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Township Law *E-Letter*

TOWNSHIP LAW UPDATE

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The laws that apply to townships are unique and not well understood by ordinary citizens and even most lawyers. These laws are also constantly developing, with new interpretations being handed down by the courts on a regular basis. Some of the most recent developments in this changing body of law are discussed below for the benefit of township officials.

Sale of Medical Marijuana Is Prohibited

After nearly three years of uncertainty, townships are finally getting more and clearer answers to the vexing issues presented by the 2008 Michigan Medical Marijuana Act (MMMA). Most recently, in the first major published Court of Appeals case on the new law, the Court decided that the sale of medical marijuana, including sales from so-called “dispensaries” and patient-to-patient sales of medical marijuana, are ***not lawful*** under the MMMA.

We have been advising townships for some time that such a result was likely, but its confirmation by the Court in a precedential opinion is a great relief for many township officials. This new decision is a real game-changer for the medical marijuana movement. It also changes the approach that most townships should be taking with their medical marijuana ordinances.

As we advised in last month’s edition of the ***Township Law E-Letter***, township regulation should carefully respect federal law, which still makes the possession, use and sale of medical marijuana a federal crime. At the same time, however, many townships are also trying to respect the will of the Michigan voters as expressed at the 2008 election. Although this may seem like walking a tightrope, townships can take some actions to balance these interests.

While no ordinance is “bullet-proof,” here are some steps your township can take to strengthen your regulation of medical marijuana:

Consider including in both your zoning ordinance and your general ordinances a statement that whatever is illegal under federal and state law is illegal in the township, and that nothing in the ordinances is intended to grant immunity from state or federal law.

Your medical marijuana ordinances should include other provisions explicitly demanding that anyone seeking to utilize medical marijuana under the MMMA must strictly comply with that statute’s requirements.

State in your ordinances that any sales of marijuana are prohibited in the township.

As discussed above, a “dispensary” where marijuana is sold to patients or caregivers should not be permitted.

Finally, your ordinances should address the home use and growing of medical marijuana by patients and caregivers. Under the recent Court of Appeals opinion, the medical marijuana movement in Michigan will need to focus on the growing and use of medical marijuana in patients’ and caregivers’ homes. Making this consistent with other residential uses should now be a regulatory priority for township governments. ***State v McQueen Michigan Court of Appeals (August 23, 2011).***

Sign Ordinances Upheld

Townships can regulate signs under either zoning ordinances or general ordinances. Sign regulations contained in zoning ordinances are limited in that they cannot be used to remove prior nonconforming signs that existed before the ordinance was adopted. One advantage of using general ordinances to regulate signs is that such general ordinances are not subject to a nonconforming uses exception. In other words, through a general sign ordinance, a township can eliminate existing nonconforming signs over time. *Albion v CLK Properties*, Michigan Court of Appeals (July 14, 2011).

The Court of Appeals recently rejected constitutional challenges to one township's sign ordinance in an unusual case involving claimed violation of a business owner's freedom of speech. The Court easily approved the sign regulations that dealt with the size, location, lighting and design of signs, because those requirements were "content neutral."

The Court was more concerned with certain exceptions in the sign ordinance, which might be interpreted as favoring some signs based on the content of the messages they contain. The exceptions applied to street signs, holiday and civic displays, municipal signs, United States, Michigan and corporate flags, real estate flags, memorial signs, real estate "for sale" signs, garage sale signs, "now hiring" signs, and temporary election signs. After reviewing many other case authorities, the Court concluded that the exceptions were also "content-neutral," and were narrowly tailored to achieve significant government interests, so they did not violate the owner's free speech rights. *Sacklah Investments v Northville Charter Township*, Michigan Court of Appeals (August 9, 2011).

Inspection Fees Must Be Cost-Based

Townships often charge inspection fees for a number of purposes, from building permits to

rental structures to other regulated uses. It is reasonable to charge such inspection fees, provided that they are proportionate to the direct and indirect municipal costs of performing the inspection services. However, if they exceed those direct and indirect costs, and become revenue-raising measures, they may be unlawful taxes under the Headlee Amendment. *Wolf v Detroit*, Michigan Supreme Court (May 18, 2011).

Costs of Responding to FOIA Requests

The Freedom of Information Act (FOIA) allows townships to charge fees to requesters, including "a fee for a public record search, the necessary copying of a public record for inspection, or for providing a copy of a public record." This fee is statutorily limited to "actual mailing costs, and to the actual incremental cost of duplication or publication including labor, the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information." Further, in "calculating the cost of labor incurred in duplication and mailing and the cost of examination, review, separation, and deletion . . . a public body may not charge more than the hourly wage of the lowest paid public body employee capable of retrieving the information necessary to comply with a request. . . . A public body shall establish and publish procedures and guidelines to implement this subsection." MCL 15.234.

As long as the township complies with the above requirements, it can properly charge a requester for the costs as computed according to the statute. The township is not limited to charging for extraordinary costs, or costs incurred beyond normal working hours. It is proper to charge any costs incurred as above by township employees.

According to MCL 15,234(3), "A fee shall not be charged for the cost of search, examination, review, and the deletion and separation of exempt from nonexempt information as provided in section 14 unless failure to charge a fee would result in unreasonably high costs to the public body because of the nature of the request in the particu-

lar instance, and the public body specifically identifies the nature of these unreasonably high costs.” A cost is “unreasonably high” under this subsection if the cost differs from costs for typical FOIA requests. Since typical FOIA requests only involve a few pages and very little labor cost, most larger FOIA requests will allow the township to charge its labor costs as “unreasonably high costs.” Remember, however, that to be able to charge costs under this subsection, the township must first “establish and publish procedures and guidelines to implement this subsection.” *Bloch v Davison Community Schools*, Court of Appeals (April 26, 2011).

Proper OMA Meeting Notices and Minutes

The Open Meetings Act (OMA) contains specific requirements for notices of meetings. For a special meeting, the notice must be posted at least 18 hours in advance of the meeting. The law does *not* require that the notice must be posted for 18 *business* hours before the meeting, or be posted in a place where it will be *accessible to the public for 18 continuous hours* prior to the meeting. In other words, it is acceptable if the notice is posted inside the township hall on a public bulletin board, as long

as the posting is made at least 18 actual hours before the special meeting is held.

The OMA also contains requirements for minutes of meetings. The minutes must, at a minimum, show the “date, time, place, members present, members absent, any decision made at a meeting open to the public, and the purpose or purposes for which a closed session is held. The minutes shall include all roll call votes taken at the meeting.” If the township board makes a decision at the meeting, including a decision to settle litigation, that decision must be reported in the minutes of the meeting, even if the settlement may have been discussed in a closed session. *CPARD v Northville Charter Township*, Michigan Court of Appeals, (May 26, 2011).

We Can Help

The lawyers of **Fahey Schultz Burzych Rhodes PLC, Your Township Attorneys**, are very familiar with the unique laws that apply to townships. We make it our business to stay current and informed on this constantly developing law for the benefit of our township clients. We regularly guide townships through difficult issues and disputes. Please contact us if you need assistance or have questions.

Fahey Schultz Burzych Rhodes PLC, Your Township Attorneys, is a Michigan law firm specializing in the representation of Michigan townships. Our lawyers have more than 130 years of combined experience in township law, and have represented more than 130 townships across the state of Michigan. This publication is intended for our clients and friends. This communication highlights specific areas of law, and is not legal advice. The reader should consult an attorney to determine how the information applies to any specific situation.



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