DICKINSON WRIGHT'S

# Municipal LEGALNEWS

**September 2016**

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## NEW MEDICAL MARIJUANA LEGISLATION

On September 21, Governor Snyder signed a package of bills (2016 PA 281-283) that significantly expands the types of medical marijuana facilities permitted under state law, and establishes a licensing scheme similar to the scheme for liquor licenses. Among other things, the legislation:

1. Legalizes the medical use of marijuana-infused products, commonly known as "edibles," for purposes of state law.

2. Creates the Medical Marihuana Licensing Board within the Michigan Department of Licensing and Regulatory Affairs (LARA) to issue licenses for various medical marijuana facilities.

3. Requires an annual license for any of the following entities to operate a marijuana facility:

   - Growers, meaning licensees that cultivate, dry, trim, or cure and package marijuana for sale to a processor or provisioning center. Registered patients and primary caregivers who lawfully cultivate marijuana in the quantities and for the purposes permitted under the Medical Marihuana Act are not considered "growers" under the new legislation.

   - Processors, meaning licensees that purchase marijuana from a grower and extract resin from the marijuana or create a marijuana-infused product for sale and transfer in packaged form to a provisioning center.

   - Provisioning centers, meaning licensees that purchase marijuana from a grower or processor and sell, supply, or provide marijuana to patients, directly or through the patient's caregiver.

   - Secure transporters, meaning licensees that store marijuana and transport marijuana between marijuana facilities for a fee.

   - Safety compliance facilities, meaning licensees that receive marijuana from a marijuana facility or primary caregiver and test it for contaminants and other substances.

4. Allows municipalities to choose whether to allow any of these marijuana facilities within their jurisdictions. If the municipality takes no action, none of the facilities are allowed. A municipality that wishes to allow these facilities must enact an ordinance explicitly authorizing them.

5. Authorizes municipalities to charge an annual fee of up to $5,000 on licensed marijuana facilities to defray administrative and enforcement costs.

6. Authorizes municipalities to adopt ordinances relating to marijuana facilities within their jurisdiction, including zoning ordinances.

7. Prohibits municipalities from imposing regulations regarding the purity or pricing of marijuana or interfering or conflicting with statutory regulations for licensing marijuana facilities.

8. Requires municipalities to provide to the Medical Marihuana Licensing Board within 90 days after notice that a license application was filed: (a) a copy of any ordinance authorizing the marijuana facility, (b) a copy of any zoning regulation applicable to the facility, and (c) a description of any previous medical-marijuana related ordinance violation.

9. Exempts from FOIA disclosure any information a municipality obtains in connection with a license application.

10. Requires the state to establish a "seed to sale" computer tracking system to compile data regarding marijuana plants throughout the chain of custody from grower to patient. The system will be able to provide this data in real-time to local law enforcement agencies.

Notably, these bills do not require a state license to operate as a primary caregiver under the Medical Marihuana Act, nor do they allow municipalities to prohibit operation as a primary caregiver. The existing regulatory scheme regarding primary caregivers remains in effect.

## OIL AND GAS DRILLING

In recent years, oil and gas companies have increasingly used hydraulic fracturing—known as "fracking"—to extract hard-to-reach deposits from mineral wells. Concern over this controversial technique has brought mining activities into the public spotlight and generated a significant amount of litigation. A number of important legal issues are now being addressed by the courts.

One recent case involved a municipal contract allowing a private company to extract mineral deposits from under a city park. A group of local activists challenged the contract on the grounds that it constituted a "sale" or "lease" of park land that required voter approval pursuant to state law and the city charter. In *Don't Drill the Hills v City of Rochester Hills*, the Michigan Court of Appeals rejected those challenges, finding that mineral resources located under park land are distinct from the park itself.

Another pending case involves a local effort to regulate mining activities. In *City of Southfield v Jordan Development Company, LLC*, a circuit court recently dismissed a lawsuit that sought to enjoin mining activities that violated a city zoning ordinance and a city-wide moratorium on new drilling sites. The court specifically ruled that the city's regulations were preempted by state law, which authorizes the Michigan Department of Environmental Quality to issue permits for oil and gas drilling. The city has appealed the circuit court's ruling, which could result in a significant precedential decision on this issue.

## SIGN OF THE TIMES: BILLBOARD ORDINANCE UPHELD

In *International Outdoor, Inc v City of Livonia*, the Michigan Court of Appeals upheld a zoning ordinance provision banning new billboards. The court held that the ordinance does not "zone out" a legal business in violation of state law, because it did not prevent the advertising companies from soliciting and serving clients within the city, but instead only prohibited a single form of advertising. The plaintiff also failed to establish a need for billboards within the city, relying in part on evidence that surrounding communities permitted billboards. The court stated that, in order to establish a cause of action under the Michigan Zoning Enabling Act, the challenger would have to demonstrate "public need for new billboards rather than a demand for those billboards by advertisers."

While this decision is a significant victory for municipalities, it does not provide blanket authority to prohibit billboards or other uses through a zoning ordinance. Instead, the legality of these ordinances depends on the circumstances in the community. Municipalities must cautiously evaluate the relative demand and existing supply of the use.

## FREEDOM OF INFORMATION ACT: PERSONAL EMAIL ACCOUNTS AND OTHER ISSUES

There are three recent FOIA decisions of interest to Michigan municipalities. In *Competitive Enterprise Institute v OSTP*, the DC Circuit held that work-related emails on a government official's private email server are public records under the federal FOIA statute. The court rejected the government's argument that the FOIA only requires disclosure of documents that the government directly controls, finding that such an argument would undermine the purpose of the FOIA. While this case is not binding on Michigan courts, it might influence decisions under the Michigan statute. Government employees and officials should be aware that their work-related emails could be subject to disclosure even if sent on private servers.

In *Cramer v Village of Oakley*, the Michigan Court of Appeals held that municipalities are not required to completely fulfill a FOIA request within the statutory deadlines, so long as they send a letter indicating whether the request is granted or denied. This means that, in some circumstances, municipalities can take more than 15 business days to complete large records searches. However, the court emphasized that municipalities must still fulfill requests within a reasonable time, or else risk statutory penalties for "arbitrary and capricious" delay.

Finally, in *Detroit Free Press Inc. v DOJ*, the Sixth Circuit reversed its own precedent and held that federal agencies may withhold booking photographs of criminal suspects under the "personal privacy" exemption of the federal FOIA statute. This decision does not have an immediate impact on Michigan municipalities, since Michigan courts have held that booking photographs are subject to disclosure. However, the Sixth Circuit's decision might prompt Michigan courts to reexamine that precedent in future cases.

## ELECTION LAW – REVIEWING CANDIDATE FILINGS

In *Berry v Garrett*, the Michigan Court of Appeals held that that a candidate for office who fails to indicate his or her voting precinct on the "affidavit of identity" required by the Michigan Election Law is not eligible to be placed on the election ballot. The court interpreted the relevant provisions of the statute as requiring the election officer to verify that the affidavit satisfied the statutory requirements, and to deny ballot access if the affidavit failed to satisfy those requirements. Accordingly, the court issued a writ of mandamus be issued to compel the election officer to remove ineligible candidates from the ballot.

While this case specifically dealt with the precinct-number requirement, its reasoning would seem to apply to all of the statutory requirements in Section 558 of the Election Law, which include a statement that the candidate is a citizen of the United States, the candidate's number of years of residence in the state and county, and other information that may be required to satisfy the officer as to the identity of the candidate. Election officers should carefully review affidavits of identity to ensure that these requirements are met before placing a candidate's name on the ballot.

## DEPARTMENT OF LABOR INCREASES MINIMUM SALARY LEVEL FOR EXEMPTION FROM OVERTIME REQUIREMENTS

The U.S. Department of Labor has issued a final rule regarding qualification for overtime exemptions. The final rule increases the salary level for employees to qualify for the executive, administrative, and professional exemptions (EAP) from the Fair Labor Standards Act. Under the new rule, employers must pay overtime to EAP employees who earn less than $47,476 annually, representing a dramatic increase from the previous threshold of $23,600 annually. Beginning on January 1, 2020, the salary threshold will update automatically every three years to the 40th percentile of full-time salaried workers in the lowest-wage U.S. Census region. The final rule also increases the total annual compensation level above which Highly Compensated Employees are ineligible for overtime to $134,004 annually, also a dramatic increase from the current threshold of $100,000 annually. Despite the increases to the annual threshold amounts, the final rule made no changes to the "duties" test for employees to qualify for the EAP exemptions.

## OTHER APPELLATE DECISIONS OF NOTE:

*Associated Builders and Contractors v Lansing* (Mich): The Michigan Supreme Court held that home rule cities have the authority to enact an ordinance requiring that a prevailing wage be paid on public construction projects, overturning a prior decision as inconsistent with the broad powers given to cities in the 1963 Michigan Constitution.

*Phillips v Snyder* (6th Cir): A federal appeals court rejected numerous challenges to Michigan's emergency manager statute, 2012 PA 436, including claims that it violates residents' constitutional right to elect local officials and enjoy a representative form of government.

*Charter Twp of Washington v Romeo District Library* (Mich App): Because state law does not provide for municipal oversight of a library district board's budget or expenses, the Michigan Court of Appeals determined a township cannot lawfully require a district library to submit its annual budget to the township board for approval.

*Charter Twp of White Lake v Ciurlik Enterprises* (Mich App): The Michigan Court of Appeals held that a stand-alone commercial composting facility is not exempt from local zoning under the Right to Farm Act because it does not produce "farm products" as defined in the Act.


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