



Michigan Association of Township Supervisors
2017 Spring Education Conference
February 10, 2017

Regulating Medical Marihuana

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Medical Marihuana

Medical marihuana was first permitted in Michigan by a voter initiative. The Michigan voters approved the Michigan Medical Marihuana Act (“MMMA”) in 2008. MMMA established rules and regulations to allow “qualifying patients” and “primary caregivers” to cultivate, distribute and use marihuana for a debilitating medical condition.

Since enactment of the MMMA, the legislature enacted the Medical Marihuana Facilities Licensing Act (“MMFLA”) in September 2016. The MMFLA allows commercial medical marihuana facilities for the first time, but licenses and taxes them. The MMFLA clarifies some of the issues that arose under the MMMA, and permits townships to choose whether they want commercial medical marihuana businesses within their borders, and gives townships the right to adopt ordinances, levy regulatory fees and receive a share of the taxes. The new businesses cannot apply for licenses for more than a year

A. Medical Marihuana Patients and Caregivers

1. *Statutory Authority.* Medical marihuana was first permitted in Michigan by a voter initiative. The Michigan voters approved the Michigan Medical Marihuana Act (“MMMA”) in 2008. MMMA established rules and regulations to prohibit the prosecution or penalization of a person distributing or using marihuana for debilitating medical conditions.
2. *Debilitating Medical Conditions.* The medical conditions that qualify for a medical marihuana qualifying patient card include Alzheimer’s, ALS, anxiety,

Crohn's, seizure, cancer, glaucoma, HIV, Hepatitis C, severe chronic pain, and nausea. The state issued more than 216,000 of these cards (valid for a year), with the vast majority of patients (93%) qualifying to use medical marijuana based on "severe and chronic pain." To be eligible for registration as a qualifying patient, an applicant must obtain a written opinion from a primary physician stating that the applicant is both suffering from a debilitating medical condition and is likely to receive a palliative or therapeutic benefit from the use of marijuana.

3. *Qualifying Patient.* A qualifying patient is issued an ID card by the State upon successful registration and is allowed to possess not more than 2.5 ounces of usable marijuana and to cultivate up to 12 marijuana plants within an enclosed, locked facility. An enclosed, lock facility could be constructed within a building or can even be an area fenced in with chain-length fence and slats placed within the fence to prevent visual observation within the fencing.
4. *Primary Caregiver.* A primary caregiver is issued an ID card, which allows the primary caregiver to grow and provide marijuana for five or fewer qualifying patients who designate that person as their primary caregiver. The primary caregiver can provide each of his qualifying patients 2.5 ounces of usable marijuana and grow 12 marijuana plants for each of his qualifying patients. The primary caregiver may also register as a qualifying patient, allowing an additional 12 plants grown for his or her personal use (so a primary caregiver can grow a maximum of 72 plants if he or she has five qualifying patients and is registered as a qualifying patient).
5. *Uses Permitted.* A licensed patient or caregiver can use medical marijuana as that term is defined in the Michigan Public Health Code. In 2016, an amendment to the MMMA permits the use of certain marijuana-infused products, including topical formulas, tinctures, beverages, edible substances and similar products available for human consumption.
6. *Case Decisions Impacting Uses Permitted.* Despite the misconception, the MMMA did not authorize dispensaries or provisioning centers, which are unlawful. Collective or cooperative grow operations, and patient-to-patient transfers are also not permitted. See *Michigan v McQueen*, Michigan Supreme Court (2013); *People v Bylsma*, Michigan Supreme Court (2012).
7. *Issues Related to the Use.* The demands of growing marijuana can require higher-capacity electric circuits and breakers (to operate fans, lights, pumps, etc.), plumbing and a supply of water, odor control, locations for storage of fertilizers, alterations to a structure to avoid space and height limitations, and humidity and mold control.

8. *Township Regulation.* The MMMA is silent about Township authority over qualifying patients and primary caregivers. Court decisions have permitted narrow regulation of these uses, if not in conflict with the MMMA.

- a. *Statutory Defense:* The statutory defense provided in Section 4(b) of the MMMA states broadly that “a primary caregiver who has been issued and possesses a registry identification card shall not be subject to . . . prosecution, *or penalty in any manner, or denied any right or privilege* . . . for assisting a qualifying patient to whom he or she is connected through the department’s registration process with the medical use of marihuana in accordance with this act.”
- b. *Complete Ban Prohibited:* The Michigan Supreme Court invalidated a municipality’s total ban on medical marihuana. *Ter Beek v City of Wyoming*, Michigan Supreme Court (February 6, 2014). The municipal ordinance banned any use of marihuana that was prohibited by other federal or state laws. The ordinance thus totally banned medical marihuana because the federal controlled substances act prohibits the use, manufacture or cultivation of marihuana. Despite this, however, the MMMA provides state-law immunity from arrest and prosecution for medical marihuana use in compliance with the MMMA.
- c. *Supreme Court’s Pronouncement on Scope of Regulation:* The Supreme Court was careful to explain that, although local governments may not totally ban uses permitted by the MMMA, that does not mean they may not reasonably regulate the use of medical marihuana. The Court stated:

“Contrary to the City’s concern, this outcome does not ‘create a situation in the State of Michigan where a person, caregiver or a group of caregivers would be able to operate with no local regulation of their cultivation and distribution of marijuana.’ *Ter Beek* does not argue, and we do not hold, that the MMMA forecloses all local regulation of marijuana”

B. Commercial Medical Marihuana Facilities

1. *Statutory Authority.* Medical marihuana was recently expanded from a “personal” service to commercial-scale growing and distribution under the Michigan Medical Marihuana Facilities Act. The MMFLA created 5 new license categories that may be involved in commercial medical marihuana growth, distribution and sale. In passage of the related bills, \$8,500,000 was appropriated to the Department of Licensing and Regulatory Affairs for its initial costs of implementing the Act.

2. *License categories:*

- a. *Growers (including classes A, B and C):* A grower may grow marihuana and sell seeds and plants to another grower, or sell plants to a processor or provisioning center. There are three classes of growers:
 - Class A – 500 marihuana plants
 - Class B – 1,000 marihuana plants
 - Class C – 1,500 marihuana plants
 - b. *Processors.* A processor may purchase marihuana from growers and sell marihuana and marihuana-infused products to provisioning centers.
 - c. *Secure Transporters.* A secure transporter may store and transport marihuana and money associated with the purchase or sale of marihuana. All movement of marihuana or seeds between other licensees must be done by a secure transporter.
 - d. *Provisioning Centers.* A provisioning center may purchase or transfer marihuana only from growers and processors and sell or transfer marihuana *only to registered qualifying patients or registered primary caregivers*. Before a provisioning center may sell marihuana, it must transport the marihuana to a safety compliance facility for testing and labeling.
 - e. *Safety Compliance Facilities.* A safety compliance facility may receive and test marihuana from another marihuana facility.
3. *Township Choice.* A township is not required to allow commercial medical marihuana facilities within its boundaries. The new facilities licensed under the MMFLA may not operate within the township unless the township passes an authorizing ordinance. See Section 205(1) of the MMFLA.
4. *Operation Commencement:* Anyone seeking a state license under the MMFLA can submit an application ***beginning on December 15, 2017***. This timeline does not apply to local ordinances, however, so if the township has an ordinance in place before December 2017, it could start processing zoning and other applications for local commercial medical marihuana operations prior to that date. Note that no facility authorized under the MMFLA may commence operation until it is licensed by the State on or after December 2017.
5. *Issuance of License:* In addition to any local regulations, all State applications must be submitted to the Medical Marihuana Licensing Board (the “MMLB”), a State body with rule-making authority created under the MMFLA within the Michigan Department of Licensing and Regulatory Affairs.

A township will receive notification of any applications regarding the intended operation of facilities within its jurisdiction. The township has 90 days to respond with the required information requested by the MMFLA.

6. *Reasons Some Township are Already Considering Facilities.*

- a. Local patients need for marihuana
- b. Safer process and more regulated framework for acquiring marihuana
- c. Employment and economics
- d. Neighboring jurisdictions authorization of use
- e. Annual administrative fee charged by the township
- f. Property tax revenues from construction and development of commercial and industrial parcels. This is especially true for some rural townships that may not otherwise experience such growth.
- g. State revenue-sharing:
 - i. A state tax will be imposed on each provisioning center at the rate of 3% of the provisioning center's gross retail receipts, which will go to the state Medical Marihuana Excise Fund.
 - ii. All revenue raised from the tax is placed into a separate fund administered by the State Treasurer, with 25% of the taxes returning to municipalities in proportion to the number of commercial medical marihuana facilities located within each.
 - iii. This suggests that an apportionment will be provided regardless of whether provisions centers are permitted. There also is not language addressing whether the size of a facility changes the tax apportionment.
 - iv. Since no taxes have been disbursed, many questions remain unanswered.

7. *FOIA Requests.*

- a. All records supplied to the MMFL Board are subject to the Freedom of Information Act (FOIA), except:
 - i. Information provided to the Board related to background investigation and trade secrets, internal controls, and security measures
 - ii. Information provided to the Board from another jurisdiction or agency under agreement of confidentiality or if release is otherwise barred by another law, and
 - iii. Information in the statewide monitoring system.
- b. How will Township records be treated?

C. Key Distinctions between the MMMA and MMFLA

1. 2 types of licenses vs. 5 types of licenses
2. Noncommercial vs. Commercial operations
3. Cost vs. Profit.
4. Cannot ban vs. Complete local control to prohibit
5. Unclear scope of regulation vs. Clearer scope of local regulation

D. The regulatory scheme for controlling medical marijuana use and operation in the township can be broken down into the following alternatives:

1. No regulation
2. Zoning Ordinance (authority provided under the Michigan Zoning Enabling Act and Planning Act)
3. Non-Zoning Ordinance (authority provided under MCL 41.181 to protect the public health, safety, general welfare of township residents, and the MMFLA itself)
4. Combined Approach (using both a zoning ordinance and non-zoning ordinance)

E. No Regulation

1. MMMA: If a township imposes no regulation related to MMMA activity, qualifying patients and primary caregivers are still permitted to operate in the Township within the limitations provided in the MMMA.
2. MMFLA: If a township imposes no regulation authorizing MMFLA activity, no facilities may operate within the Township's jurisdiction.

F. Zoning Approach

1. The power to adopt and amend zoning ordinances is governed by the Zoning Act, which was comprehensively amended in 2006. The Zoning Act provides the township authority to regulate land uses and buildings by districts, locations and areas.
2. Townships that choose to regulate marijuana under the zoning approach must have a planning commission and a zoning ordinance (or otherwise create them).

G. Non-zoning Approach

1. The power to adopt a non-zoning ordinance is provided under MCL 41.181, which provides the adoption of ordinances "regulating the public health, safety, and general welfare of persons and property" of the township. The

MMFLA also provides express authority to regulate MMFLA facilities through a non-police power ordinance. The ordinance cannot regulate by districts.

2. Townships that do not currently have a planning commission or zoning ordinance may find that a non-zoning ordinance best suits its needs.
3. Non-zoning medical marihuana ordinances are not subject to referendum and regulate current and future facilities. "Grandfathering" of nonconforming uses does not apply.
4. Non-zoning regulations can be comprehensive ordinances addressing most concerns that may be lawfully addressed under the medical marihuana statutes.

H. Combined Approach

1. All townships are provided statutory authority to adopt non-zoning ordinances under MCL 41.181. Those townships that also have a zoning ordinance may find that a combined approach of adopting a non-zoning ordinance and medical marihuana provisions in a zoning ordinance provides a flexible and defensible approach.
2. The combined approach provides a method for a township to address specific concerns that arise in each land use district, but also create general standards that regulate the operation of any medical marihuana use, operation or facility in the township.

I. MMMA Zoning and Non-zoning Considerations:

1. Registered patients as accessory use in residential district.
 - a. Accessory use is a supplemental building or structure on the same lot as the main building occupied by or devoted exclusively to an accessory use, but not for dwelling, lodging, or sleeping purposes. Conditions can be imposed to ensure the use is naturally and normally incidental and subordinate to the main use of the land or building.
2. Primary caregivers as accessory use or home occupation in residential district.
 - a. Home Occupation Ordinance imposes limitations to prevent impact on other neighboring homes from the conduct of a business in a residential area. Treated as an accessory use to the home, which is the principal use.
3. Primary caregivers in other districts, such as agricultural, commercial, industrial.

4. Conditions for Registered Patient's Use:

- a. Restrict growth by the registered patient to his or her primary residence (or to the residential districts generally)
- b. Amount of marihuana may not exceed State law (12 plants per patient)
- c. Required operations to be conducted indoors in principal residence or secondary accessory structure
- d. Required permitting for any alterations to the property, such as building, electrical, plumbing and mechanical changes

5. Conditions for Primary Caregiver Operation:

- a. Limitations on number of primary caregivers to operate in single facility.
- b. Spacing requirements from other operations, facilities, schools, churches, parks, etc.
- c. Amount of marihuana may not exceed State law (60 plants per caregiver/ 12 additional plants if also qualified patient).
- d. Storage requirements and security measures
- e. Limitations on use or transfer of marihuana on site
- f. Required operations to be conducted indoors
- g. Required permitting for any alterations to the property, such as building, electrical, plumbing and mechanical changes
- h. Inspection of the facilities to ensure compliance

J. MMFLA Zoning and Non-zoning Considerations:

1. Use the Zoning Ordinance to define the different licensees permitted to operate within the Township and designate in which districts each specific permitted type of licensee may operate. MMFLA allows growers to *operate only in agricultural or industrial zones, or in unzoned areas*.
2. The Zoning Ordinance can also include similar regulations as discussed later regarding non-zoning ordinances.
3. General. If a Township desires to permit these facilities within the Township, the Township should adopt a non-zoning ordinance. This ordinance should be designed to establish a permitting framework for review and approval of each facility within the Township.
4. Issues to Consider. A Township Board opting to allow these uses should consider the following issues when developing ordinances:
 - The types of commercial facilities that will be authorized.
 - The number of each type of authorized facility that will be allowed.
 - Distances of buffer zones around schools, parks, churches, etc.

- Minimum distances between commercial medical marihuana facilities.
- The amount of the annual fee to be imposed (\$5,000.00 or less).
- Minimum security measures required.
- Restrictions on how, when and where facilities may operate.
- Restriction on what is visible from the outside of the facility.
- Required operations to be conducted indoors
- Required permitting for any alterations to the property, such as building, electrical, plumbing and mechanical changes
- Inspection of the facilities to ensure compliance
- Waste disposal of by-products or other materials created in the facility

K. Other Potential Issues

1. Farming and the Right to Farm Act

a. Preemption by the Right to Farm Act. The Right to Farm Act (the “RTFA”), MCL 286.471 et seq, was enacted in 1981 to counter neighbors’ nuisance lawsuits against farms and farmers. The basis for claiming such a defense under the RTFA lies in the Generally Accepted Agricultural Management Practices (GAAMPS)

i. Important Definitions.

- Farm – “the land, plants, animals, buildings, structures, . . . used in the **commercial** production of farm products.”
- Farm operation – “the operation and management of a farm . . . in connection with the commercial production, harvesting and storage of farm products...”
- Farm product – “those plants and animals useful to human beings produced by agriculture . . . or any other product which incorporates the use of food, feed, fiber, or fur, as determined by the Michigan commission of agriculture.”

ii. Purposes

(a) Preempt local regulations.

“[I]t is the express legislative intent that this act preempts any local ordinance, regulation, or resolution that purports to extend or revise in any manner the provisions of this act or generally accepted agricultural management practices developed under this act. Except as otherwise provided in this section, a local unit of government shall not enact, maintain, or enforce an ordinance, regulation or resolution that conflicts in any manner with this act or [GAAMPs] developed under this act.” MCL 286.474(5)

b. *GAAMPs*. The RTFA only provides a defense for those farming practices that conform to a GAAMPs, but compliance is voluntary. Those GAAMPs are:

- Manure Management and Utilization
- Pesticide Utilization and Pest Control
- Nutrient Utilization
- Care of Farm Animals
- Cranberry Production
- Site Selection/Odor Control for New and Expanding Livestock Facilities
- Irrigation Water Use
- Farm Market (Including Roadside Stands)

c. *Protection for Marihuana Cultivation?*

- MMMA: Since a caregiver can only recover costs to produce, arguably not a commercial operation.
- MMFLA: The MMFLA has no restriction on profit, and reading between lines, the facilities will be profit driven commercial enterprises. BUT, arguably, the marihuana may not be considered a “farm product” at this point, and there are no GAAMPs that generally cover plants, or more specifically cover marihuana. Thus, since no local regulation would conflict with any GAAMPs, it arguably must comply with the local ordinances.

