



The Medical Marijuana Act and the Issues it Presents to Municipalities

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The Medical Marijuana Act: An Overview of the Law

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History

- Michigan voters approved Proposal 1 in 2008, permitting the use and cultivation of medical marijuana.
- Proposal 1 received majority support in every Michigan county and was approved by 63% of voters statewide.
- Proposal 1 became the Michigan Medical Marijuana Act, MCL 333.26421 *et seq.* (the “Act”).



Intent of the Act

- The Act was drafted by a medical marijuana activism group – so usual reports of legislative history and intent are not available.
- Presumably, the purposes include:
 - creating a registration process for patients and caregivers; and
 - creating a procedure for patients to obtain treatment for various medical conditions.



Overview of the Act: Patients

- “Qualifying patient” with an ID card can possess up to 2.5 ounces of marijuana. MCL 333.26424(a).
- If the patient has not specified a “care-giver,” then the patient may keep up to 12 marijuana plants in an enclosed, locked facility. MCL 333.26424(a).



Overview of the Act: Patients

- **“Qualifying patient”** means a person who has been diagnosed by a physician as having a debilitating medical condition, including cancer, glaucoma, HIV/AIDS, hepatitis C, Crohn’s disease, Alzheimer’s, diseases that cause severe pain or nausea, and other conditions identified by the Act or approved by the Department of Community Health.



Overview of the Act: Caregivers

- A “**primary caregiver**” with an ID card can possess up to 2.5 ounces of marijuana for each qualifying patient and keep up to 12 marijuana plants for each patient.
- Each caregiver can assist up to 5 patients.
- The patient must specify the caregiver during the registration process.
- Caregivers can receive compensation.



Administration of the Act

- The Department of Community Health is charged with promulgating rules.
- 128,908 original and renewal applications received since April 6, 2009.
- 71,356 patient registrations issued.
- 13,504 applications denied.
- Unknown number of caregiver applications approved.



Requirements: Written Certification from Physician

- To obtain an ID card, a patient must have a “written certification” from a physician identifying the patient’s debilitating medical condition and stating that patient will receive therapeutic or palliative benefit from the use of medical marijuana.



Other Requirements

- Prospective patients also must provide:
 - an application or renewal fee;
 - the name, address, and birth date of the qualifying patient;
 - the name, address, and telephone number of the qualifying patient's physician;
 - the name, address, and birth date of the qualifying patient's caregiver.



Caregiver Registry ID Cards

- Caregivers must be 21 years or older.
- “The department shall issue a registry identification card to the primary caregiver, if any, who is named in a qualifying patient's approved application; provided that each qualifying patient can have no more than 1 primary caregiver, and a primary caregiver may assist no more than 5 qualifying patients with their medical use of marihuana.”



Confidentiality

- Applications are confidential.
- The Department maintains a confidential list of persons to whom ID cards have been issued, which is not subject to FOIA.
- Disclosure of confidential information – including by a local government official or employee – is a misdemeanor.



Limits on Possession and Use of Medical Marijuana

- Even with an ID card, can't possess or use:
 - on a school bus;
 - on the grounds of any preschool or primary or secondary school;
 - in any correctional facility.

Can't smoke marijuana in any public place or on any form of public transportation.

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Limits on Possession and Use of Medical Marijuana

- Cannot operate, navigate, or be in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of marijuana.

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Affirmative Defense

- The medical use of marijuana is an affirmative defense to a prosecution involving marijuana if:
 - physician issued written certification;
 - quantity was not more than “reasonably necessary” to ensure availability; and
 - medical use was involved.



Protections Afforded by Act

- A qualifying patient with an ID card and a lawful quantity of marijuana “shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau[.]”
- Same for caregiver with ID card.



What's Missing from the Act?

- The Act is silent on some important issues.
 - Act does not address how patients or caregivers can acquire marijuana seeds or plants. Can they be legally purchased?
 - Dispensaries are not addressed by the Act. Not expressly allowed *or* prohibited.
 - Law enforcement challenges: how do you know who is registered and who is not?



No Easy Answers

- Many of the “holes” in the Act have created problems for municipalities.
- Next, we will look at some of these problems and some creative ways that municipalities can address them.



Zoning Options for Municipalities

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Competing Public Views: Dilemmas for Local Governments

- Statewide, there is a large demand for medical marijuana.
- Advocates are often vocal and organized.
- But many are also concerned about dispensaries opening on Main Street or medical marijuana being sold near parks, schools, and churches.

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What Options are Available?

- “Wait and see” – wait for the Legislature to amend the Act.
- Impose a moratorium.
- Permit, but regulate through zoning.
- Permit, but regulate through licensing.



“Wait and see” – will the Legislature amend the Act?

- The Act is unclear in several ways.
- But because it is a ballot initiative, amendments are more difficult.
- Need $\frac{3}{4}$ of Legislature to amend.
- While waiting for an amendment, uses can commence and then be prior nonconforming uses if medical marijuana is later regulated through zoning.



Moratorium: Stop the Clock

- Temporary freeze while the municipality decides how to regulate.
- “Reasonable time” is the rule.
 - Many municipalities impose a moratorium for six months, with a possibility for extension.
- Unreasonable time could lead to takings claim.

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Regulate through Zoning

- There are many zoning options:
 - Limit use to commercial or industrial districts, not residential. (Industrial may be preferable in some municipalities to keep use away from “Main Street.”)
 - Is it better to concentrate the use (e.g., all in one area) or disperse it (spread out the use)?
 - Local decision. Concentration can lead to increased crime in one particular area.

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Zoning Options

- Permit as a special use permit, subject to conditions:
 - Minimum distance from other dispensaries, schools, daycare centers, churches, playgrounds, and homeless shelters?
 - Provide that only one caregiver can provide services on a parcel.
 - Require inspection by building, fire, and law enforcement officials.



Zoning Options

- Another possible regulation:
Cultivation/growing or distribution of marijuana shall not occur in connection with or at a location at which any other commodity, product, or service is also available.
- This might limit the appeal of (or at least the traffic at) a particular location.



Exclusionary Zoning

- If medical marijuana use is limited to a particular location, that location must actually exist within the municipality.
- For example – use could be allowed only within 1000 feet of a police station, but the municipality must actually have a police station.



Dispensaries

- Dispensaries are not specifically allowed under the Act and are likely prohibited.
- Zoning ordinance could ban dispensaries, or limit them to certain zoning districts (regulate like adult-oriented businesses).



Prohibited under Federal Law

- Marijuana is still illegal under federal law.
- One option is to prohibit any operations that violate federal law.
- Could implicate federal constitutional law issues relating to the supremacy of federal law over state law.



Regulate through Licensing

- Licensing ordinance must be reasonably related to police power and have standards to guide decision-making authority.
- Benefit: no prior non-conforming uses.
- Drawback: more difficult to enforce because of the Act's confidentiality provisions.



Continuing Uncertainty

- Although many options are available and municipalities are beginning to regulate medical marijuana, many questions remain.
- Next, we'll look at the potential consequences of regulation.

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Legal Update on Medical Marijuana Regulation

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The Preemption Doctrine – Conflict With State & Fed Laws

- **State Preemption**
 - G/R: Muni's can't bar what state law allows
 - *Michigan Rest Assoc*
 - State law set maximum smoking seats allowed in rest
 - City ordinance banned smoking in all rest
 - Ct: City ordinance was preempted
- **Federal Preemption**
 - G/R: States can't allow what fed law bars
 - G/R: Muni's can't allow what fed law bars



Preemption – State Act

- State Preemption Arguments – the Act
- Does Med Marijuana Ord conflict with the Act?
- If you ban dispensaries, are you conflicting with the Act?
 - Act does not speak to dispensaries.
 - Act says its purpose is to allow under state law medical use of marijuana
 - Act does not expressly allow or bar municipal ordinances regulating medical marijuana
- Any Muni Ordinance may be struck down as preempted by the Act if Ct thinks the Act intended to allow dispensaries or medical marijuana use



Preemption – Federal Law

- Federal law: marijuana is a schedule 1 drug (no medical benefit)
- Illegal to grow, distribute, possess, dispense marijuana
- No medical necessity exception to fed law
- Supremacy Clause in Constitution: Federal law trumps conflicting state law



Federal Law – US Attorneys View (2009)

- US Dep't of Justice Memo 10-19-09 (Ogden Memo)
- Fed law prohibits growing, possessing, distributing marijuana
- But Current policy – “Hands Off”
- No intent to devote federal resources to people strictly complying with existing state laws regarding medical marijuana use
- But reserve right to investigate if reasonable basis to believe complying with state law is a pretext to grow or distribute marijuana for unauthorized purposes
 - Large scale growing operations are fair targets



Federal Law – US Attorneys View (2011)

- Seriously ill individuals who use marijuana as part of medically recommended treatment program in compliance with state law – No Issue
- But “full authority” to vigorously enforce fed laws against those who participate in unlawful growing and selling activities – even if permitted under state law
- Feds do not consider state employees who conduct acts under state med marijuana laws immune from liability under fed law

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Preemption – Federal Law

Federal Preemption Decisions

Yes

- *Oakland Cannabis*
- *Emerald Steel*
- *Redden concurrence*
- *Brandon*

No

- *Qualified Patient*
- *San Diego*
- *Garden Grove*

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Preemption – Federal Law

- *US v Oakland Cannabis Buyers Coop*
- United States Supreme Court ('01)
 - Ct: rejects medical necessity defense to a prosecution of manufacture and distribution of marijuana
 - Fed law does not recognize medical necessity defense to prosecution

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Preemption – Federal Law

- *Emerald Steel Fabricators v Dep't of Labor* Oregon Supreme Court ('10)
 - Employment case. Employee used marijuana to treat illness. Oregon had medical marijuana law.
 - Employee tells boss of drug use before drug test. Employer fires employee.
 - Ct: Federal law preempts Oregon state law that authorized use of medical marijuana

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Preemption – Federal Law

- *People v Redden*, Michigan Court of Appeals, 9-14-10
- Maj: to use the affirmative defense, Patient must show “bona fide” doctor-patient relationship
- Concurrence: (not binding)
 - Federal law recognizes no acceptable medical use of marijuana
 - State medical marijuana laws do not supersede federal laws
 - Act has no effect on federal prohibitions on possession or consumption
 - Act creates no right under state law to use or possess marijuana. Just provides protection to certain people from prosecutions under state law



Preemption – Federal Law

- *People v Brandon*
- MI 19th District Court (Dearborn), 3-7-11
 - Def arrested for possession under City Ord
 - Ct: Act is void as preempted by federal law
 - No room for State regulation given Congress's extensive drug regulations.
 - Act is in direct conflict with federal law.



Preemption – Federal Law

- *Qualified Patient Assoc v City of Anaheim* ('10)
- California Appellate Court
 - City bans dispensaries.
 - Assoc sues, says CA med mar. law preempts City Ord
 - City says federal law preempts CA law
 - Ct: fed law did not preempt CA law since St law only legalized certain marijuana conduct “for purposes of state law”
 - so CA Law is not a hurdle to enforcing state law

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Preemption – Federal Law

- *City of San Diego v San Diego NORML*
- California Appellate Court ('08)
 - CA law required counties to provide medical marijuana ID cards to patients who are allowed to claim medical marijuana defenses
 - Counties sued CA, claiming not required to comply with CA law
 - Ct: federal law does not preempt ID card part of law

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Preemption – Federal Law

- *City of Garden Grove v Superior Court* ('07)
- California Appellate Court
 - Def arrested, possession of marijuana
 - City dismisses charge, but keeps drugs
 - Def sues to get drugs
 - City says not entitled to return under federal law
 - Court: Def wins.
 - Federal law does not preempt return of drugs since federal law does not bar return of drugs to someone in possession under state law

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Recent Court Activity

- Feds Subpoena Michigan-Held Marijuana Pt Records
 - DEA subpoenaed MDCH for records of 7 persons who applied for medical marijuana caregiver cards.
 - DCH opposed it, citing Act's confidentiality rules.
 - MI AG would give docs if court ordered it to do so and if officials got immunity for the release.
 - Several medical marijuana groups seeking to get involved and oppose release
 - 2-1-11: parties presented arguments.
 - Case still pending (WD Mich, 1:10-mc-109).

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Recent Court Activity

o Act Does Not Allow Patient to Patient Sales.

- *State v The Health Center* (Alpena Circuit Court), March 2011
- Ct: "The Health Center," serving 60 clients, acted outside the "medical use" exception provided in the Act when it provided a location for qualified patients to sell marijuana to other qualified patients.
- Pt-to-Pt sales are not a "medical use" of marijuana.
- Center was a public nuisance insofar as it engaged in barred sales. It reasoned that the Act specifically mentions caregiver-to-patient sales, and allows a registered caregiver to receive compensation for costs associated with assisting a registered qualifying patient in the use of medical marijuana, and that the receipt of that compensation is not the sale of controlled substances.
- *Health Center* conflicts with *State v McQueen*?

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Recent Court Activity

o Act Allows Patient to Patient Sales

- *State v McQueen* (Isabella County Court) 12-16-10 (now in COA)
- Registered qualifying patient and registered primary caregiver started a business leasing lockers for marijuana storage to other registered qualifying patients and primary caregivers that became "members" of the business.
- Complete an app, pay a fee, then lease a locker to store pot, and can sell to or buy pot from other members. The warehouse business did not own or sell any pot, but did collect locker rental fees.
- Ct: the dispensary did not violate the Act, not a nuisance.
 - Dispensary owners did not violate the Act by possessing or growing more marijuana than the Act allows, since they did not own the pot and it was stored in the lockers.
 - Act permits patient-to-patient transfers, even through or at the hands of primary caregivers, since it is a medical use of pot.

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Recent Court Activity

- **Bloomfield Township Sued For Banning Dispensaries & Requiring Patient Registration With Twp**

- Twp's Ord: no more than 2 registered patients per household. Card-carrying patients must register with Town P.D. Failure to register is a misdemeanor.
- And Ordinance prohibits "cultivation or distribution of medical marijuana" And bans dispensaries.
- Patient sued, seeking to have it declared void as preempted by State Act
- Oakland Circuit Court

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Recent Court Activity

- **Pt Sues Lyon Township over barring uses that violate fed law**

- Lyon Township amended its ZO to prohibit any use that violates federal law.
- Patient sued Twp seeking to have it declared void as preempted by State Act
- Oakland County Circuit Court (July 2010 suit)

- **ACLU sues Livonia, Birmingham, and Bloomfield Hills for barring uses that violate fed law.**

- all cities banned uses that violate fed law
- Wayne County (*Lott v Livonia et al*, Wayne County 10-1-13917)
- Hearing scheduled June 14th

- **City of Wyoming Sued Over Ordinance barring uses that violate federal law**

- Kent County Circuit Court

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Recent Court Activity

- **Wal-Mart Can Fire For Med. Marijuana**
- **Casias v Wal-Mart (WD Mich Feb 2011)**
 - Wal-Mart fired employee for testing positive for pot – even though employee has a medical marijuana card and allegedly smoked it to alleviate an inoperable brain tumor and cancer.
 - Ct: Act allows employer to fire people for drug use.
 - A key factor was that the marijuana use was detected as part of a company drug testing policy that it had consistently enforced.
 - Lesson: employers can continue to develop and enforce their workplace drug-testing policies
 - Act does not require employers to accommodate ingestion of marijuana at work or an employee under influence of pot

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Recent Legislative Activity

- **HB 6394 - Introduced August 2010**
 - Would ban organizing or operating a “marijuana bar or club”
 - Didn’t get too far. Now dead.
- **SB 017 Bars Marijuana Clubs (& HB 4397) – Still Pending**
 - seek to bar a person from operating a marijuana club or bar (excludes hospice, nursing facility).
 - Referred to committee. Still pending.
- **SB 321: No-Fault Benefits Include Medical Marijuana Costs**
 - Introduced 4-12-11. Still pending.

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Questions?

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