MICHIGAN COUNTY ROAD COMMISSION
SELF-INSURANCE POOL

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POOLCUE

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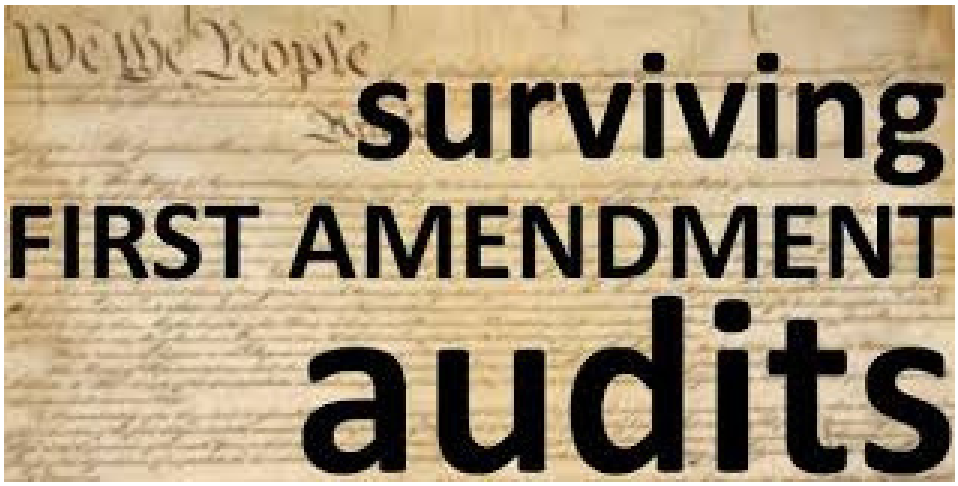
New MCRCSIP Training Program: Dealing with Difficult Citizens and First Amendment Auditors

Charlie Pike
Director of Loss Control, MCRCSIP



It is no secret that difficult people are abundant and excessively vocal nowadays. Government employees are often the target of difficult people because some citizens operate under the belief that since they pay taxes, they get to tell governmental employees what to do. One YouTube search can pull up countless videos of citizens being rude, difficult, and occasionally violent to civil servants all over the country. Some people seem to seek out confrontation because they have nothing better to do. Other people are misinformed and refuse to acknowledge that they could be wrong. Regardless as to why, difficult people certainly exist.

Some citizens are documenting these interactions by conducting "first amendment audits" of various governmental organizations throughout the country. A "first amendment audit" occurs when individuals film public officials or employees performing official duties to hold them accountable or "test" the individual's right to film in public spaces. These audits can make employees uncomfortable and turn confrontational if not handled appropriately. Citizens will attempt these audits inside our buildings and potentially at our work zones.

No matter what your position is at the road commission, chances are you have had a run in with a rude citizen or difficult homeowner. These interactions can be extremely difficult and time consuming to handle if you are not trained in techniques on how to de-escalate these situations. First Amendment Auditors make training even more important since our employees need to be aware of what exactly first amendment auditors are permitted to do while on our premises.

It was this backdrop that led MCRCSIP's Loss Control Department to create a new "Dealing with Difficult People" training program designed specifically for road commission employees. The program covers a multitude of topics, including de-escalation techniques that will help ensure employee safety as well as help employees end the conversation in a timely and efficient manner. The program discusses how to set boundaries with rude individuals and how to demonstrate active listening. After all, many times these citizens are just frustrated and are looking for their concerns to be heard. After having sat through the program, employees will be much more comfortable and confident when dealing with these unruly individuals.

The second part of the training program deals with how to handle first amendment auditors. Importantly, the training discusses the purpose of these audits and the legal background the auditors rely on to support their right to conduct said audits. Knowing exactly what the first amendment allows these auditors to do is important since denying the auditors their first amendment rights can lead to a potential lawsuit. The training program then provides information on how to get through the audit without incident.

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In This Issue

Shooting the Breeze: Michigan Supreme Court Rules on Turbine Case with Positive Implications for Road Commissions

William Henn and Andrea Nester
Henn Lesperance PLC

What kind of music do wind turbines like? They are big metal fans. And while these big metal fans might not ordinarily have major implications for Road Commissions apart from oversized haul permits, a recent Michigan Supreme Court case involving turbines has potential to be the wind beneath our wings. That is because the Court reaffirmed a deferential standard of review for agency decision making—the same standard that is applied to many cases involving discretionary determinations by Road Commissions.

Specifically, in *Pegasus Wind, LLC v Tuscola County* (Docket 164261, issued April 9, 2024), the Michigan Supreme Court considered a case involving a zoning variance requested by plaintiff Pegasus Wind, LLC. The underlying dispute started after Pegasus applied to the Tuscola Area Airport Zoning Board of Appeals (AZBA) to construct several wind turbines near the Tuscola Area Airport. Variances were necessary because the turbines would violate the height restrictions and minimum descent requirements of the local airport zoning ordinance.

The AZBA held a hearing on the application and considered evidence for and against the proposed turbines. At least two local pilots testified that the proposed wind turbines would create specific substantial hazards to a certain type of aircraft. The evidence submitted by Pegasus from the FAA and Michigan Department of Transportation, however, suggested that this risk would be minimal or nonexistent.

Ultimately, after considering the evidence, the AZBA denied the variance applications because it determined the turbines could pose a hazard and were therefore contrary to the public interest. The Circuit Court affirmed the AZBA determination and Pegasus appealed to the Michigan Court of Appeals, which reversed. Specifically, the Court of Appeals conducted its own factual review and concluded that Pegasus's evidence refuted the evidence cited by the AZBA. Judge Murray dissented. In Judge Murray's opinion, under the established deferential standard of review, there was sufficient evidence to support the AZBA determination that the turbines would create additional risk to the airport. In other words, even though it might be a "close call" or there may be weaknesses in the evidence relied upon by the AZBA, there was no error warranting reversal of the AZBA determination.

The AZBA appealed to the Michigan Supreme Court. After oral argument and supplemental briefing, the Court reversed the Court of Appeals and affirmed the decision of the AZBA. First, the Court reaffirmed that review of an agency's determination is "limited to whether the decision is authorized by law and supported by competent, material, and substantial evidence on the whole record." Substantial evidence "is evidence that a reasonable person would accept as sufficient to support a conclusion." While "substantial evidence" requires "more than a scintilla of evidence, it may be substantially less than a preponderance." In other words, neither the AZBA (nor any agency) is subject to de novo review or a "more likely than not" standard with regard to its decision-making process.

The Supreme Court then concluded that the Court of Appeals failed to apply this standard to the AZBA decision. Instead, the Court of Appeals "considered the evidence anew and reached the decision it thought the evidence best supported." That was incorrect. Even accepting that there were "vulnerabilities" in the evidence accepted by the AZBA, the AZBA's decision was supported by substantial evidence and should not be disturbed.

This decision—which was joined by six of the Justices—matters because the "substantial evidence" test is the same one that is applied to many discretionary decisions made by Road Commissions, including decisions regarding removal of encroachments, permitting, use of the right-of-way, and other matters. See *Turner v Washtenaw Cnty Rd Comm'n*, 437 Mich 35, 37; 467 NW2d 4 (1991).

The takeaway from Pegasus Wind is two-pronged. First, it is heartening that the current Court has reaffirmed that decisions by local units of government should be given deference as described in Turner. As a practical matter, this means that plaintiffs cannot ask the courts to reevaluate the totality of the evidence when a Road Commission makes a decision they do not like. Instead, these decisions can only be reviewed to determine if there is a legal basis and at least some competent, material, and substantial evidence. Second, *Pegasus Wind* reaffirmed that it remains paramount to make a good evidentiary record regarding the basis and reasoning for Road Commission decisions. Even though Pegasus may have had arguably "better" evidence, the AZBA was validated because it relied upon specific, reasonable evidence in the record and sufficiently preserved that record for review.

As always, MCRCSIP is ready and able to assist with any questions regarding making a record, or specific application of this standard.

Employee vs. Independent Contractor—How Do You Determine?

Wendy Hardt, JD
Claims Director, MCRCSIP

The U.S. Department of Labor announced a final rule on January 9, 2024, which revised the Department's guidance on how to analyze who is an employee or who is an independent contractor under the Fair Labor Standards Act (FLSA). The rule rescinds the 2021 Independent Contractor Rule and replaces it with the long-standing multifactor "economic reality" test used by the courts to determine whether a worker is an employee or independent contractor. The final rule became effective on March 11, 2024.

The final rule applies the following six factors to analyze employee or independent contractor status under the FLSA:

Factor	Considerations
(1) Opportunity for profit or loss depending on managerial skill	Whether the worker determines or can meaningfully negotiate the charge or pay for the work provided; whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed; whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work; and whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space.
(2) Investments by the worker and the potential employer	Whether the worker makes investments that generally support an independent business and serve a business-like function, such as increasing the worker's ability to do different types or more work, reducing costs, or extending market reach; BUT NOT costs to a worker of tools and equipment to perform a specific job, costs of workers' labor, and costs that the potential employer imposes unilaterally on the worker.
(3) Degree of permanence of the work relationship	Whether the work is definite in duration, non-exclusive, project-based, or sporadic based on the worker being in business for themselves and marketing their services or labor to multiple entities (if so, then more likely an independent contractor).
(4) Nature and degree of control	Whether the potential employer sets the worker's schedule, supervises the performance of the work, explicitly limits the worker's ability to work for others, reserves the right to discipline the worker, or places demands or restrictions that do not allow the worker to work for others or work when they choose.
(5) Extent to which the work performed is an integral part of the potential employer's business	Whether the work the worker performs is critical, necessary, or central to the potential employer's principal business (if so, then more likely an employee).
(6) Skill and initiative	Whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative (if so, then more likely an independent contractor).

Under the economic reality test, no single factor (or set of factors) automatically determines a worker's status as either an employee or an independent contractor. Instead, the economic reality factors are all weighed to assess whether a worker is economically dependent on a potential employer for work, according to the totality of the circumstances.

The 2024 final rule will make it a little harder to classify individuals as independent contractors than it was under the 2021 Independent Contractor Rule. The 2021 Rule identified two core factors for making the determination – (1) the nature and degree of control over the work; and (2) the worker's opportunity for profit or loss. These two factors were considered the most important factors deserving the most weight. If analysis of these two factors was not determinative, then three additional factors could be considered:

- The amount of specialized training or skill required for the work that the potential employer does not provide;
- The degree of permanence of the working relationship, focusing on the continuity and duration of the relationship; and,
- Whether the work performed is "part of an integrated unit of production."

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Employee vs. Independent Contractor—How Do You Determine?

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However, these three factors did not require consideration if the outcome was supported by consideration of the two core factors. Now, all six factors of the 2024 test need to be considered, with no one factor being determinative.

It is important to remember that, if a worker is an employee under the FLSA, they cannot waive employee status and choose to be classified as an independent contractor. The employer would be the one who ultimately pays for the misclassification, not the misclassified employee. Such consequences could include unpaid overtime, liquidated damages, unpaid employment taxes, and fines. Therefore, it is advisable to closely examine any independent contractor relationships an employer may have to ensure that they comply and are not at risk for a misclassification determination. For those workers who may be properly classified as independent contractors, having written independent contractor agreements in place with them will also help protect your road commission from liability under these rules.

DOL Raises Salary Level to be Considered Exempt from Overtime

Wendy Hardt, JD
Claims Director, MCRCSIP

On April 23, 2024, the Department of Labor (DOL) issued a new final overtime rule which significantly increases the minimum salary for "white collar" employees to be considered exempt from the FLSA's overtime pay requirements. Effective July 1, 2024, an executive, administrative, or professional employee must receive a salary equivalent to $43,888 per year (equivalent to $21.10 per hour) in order to be classified as exempt. This will increase to $58,656 (equivalent to $28.20 per hour) on January 1, 2025. The rule also implements a triennial automatic update to these thresholds, which will begin on July 1, 2027, and then occur every three years thereafter.

The new final rule leaves the "duties" tests for the exemptions unchanged. An employee must meet both the duties and pay requirements (which include being paid on a salary basis as well as meeting the above-noted minimums) of at least one exemption in order to be classified as exempt. This means that, even if an employee meets the "duties" test, if they are paid less than the above-referenced minimum salary, then they must be paid overtime for any hours worked over 40 in a week.

Lansing Gridlock is Finally Over (Hopefully)

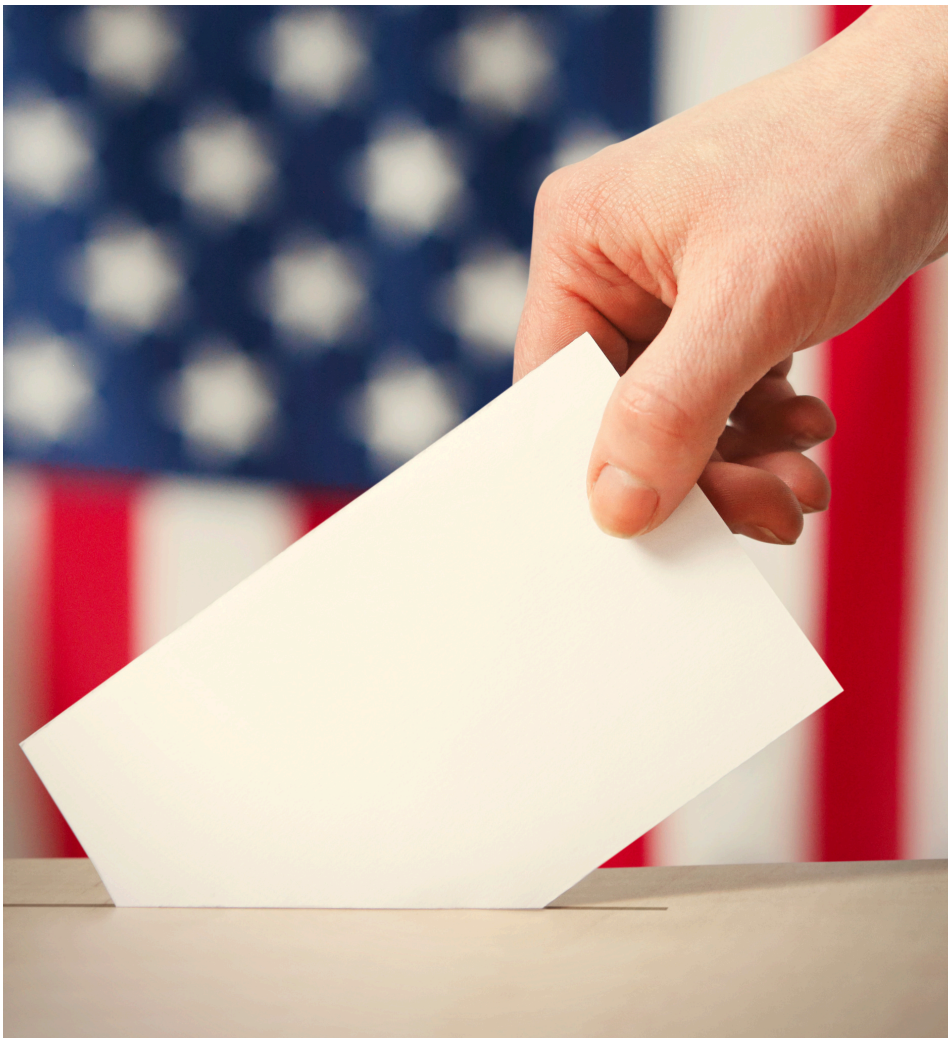
Bob DeVries
Lobbyist, GCSI

This Legislative session has been one of the least productive sessions on record. Extremely narrow majorities in the House and Senate have made it difficult for the majority Democrats to push an aggressive legislative agenda. This trouble was compounded when two democratic members of the House won election to the mayorship of their respective hometowns. Once they resigned to take these roles last November, the House of Representatives stood tied at 54 Democrats and 54 Republicans.

Despite the fact that the partisan balance has been evenly split since November, the Democrats have remained in control of the legislative process. Republicans have repeatedly asked for some sort of temporary power-sharing agreement, but the Democrats were not interested. In protest, the Republicans have not allowed hardly any bills to come to a vote. With the 54-54 deadlock, one Republican would have to join all 54 Democrats to get any bill done. The Republicans have stood firm and declined to offer yes votes on nearly every issue the Democrats put on the table.

On April 16, there were special elections to fill the two vacant House seats. Rep. Elect Mai Xiong, a Democrat from Warren, won election in the 13th District while Rep. Elect Peter Herzberg, a Democrat from Westland, won election in the 25th District. I expect the pace of legislation to speed up now that the Democrats have regained their majority.

This is good news for our top MCRCSIP legislative priority. SB 465, our bill to require motorists to stay back 200 feet from an operating snowplow, will be up for consideration in the House Transportation Committee in the near future. We received unanimous bi-partisan support in the Senate and are hopeful that we will see the same thing in the House.



New MCRCSIP Training

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The audits can be uncomfortable, but being trained in how to manage the interaction will give your employees the tools needed to get through the ordeal.

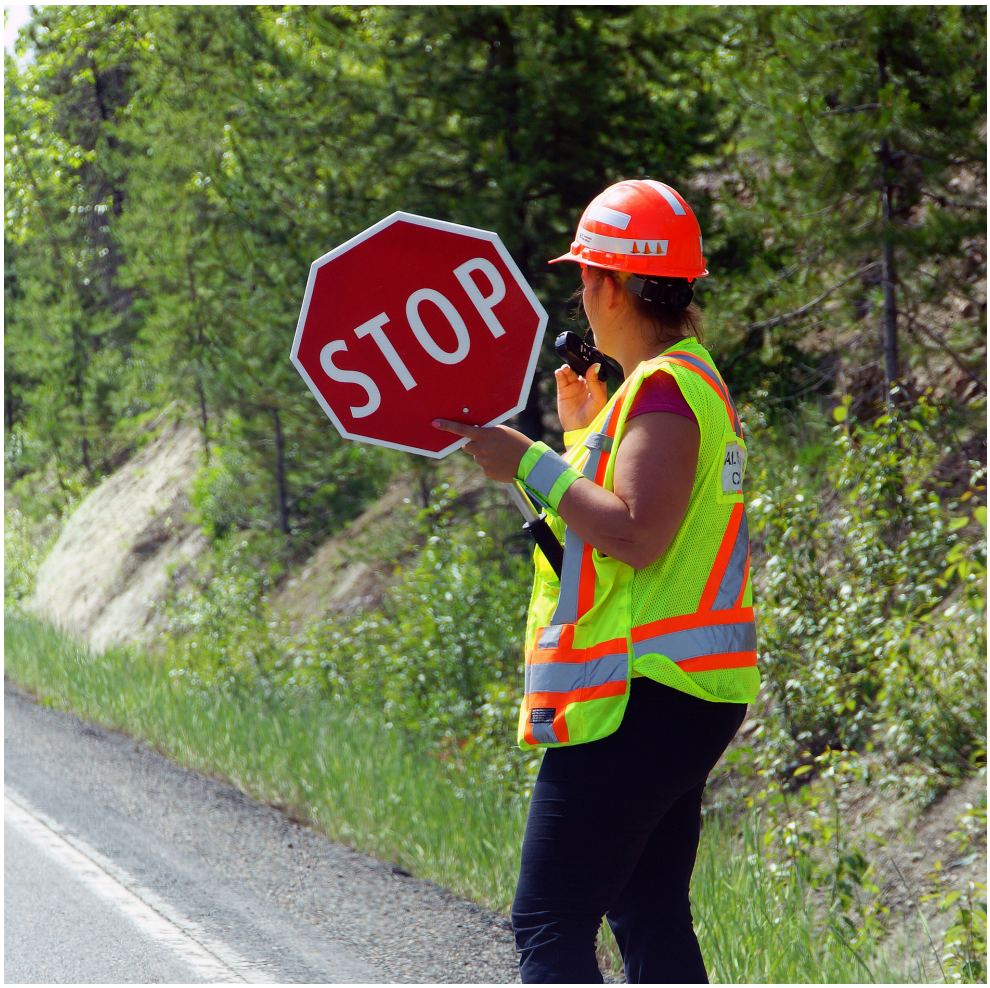
If you are interested in having the program presented to your employees, please reach out to a member of MCRCSIP's loss control team. The program takes about 45 minutes and would be a valuable topic during a safety day or as its own standalone training. We highly encourage you to get it scheduled so that your employees are prepared to handle difficult encounters with the public.

I want to provide one last reminder that MCRCSIP's Loss Control Department offers reasonable suspicion training. All newly employed supervisors of commercial motor vehicle drivers must undergo reasonable suspicion training. We also recommend that supervisors receive a refresher training every three years. If you think you have any supervisors that are in need of reasonable suspicion training, please reach out to a member of the MCRCSIP Loss Control Department to get the program scheduled.

Raise your Expectations for Work Zone Safety:

A guide for supervisors during the road construction and maintenance season.

Mike Phillips
Senior Loss Control Representative, MCRCSIP



We have had more than our share of tragedies in the last few years. As a supervisor, you want to make sure that nothing like this ever ***happens on my watch***, but many of our newer supervisors do not know where to start. Though their hearts may be in the right place, they may not know how to express their concerns to employees in a way that brings lasting change. In this article, I will offer a few suggestions about how you, as a supervisor, can raise your organization's performance in work zone safety this year.

Lead by example. Make sure your employees have all the tools and equipment they need to get the job done. This might include training. MCRCSIP and the state of Michigan have a variety of training resources to ensure that you are in the know. On jobsites, you should be checking traffic control plans to confirm that everything is set up correctly. This also means that you are setting the example by having your beacons on when needed, your seatbelt on, and are wearing all the necessary personal protective equipment.

Give them the glow before you give them the grow. When you are out on the project, assess the quality, production, and safety of the operation. This will usually take about 5 to 10 minutes of observation, which may include driving through the work zone a number of times to really see what is going on. Tell your employees what you like about the operation. If adjustments are needed, make your expectations known. The first step might not be discipline. The employee(s) may need to be properly trained, or they may need to be told how serious you are about enforcing safety standards. If the employee just is not getting it, or if they just do not want to get it, your progressive discipline program may then come into play.

Keep communication open. Talk to your employees and let them know your expectations. Set standards that should be followed for everything you do. Some of these are as simple as using beacons and hi-vis, while others may be much more complex like setting up for Traffic Regulators. Talk about what you are doing and the reasons for it, giving your employees an opportunity to express their concerns.

Live in the real world. Talk with your employees about the hazards created by the motoring public. People are selfish. They make bad decisions. Motorists today are often drunk, distracted, fatigued, overly aggressive, or just bad drivers. We have to account for that when we are establishing safe work zones. There is a lot out there that we cannot control, yes, but there is also a lot that we can do to make our working environment a safer place to be. As a supervisor, that responsibility is in your hands.

MCRCSIP 40th Annual Workshop & Membership Meeting

July 24 & 25, 2024

Soaring Eagle Conference Center
6800 Soaring Eagle Blvd.
Mt. Pleasant, Michigan

REGISTRATION

Registration for the 40th Annual MCRCSIP Workshop & Membership Meeting is now open at www.mcrcsip.org.

For hotel booking, visit www.soaringeaglecasino.com and use Group Code **MCRCSIP072324**.

AGENDA

Tuesday, July 23
5:30 p.m. – Dinner ($20/per person)

Wednesday, July 24
11:30 a.m. to 12:30 p.m. — Group Luncheon
12:30 p.m. to 5:00 p.m. — Keynote Speaker and Workshop
5:00 p.m. — Social Hour
6:00 p.m. — Member Dinner

Thursday, July 25
8:30 a.m. — Business Meeting

ROAD MANAGERS STRATEGY SESSION

(and Private Grand Opening of the NEW MCRCSIP office)

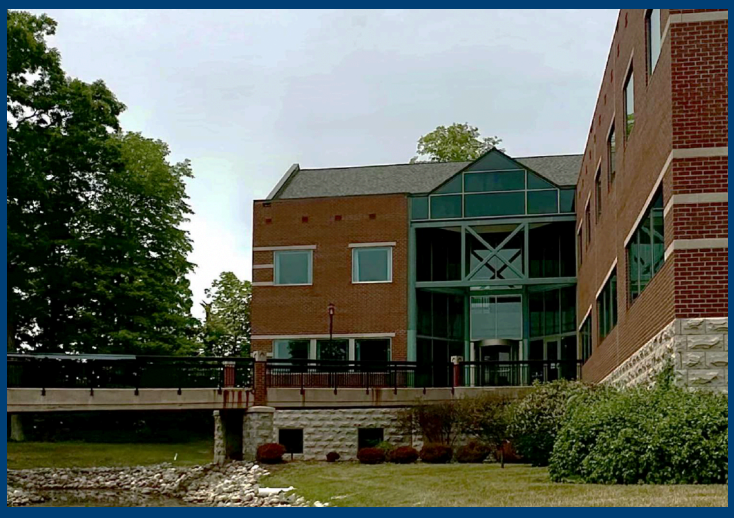
Wednesday, August 14, 2024
1760 Abbey Road
East Lansing, MI 48823

Register: www.mcrcsip.org

We have a block of rooms at the Holiday Inn Express and the Hampton Inn for those of you wishing to stay.

Please reserve your rooms before July 30, 2024.

For more information, please call the MCRCSIP Office at 1-800-842-4971.



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