



## OLSON BZDOK & HOWARD

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### MEMORANDUM

**TO:** Onekama Village Council  
**FILE NO.** 5666.00  
**FROM:** Christopher Bzdok and Kate Redman  
**DATE:** July 27, 2012  
**RE:** Voting Procedure for Village Disincorporation

You asked that we provide guidance on whether disincorporation must be approved by the voters of the Township and the Village, separately, or whether it is sufficient if it is approved by the combined tally of all votes from both the Village and Township. Our recommendation is that the Village and Township votes should be combined and approval by the voters of each is not required. Notably, whether the village and the township are required to hold separate election procedures is a different question, but, even if they were, it would not change that disincorporation still must only be approved by a combined vote in the Township and Village. The analysis section of this memo will discuss each of these issues in greater depth.

This is a confidential memorandum that is protected by client-attorney privilege. However, the Village Council or its chosen representative may choose to waive the attorney-client privilege and make this document available to the public.<sup>1</sup>

### ANALYSIS

The Michigan Constitution grants the Legislature the authority to provide laws governing the incorporation of villages, which includes the authority to adopt laws governing municipal boundary

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<sup>1</sup> If the Village Council has directed a specific officer to manage its legal decisions and/or decisions regarding the confidentiality of documents, either by contract or ordinance, then that officer would be responsible for the decision.

changes and presumably laws governing disincorporation.<sup>2</sup> As a result, the disincorporation process is governed by the laws adopted by the Legislature unless the law conflicts with another provision of the Constitution. Therefore, this memo will discuss (1) what is required by the statute and (2) whether the statute is consistent with the Constitution.

## I. STATUTORY REQUIREMENTS FOR DISINCORPORATION

**Approval of Disincorporation Under the General Law Village Act.** The disincorporation of a village is governed by the General Law Village Act (the "Act"). Under the Act, the disincorporation of a village is initiated when a petition signed by not less than 15% of the registered electors of the village is filed with the township clerk, who verifies the sufficiency of the petition. At the Village Council's first meeting after the petition is verified, it may choose to proceed with the development of a disincorporation plan under sections 23a through 23i of the Act. If the Council does not choose to do so, or, as happened here, the plan is not approved, then the question of disincorporation is presented to the voters according to the election procedure in section 18a of the Act. Among other things, section 18a provides:

(4) . . . [T]he question of the disincorporation of the village shall appear on the ballot at the next general or special election to be held in the village, subject to the Michigan election law, 1954 PA 116, MCL 168.1 to 168.992. The township clerk shall prepare the ballot language, in substantially the following form:

"Shall incorporation of the village of \_\_\_\_\_ be vacated?

( ) Yes

( ) No".

(5) The county election commission of the county in which the greatest number of electors of the village reside shall provide ballots for the election.

(6) The clerk and election officials of each township into which the village is proposed to be disincorporated shall conduct the election on the proposed disincorporation in the village and the portions of the township outside the boundaries of the village, respectively.

\* \* \*

(8) The results of the election on the proposed disincorporation shall be canvassed by the board of canvassers of the village and the board of canvassers of each township in which the village is located.

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<sup>2</sup> 1963 Mich Const At 7, Sec 21; *Hempel ex rel Michigan Limestone & Chem Co v Rogers Twp*, 313 Mich 1, 9 (1945)..

(9) The disincorporation of the village shall take place under this section only if 2/3 of the electors voting on the questions vote "yes."

The question here is whether Section 18a(9) requires approval of 2/3 of *each* the village and the township, separately, or 2/3 approval of the aggregate of the village and the township. The most straight-forward reading of this statute is that it requires 2/3 of the aggregate. Section 18a(6) provides that the township clerk and election officials will conduct "the election" in the village *and* the township, and Section 18a(9) requires 2/3 approval of "the electors voting on the questions." Section 18a only contemplates "the" election, and Section 18a(9) also does not distinguish between township and village electors for purposes of the 2/3 requirement.

This reading is further reinforced by contrasting it with another section of the same Act in which the Legislature did clearly provide for separate tallies of township and village voters:

The proposed disincorporation is approved by the electors and shall take place pursuant to the plan adopted under section 23e of this chapter<sup>1</sup> only if a majority of each of the following votes cast on the question of the proposed disincorporation are in favor of the disincorporation:

- (a) The votes cast by electors of the village.
- (b) The votes east by the electors of each township into which the village is proposed to be disincorporated, counted separately, and excluding votes cast by residents of the village.<sup>3</sup>

In other words, it is clear that the Legislature knew how to indicate that separate approval is required by both the village and the township, and it chose not to include that requirement in Section 18a. Accordingly, the plain language of the statute does not appear to require separate tallies of the village or township votes.

**Legislative History.** This reading of the statute is also supported by the Act's legislative history.<sup>4</sup> The Act in its substantially current form was adopted in 1998. Under the pre-1998 statute, *only* the village electors voted on disincorporation, and it would pass only "[i]f a 2/3 majority of the

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<sup>3</sup>MCL 74.23h(1).

<sup>4</sup> Michigan courts generally look at legislative history only as a last resort to interpret ambiguous language, but it is still informative to consider it here.

village votes canvassed are in favor of vacating . . . .”<sup>5</sup> In 1998, the original bill passed by the House rejected the requirement that only village approval was required and instead contemplated that approval by a majority of both the village and the township would be required.<sup>6</sup> However, the bill proposed by the Senate rejected the idea that a majority of each the township and the village would have to approve disincorporation. Instead, the Senate Bill, which is substantially the same as the law is today, created two separate paths to disincorporation, one which required approval by the village and the township separately, and one which required approval by both areas combined. The House Legislative Analysis Section summarized the senate-amended bill that was eventually adopted into law as follows in relevant part:

New provisions would be provided for the disincorporation of a village. Two procedures would be available. In either case, the bill would require that to initiate disincorporation, a petition signed by at least 15 percent of the registered voters in the village be filed with the village clerk. . . . Once the petition was determined to be sufficient, the village council could either 1) allow the question of disincorporation to go directly to the ballot at the next general or special election or 2) decide to form a disincorporation commission to develop a disincorporation plan, which would then be put on the ballot. *Under the first procedure, disincorporation would require a “yes” vote from at least two-thirds of the electors voting on the question.*

Under the second procedure, the village council could decide by resolution at the next meeting after the petition was found sufficient to form a disincorporation commission . . . . The plan would be submitted to the village council and then to the township board of each affected township for ratification. *If each body ratified the plan, the question of disincorporation would be submitted to voters and would require approval by a majority of the voters of the village and a majority for the voters of each township involved. (The votes of village residents would not be taken into account in determining a majority in a township.) If the plan was not ratified, the question of*

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<sup>5</sup>See HB 5437, as passed by the Senate, on June 10, 1998, available at: [www.legislature.mi.gov/documents/1997-1998/billengrossed/House/pdf/1997-HEBS-5437.pdf](http://www.legislature.mi.gov/documents/1997-1998/billengrossed/House/pdf/1997-HEBS-5437.pdf).

<sup>6</sup> The first proposed amendment would have required *two* elections: first, *only* the village would hold an election on the question of disincorporation, and “[i]f a majority of the electors voting on the question vote ‘yes’”, then a disincorporation plan would be written and would have to be approved by “a majority of each “the votes cast by the electors of the village” and “the votes cast by the electors of each township . . .” See HB 5437, as passed by the House, on February 4, 1998, [www.legislature.mi.gov/documents/1997-1998/billengrossed/House/pdf/1997-HEBH-5437.pdf](http://www.legislature.mi.gov/documents/1997-1998/billengrossed/House/pdf/1997-HEBH-5437.pdf).

*disincorporation would still be submitted to voters, but in the manner prescribed for disincorporation without the approval of a commission (which requires two-thirds voter approval).<sup>7</sup>*

This summary of the law, like the statute itself, makes clear that while approval of a disincorporation plan requires approval of both the village voters and the township voters, separately, the procedure under Section 18a in contrast “would require a ‘yes’ vote from at least two-thirds of the electors voting on the question.”

In light of the foregoing, it is our recommendation that the results of the election should be based on a vote tally that combines the votes in the Township and the Village.

**Separate Election Proceedings.** A separate question is whether the statute requires the Township and the Village to hold separate election proceedings. This is a more difficult question. Our recommendation is that it does not require separate proceedings, but it is important to keep in mind that even if separate proceedings were required, it would not mean that disincorporation requires separate approval by the Township and the Village.

It is more ambiguous whether the Legislature intended to require separate election proceedings. There are two main subsections of 18a that relate to this question. First, the use of the word “respectively” in Section 18a(6) could be read to mean that the township clerk and election officials will respectively, i.e., separately, conduct the election in (a) the village and (b) the portions of the township outside the village, which would require two separate election procedures. The more likely reading of this section, however, is that *each township* in which the village will be disincorporated will respectively, i.e. separately, conduct the election for the portion of the village within the boundaries and the outlying township areas. This reading is more consistent with the statute as a whole, given that the results only need be counted in aggregate, and also more consistent with how elections are conducted in townships and villages under Michigan Election Law.

Second, the statute states that the “results of the election on the proposed disincorporation shall be canvassed by the board of canvassers of the village and the board of canvassers of each township in which the village is located.” This could, in practice, require that the votes of township and village residents be kept separate, but there is no practical effect to this section given that here the duties of these bodies are assigned to the county board of canvassers.<sup>8</sup> But even if they did exist, the fact that votes are canvassed by different bodies does not mean that they are counted separately for determining the outcome of election. As happens in many if not most elections, the outcome of the election can be determined by aggregating votes from multiple canvassing boards, if that is how law provides that the outcome should be determined. Therefore, as a practical matter, this section

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<sup>7</sup> See the Second Analysis of HB 5437/5438, dated July 21, 1998. Available at: [www.legislature.mi.gov/documents/1997-1998/billanalysis/House/pdf/1997-HLA-5437-B.pdf](http://www.legislature.mi.gov/documents/1997-1998/billanalysis/House/pdf/1997-HLA-5437-B.pdf).

<sup>8</sup> MCL 168.24a(1) and (6).

no longer requires separate voting procedures, and it also does not impact the determination of how the outcome of the election is determined.

## II. CONSTITUTIONAL LIMITATIONS

As a final note, this memo will quickly address the constitutionality of the statute. We recommend that it is most likely to be considered constitutional.

The United States Supreme Court and Michigan courts have recognized that the Legislature has broad discretion to determine how local governments are formed, expanded, or disbanded, and citizens have no right in the unaltered or continued existence of a municipality.<sup>9</sup> However, if the Legislature provides that local governments are organized by votes, the voting procedures must not violate provisions of the Constitution, such as the equal protection clause. Under case law interpreting the Equal Protection Clause of the Michigan and federal Constitutions, if the Legislature distinguishes between township and village voters for purposes of voting, there must be legitimate differences between the interests of those voters, but courts largely defer to the Legislature.<sup>10</sup>

Michigan courts have made clear that there is no single "right" procedure that must be followed. It is okay for the Legislature to allow only people living in the area to be incorporated or annexed to vote; it is also okay for the Legislature to also allow people to vote that live outside of the annexed land, but within the municipality from which the land was being annexed.<sup>11</sup> Accordingly, it is likely that it is constitutional either to allow only the village to vote on disincorporation (as was required by the pre-1998 statute) or to allow both the village and the township to vote, as the current statute allows. A more complicated question is whether the votes of township and village residents must be counted separately, *i. e.* if both the township and the village must approve the disincorporation for it to be valid. There is less case law on this issue, but in light of the above cases and the high deference courts give to the Legislature in this area, it is unlikely that a court would find the voting procedure provided in the Act to be unconstitutional.

We hope that you find this helpful, and please do not hesitate to contact us with questions.

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<sup>9</sup> *Hunter v City of Pittsburgh*, 207 US 161, 178-79 (1907).

<sup>10</sup> *Lockport v Citizens for Cmty Action at Local Level*, 430 US 259, 272 (1977).

<sup>11</sup> *Bray v Stewart*, 239 Mich 340 (1927). See also *Village of Inkster v Bd of Sup'rs of Wayne Co*, 363 Mich 165, 169 (1961).