necessities"); *N. States Power Co. v. Fed. Transit Admin.*, 358 F.3d 1050, 1053 (8th Cir. 2004) (calling the common law utility-relocation rule "undisputed precedent"); *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001) (noting that the rule has been followed in virtually every jurisdiction).  
 9 See *City of Taylor v. DTE*, 475 Mich. 109, 124, 715 N.W.2d 28 (2006) (Kelly, J., dissenting) (citing numerous cases from the past century).  
 10 *City of Pontiac v. Consumers Power Co.*, 101 Mich. App. 450, 453, 300 N.W.2d 594 (1980), *lv. den.* 410 Mich. 908 (1981).  
 11 *Boerth v. Detroit City Gas Co.*, 152 Mich. 654, 116 N.W. 628 (1908).  
 12 *Detroit v. The Fort Wayne & E. Ry. Co.*, 90 Mich. 646, 51 N.W. 688 (1892).  
 13 *Detroit Edison Co. v. Detroit*, 332 Mich. 348, 51 N.W.2d 245 (1952).  
 14 *Michigan Bell Telephone Co. v. Detroit*, 106 Mich. App. 690, 308 N.W.2d 608 (1981), *lv. den.* 414 Mich. 869 (1982). See also, *Consumers Power Co. v. Costle*, 468 F. Supp. 375 (E.D. Mich. 1979).  
 15 OAG, 1981-1982, No. 6004, p. 436 (Oct. 30, 1981).  
 16 *Id.*, citing Mich. Comp. Laws § 247.183-185.  
 17 *Id.*  
 18 *Id.* The Attorney General's Opinion also cited the long-standing Michigan case law cited above, and ultimately determined that "It is my opinion, therefore, that privately-owned public utilities are responsible for bearing the costs which may be incurred in connection with the relocation or improvement, if any, of their facilities located within public rights-of-way necessitated by" public works construction.  
 19 *Detroit Edison Co. v. Southeastern Michigan Transp. Auth.*, 161 Mich. App. 28, 410 N.W.2d 295 (1987), *overruled by City of Taylor v. Detroit Edison Co.*, 475 Mich. 109, 715 N.W.2d 28 (2006).  
 20 *City of Taylor v. Detroit Edison Co.*, 475 Mich. 109, 715 N.W.2d 28 (2006).  
 21 In the *City of Taylor* case, the court analyzed a Michigan Public Service Commission

- ("MPSC") rule governing the responsibility for costs to "underground" electric lines that were previously on overhead polls, *id.*, but there is no similar rule that deals with lines already underground in need of relocation. Moreover, that rule only applied to electric lines, and not other utilities. And because there is no statutory state law directly on point, this raises the question of whether or not the generally accepted common law is considered a "state law" for purposes of this analysis. And because the Supreme Court's reasoning hinged on the fact that the common-law rules were promulgated before the MPSC passed its regulations, arguably those common-law rules that do not conflict with MPSC regulations could still govern. Unfortunately, *City of Taylor* may have raised more questions than it answered. See, generally, *id.* at 135 (Kelly, J., dissenting) ("And it is now unclear whether the common law in this area is abrogated in all situations or just in some situations."); see also *Mayfield Twp. v. Detroit Edison Co.*, 2016 WL 3020802 (Mich. App. May 24, 2016) (holding that a utility "is not exempt from every statute or rule other than those administered by the PSC.")  
 22 HB 5016 (2015)  
 23 Legislative Analysis of Relocation of Broadband Facilities: Government Notice, Dec. 17, 2015, found at: <http://www.legislature.mi.gov/documents/2015-2016/billanalysis/House/pdf/2015-HLA-5016-54894936.pdf>.  
 24 *Id.*  
 25 *Norfolk*, *supra* at 42.  
 26 Mich. Comp. Laws § 125.1592.  
 27 *Id.*  
 28 See, e.g., *Gleason Constr. Co., Inc. v. Cascade Charter Twp.*, 2001 U.S. Dist. LEXIS 4373 (W.D. Mich. Mar. 23, 2001) ("overly expansive exculpatory clauses will not be upheld").  
 29 Mich. Comp. Laws § 460.726a.  
 30 MCL 460.726a(3).  
 31 See, e.g., *Rental Prop. Owners Ass'n of Kent Cty. v. Grand Rapids*, 455 Mich. 246, 566 N.W.2d 514 (1997) ("The enactment and enforcement of ordinances related to municipal concerns is a valid exercise of municipal police powers as long as the ordinance does not conflict with the constitution or general laws.").  
 32 *City of Taylor*, 475 Mich. at 121.  
 33 *Anderson v. Fuller*, 41 So. 684 (Fla. 1906).  
 34 *Id.* at 688  
 35 *Id.*  
 36 *Id.*  
 37 *Id.*  
 38 *Id.* In that case, the court allowed a taxpayer to bring a complaint to "restrain the paying out of public moneys upon void and unauthorized contract." *Id.*  
 39 *In re Deering*, *supra*.  
 40 *Id.* at 362.  
 41 *First Nat'l Bank of Bos. v. Me. Tpk. Auth.*, 136 A.2d 699, 717 (Me. 1957).  
 42 Mich. Const. 1963, art. 7.  
 43 Mich. Const. 1963, art. 7, §§ 1, 17, and 21.  
 44 *City of Kalamazoo v. Titus*, 208 Mich. 252, 262, 175 N.W. 480 (1919); quoting 1 Cooley, *Constitutional Limitations* (7th ed.), pp. 163, 264 et seq.  
 45 Mich. Const. 1963, art. 7, § 29.  
 46 *People v. McGraw*, 184 Mich. 233, 238, 150 N.W. 836 (1915).  
 47 See *Differing Site Condition Statute*, Mich. Comp. Laws § 125.1592; *Miss Dig Act*, Mich. Comp. Laws § 460.726a.  
 48 Arguably, a municipality is not exerting "reasonable control" over its rights-of-way by merely shifting costs from a party that bears that burden to a party that doesn't. Because the municipalities ultimately are the parties that pay to move these underground facilities through its payment to the contractors, such provisions arguably cede and surrender the municipalities' reasonable control of its public spaces by giving that control to the utility companies.  
 49 Mich. Comp. Laws § 117.4j(3).  
 50 Both the Constitution and the Home Rule statutes limit municipal regulatory authority to areas of "municipal concern," meaning those that bear "real or substantive relation to the public health, morals, safety, or general welfare of the municipality." *Austin v. Older*, 283 Mich. 667, 674, 278 N.W. 727 (1938); *Kalita v. Detroit*, 57 Mich. App. 696, 703, 226 N.W.2d 699 (1975). It is hard to see how a simple cost-shifting provision has any relation to the public health, morals, safety or general welfare of the municipality. And if the municipalities could not legally pass a resolution to that effect, they should not be permitted to unilaterally include such provisions in their contracts either.

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# Problem Solver: Help Us Help YOU!

Between local, state and federal government, there are enough regulations and oversight in the heavy construction industry to make anyone's head spin. It seems like big government is lurking around every corner, waiting to tell our members what to do and how to do it. It's even worse when government officials begin to start interpreting the law themselves and attempt to influence their opinion into perfectly legal construction practices.

Recently, a MITA member ran into a situation where a common practice for them was being questioned by a regional government official for the state. Being that this was not the first time they had been questioned about the practice, they decided to contact the MITA office. They had done some research themselves, and they could not find a single section in the law that prohibited them from continuing with their process. They wanted some confirmation from the association that they were doing the right thing.

MITA staff had contacted various local and state agencies, as well as other members who perform similar work, to confirm that the processes the member was using were, in fact, legal. After some more research was completed, it was clear that this

governmental employee was overreaching with their limited authority, and they were attempting to scare our member into possible legal action so they would stop the process.

The point of this story is that MITA staff is here to help on all levels. We may not always have the answers right away, and we may not always have the answers that our members want to hear, but we are going to do everything that we can to find the RIGHT answers for you. Between all of the professional staff and across the wide range of expertise at MITA, we work very closely together to get to the right agency or right expert to ensure that our members can work comfortably without the harassment of certain governmental employees.

If you are having an issue, if you have a question, if you need information, or if you just want to talk over a problem, please don't hesitate to contact the MITA office, and we will put you in touch with an appropriate staff member. To reach anyone at MITA, please call 517-347-8336. The MITA website is also a great resource, and it provides detailed information on what each MITA staff member provides for the association and its members. We look forward to hearing from you! ⚠️



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# Did You Know?

## Mark Your Calendar for MITA's 2017 Annual Conference

**J**anuary 18, 19, 20, 2017. These are the dates for the 12th year of the MITA Annual Conference, to be held at the Soaring Eagle Casino and Resort in beautiful Mt. Pleasant, Mich. This annual event is MITA's largest event attended by members, industry officials and affiliates. The 2017 event will also include, as in past years, the Michigan's Utility Coordinating Conference, which we affectionately call the conference within the conference. It is a mechanism that promotes proper engineering and design of utilities at construction sites prior to installation in an effort to ease conflicts during the construction phase. MITA will continue to promote its associate members via the vendor area and encourage members to support those who support us.

Please keep an eye on the MITA website ([www.mi-ita.com](http://www.mi-ita.com)) for registration information, which will include class information and keynote speaker updates. Many of the classes will be eligible for continuing education hours. See you in January! ▲

## Calendar of events

### 2016 DECEMBER

- 9 MITA Board Meeting**  
Country Club of Lansing, Lansing  
9 a.m.
- 9 Central Holiday Party**  
Country Club of Lansing, Lansing  
11:30 a.m.
- 13 Western Holiday Party**  
The Waldron Public House  
Grand Rapids (formerly McFadden's)  
11:30 a.m.
- 15 Metro Holiday Party**  
Somerset Inn, Troy  
11:30 a.m.

### 2017 JANUARY

- 18-20 Annual Conference**  
Soaring Eagle Casino



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