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## Township Law *E-Letter*

# Goodbye “Emily!”: A Review of 2018 Lame Duck Laws Affecting Townships

*As 2018 came to a close, the Legislature rapidly passed a number of new laws, many of which impacted Michigan’s many townships. These laws addressed issues ranging from anonymous FOIA requests from requestors like “Emily,” to fireworks regulations, assessing, and even drones! This **E-Letter** is designed to update you on these changes, so you can be sure that you are compliant with the latest in Michigan township law.*

### “EMILY’S” REQUEST FOR VOTED BALLOTS SPARKS CHANGES TO FOIA

Since “Emily” made her request for records relating to the November 2016 presidential election, many townships have been left in a state of limbo as to the next step. This uncertainty is largely due to the fact that “Emily” never followed through with her FOIA request by paying a good-faith deposit for the requested public records. Thankfully, the Legislature has amended FOIA to better address both this specific request, and similar requests in the future.

The Governor signed Public Act 523 of 2018 into law on December 28, 2018 with immediate effect. This Act amends FOIA in a way that significantly impacts how townships can process FOIA requests. First, anonymous FOIA requests (like “Emily’s”) are now prohibited. A valid FOIA request must now contain the requestor’s: (1) complete name; (2) address written in compliance with United State Postal Service Standards; and (3) telephone number or e-mail address. Corporate entities who request records under the FOIA must provide this information for a company’s agent. A request that does not contain this information may be denied as invalid.

PA 523 also amends the FOIA to allow townships to terminate FOIA requests when that request has been abandoned. As a reminder, townships can require a FOIA requestor to submit 50% of the costs to fulfill a FOIA request before processing that request when the estimated costs of fulfilling a request exceed \$50.00. MCL 15.234(8). Before PA 523, there was no limit on the time a requestor had to provide the requested deposit, theoretically requiring townships to respond to requests months or years after the initial request had been made. This burden was only increased by the lack of clarity surrounding township’s responsibility to retain the records subject to the FOIA request. To address this oversight, PA 523 amended FOIA to allow townships to consider a request “abandoned” if a good-faith deposit is not received within 48 days after the good-faith deposit is requested. If the good-faith deposit is not paid

within that period, the requestor would then be obligated to file a new FOIA request to obtain the requested records. MCL 15.234(14). To take advantage of this amendment, however, the good-faith deposit request must specify that the request will be considered abandoned unless a deposit is received within 48 days from the date the letter is mailed.

These amendments allow Michigan townships to address both “Emily’s” request, and similar requests moving forward. Township’s still dealing with “Emily’s” request should provide Emily with an abandonment notice, informing her that a failure to pay the requested deposit within 48 days will result in her request being considered abandoned. MCL 15.234(14). Townships should also amend their existing FOIA procedures, guidelines, and public summary, as well as any “form” responses, to include language that addresses the abandonment of a request.

The following is an example of the type of language you could use to address Emily’s FOIA request. Please note that this language is not legal advice and may not be appropriate for every situation. Thus, you should consult with your township attorney before proceeding.

The Township previously responded to your Freedom of Information Act (“FOIA”) request for certain 2016 election materials, including a request for a good faith deposit (see attached Township response). We have not received your good faith deposit. Unless the Township receives your good faith deposit within forty-eight (48) days from the date of this letter, the Township will consider your FOIA request abandoned under MCL 15.234(14).

The Township has no duty to fulfill an abandoned FOIA request. *Id.* The Township may destroy previously-requested public records following applicable state and federal retention schedules. Once an FOIA request is abandoned, a new FOIA request is required to obtain any previously-requested public records that have not been destroyed.

## **UPDATE ON MEDICAL MARIHUANA ZONING CASES – SUPREME COURT TO CONSIDER APPEAL BY TOWNSHIP**

In our August **E-Letter**, we discussed two cases limiting local control of marihuana activity under the 2008 MMMA. In one case, where the Court of Appeals concluded that the MMMA does not permit municipalities to regulate patients and caregivers through zoning permits or zoning districts, the Supreme Court confirmed it will consider the appeal by the Township. The Supreme Court may take several different actions, but hopefully will issue a decision more beneficial to Townships and reasonable, local zoning control. The case is *DeRuiter v Byron Twp*, while the other case discussed in August, *York Charter Township v Miller*, is held in abeyance pending the outcome of *DeRuiter*. We will continue to follow developments closely. You can read our August E-Letter on marihuana here: <https://www.fsbrlaw.com/Resources/Articles/ID/556/Limits-of-Medical-Marihuana-Regulation-and-Legalization-of-Recreational-Marihuana> .

## **NEW OPEN MEETINGS ACT AMENDMENTS ALLOW TELECONFERENCING IN LIMITED CIRCUMSTANCES**

The most-recent legislative session also amended the Michigan Open Meetings Act (OMA) to allow teleconferencing in limited circumstances. Public Act 485 of 2018 now allows members of a public body engaged in military service to appear using teleconferencing meeting certain requirements.

PA 485 becomes effective on March 29, 2019, and townships should be aware that certain procedures must be established by that date. Specifically, townships must adopt procedures to accommodate members of a public body in military service that: 1) allow the absent member to participate in the business of the public body, with 2-way communication preferred; 2) provide the public notice of the member's absence, and instructs the public as to how that member may be contacted in advance of the meeting.

Although it is unfortunate the Legislature did not take advantage of the opportunity to allow for teleconferencing in a broader range of circumstances (or clarify whether this enactment now makes any other teleconferencing unlawful under the OMA), it is encouraging that members of the military will no longer be effectively barred from serving on public bodies. Please be sure to adopt policies consistent with this amendment to ensure you remain compliant with the OMA!

## **AMENDMENTS TO THE FIREWORKS SAFETY ACT INCREASES LOCAL CONTROL OVER FIREWORKS**

The latest lame duck session also significantly revised regulation of fireworks in Michigan through HB 5939, 5940, and 5941. Prior to these amendments, the Michigan Fireworks Safety Act (MCL 28.451 et seq.) prohibited municipalities from regulating the "ignition, discharge, and use of consumer fireworks" on the day preceding, the day of, and the day following a national holiday. MCL 28.457(2). HB 5940, however, amended this restriction. Now, a township's fireworks ordinance can regulate the use of consumer fireworks on all days except:

- (1) New Year's Eve until 1:00AM on New Year's Day;
- (2) 11:00AM on the Saturday immediately preceding Memorial Day until 11:45PM on the following Sunday;
- (3) All dates from June 29 to July 4, between 11:00AM-11:45PM;
- (4) 11:00AM on July 5 (if a Friday or Saturday) until 11:45PM; and
- (5) 11:00AM the Saturday and Sunday immediately preceding Labor Day until 11:45PM.

Other than these times, however, a township may freely restrict, or even forbid, the discharge of consumer fireworks. The penalty for violating a local fireworks ordinance has also been increased to \$1,000 for each violation. *Id.*

The Legislature also amended the Fireworks Safety Act to add language allowing local governments to, after consultation with the Department of Natural Resources, prohibit the use of fireworks when dangerous burning conditions exist. If those conditions (as determined by the DNR) exist, the head of a

township fire department can restrict or ban the use of fireworks, even if that ban overlaps with one of the holiday periods described above. Furthermore, local officials can ban fireworks if a dangerous or emergency condition exists in a particular instance.

If your township has adopted a fireworks ordinance, you should be sure to update your ordinance to account for these changes.

## **NEW REGULATIONS HOVER OVER DRONE USE IN MICHIGAN**

The advent of drones has led many townships to take advantage of the unique opportunities they provide, particularly in a code enforcement context. Public Act 444 of 2018, however, made a few tweaks to drone law that townships should be aware of before using a drone.

PA 444 has clarified that, if a drone operator commits a criminal offense using a drone, he or she is responsible for that offense. Although there are a variety of criminal laws that could be violated with a drone, the most common issue for townships will be the risk of committing criminal trespasses while using a drone for code enforcement activities. Thus, it is more important than ever to discuss your drone use with your township attorney!

Public Act 455 of 2018 also introduced new drone regulation by making it a felony to “knowingly and intentionally” use a drone in a manner that interferes with a key facility, a correctional facility, or a law enforcement facility. Key facilities include chemical manufacturing facilities, refineries, utilities, water facilities, gas and liquid gas facilities, transportation facilities, telecommunications facilities, and various other manufacturing or storage facilities. See MCL 750.552c. Operators who violate this statute are guilty of a felony punishable by imprisonment for not more than 4 years and/or a fine of not more than \$2,500.00.

Given the criminal ramifications of these new drone laws, townships should be extremely careful to ensure that any official using a drone as part of his or her duties is formally trained in its appropriate usage. Townships should also keep in mind that many of its facilities are now also protected against interference from drones and should work with law enforcement to ensure that violators of these new laws are appropriately prosecuted.

## **ASSESSING AUDITS AND CERTIFICATIONS**

The lame-duck legislature also adjusted the laws governing the certification and auditing of assessors. The amendments in the enabling legislation, Public Act 660 of 2018, were extensive, but there are a few highlights worth further discussion.

In addition to clarifying assessors’ certification requirements, Public Act 600 granted the State Tax Commission the authority to audit local assessing offices beginning December 31, 2021. MCL 211.10e. These audits will determine, among other things, whether townships:

- (1) Employ or contract with an appropriate assessor of record;
- (2) Use a permitted computerized mass appraisal system;
- (3) Have and follow a published policy that makes the assessor's office reasonably accessible to taxpayers;
- (4) Provide taxpayers online access to assessment services;
- (5) Ensure that support staff is sufficiently trained to respond to taxpayer inquires; and
- (6) Require their assessors to maintain their certification levels. MCL 211.10g.

The assessing bill also allows the governing bodies of two or more contiguous cities or townships to form a single board of review by agreement. MCL 211.28(6).

Townships should begin working with their assessors and township attorney to ensure that all proper procedures are in place prior to 2021, when audits will begin. Townships should also consider whether it would be beneficial to share a board of review with their neighbors, as that may promote greater efficiency and expertise at a lower cost.

## **NEW ELECTION REGULATIONS**

The lame-duck session also brought about some minor changes to Michigan's Election Law, MCL 168.1 et seq. Public Act 654 of 2018 (amending MCL 168.349(2)), a candidate for township office in a primary election may now pay a filing fee of \$100.00 to the township clerk in lieu of filing a nominating petition. As such, township clerks should expect to see far fewer nominating petitions in the future! Be aware, however, that candidates who are nominated, and candidates who receive the second highest number of votes must have their filing fees refunded. If 2 or more candidates tie as having the second highest number of votes, each will receive \$50.00. All other candidates must be notified that their deposits are forfeited, and those deposits will then be credited to the township's general fund.

## **CONCLUSION**

As you can see, the Legislature was certainly busy at the end of last year! Be sure to check your township's ordinances to ensure that you are up-to-date with these latest changes!

**-- Christopher Patterson and Kyle O'Meara**

*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 150 years of experience in township law and have represented more than 150 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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