New Medical Marijuana Law Presents Legal Challenges to Michigan Municipalities

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In 2008, Michigan became the 13th state to legalize medical marijuana. Now, municipalities are faced with determining if, and how, they can regulate the use of medical marijuana at the local level. Supporters of medical marijuana who oppose municipal regulations could raise legal challenges against enforcement of local regulation. This article addresses two possible challenges: preemption by state law and protection under the Michigan Right to Farm Act.

MICHIGAN MEDICAL MARIJUANA ACT

The Michigan Medical Marijuana Act, MCL 333.26421*et seq*. (the "Act"), was enacted in December 2008 after Michigan voters approved a medical marijuana ballot initiative. The Act allows a "qualifying patient" who has been issued and who possesses a registry identification card to possess up to 2.5 ounces of usable marijuana. MCL 333.26424(a). If the patient has not specified that a primary caregiver will cultivate marijuana for the patient, then the patient also may keep up to 12 marijuana plants in an "enclosed, locked facility." MCL 333.26424(a). A "qualifying patient" is a person who has been diagnosed by a physician as having a debilitating medical condition as defined in the Act. MCL 333.26423(h).

The Act also permits a "primary caregiver" who has been issued and who possesses a registry identification card to possess up to 2.5 ounces of usable marijuana for each qualifying patient and to keep up to 12 marijuana plants for each qualifying patient who has specified the primary caregiver in the registration process. MCL 333.26424(b). Each caregiver may assist up to five qualifying patients. MCL 333.26426(d). A registered caregiver may receive compensation for the costs associated with providing marijuana to a qualifying patient. MCL 333.26424(e).

Now that the Act is in effect, municipalities are either considering or have adopted ordinances regulating how marijuana is used and distributed. These local regulations are not without controversy. Some members of the public want local governments to regulate medical marijuana because they are concerned about children gaining access to marijuana and about the potential impact on neighborhoods. Other members of the public object to local governments placing additional restrictions on the use of marijuana, arguing that the Act helps terminally ill people who are unable to grow medical marijuana on their own.

Municipalities have responded to the public debate in various ways. However, the critical threshold question is whether local governments have the authority to regulate medical marijuana through police power ordinances or through zoning.

MUNICIPAL AUTHORITY TO REGULATE MEDICAL MARIJUANA

1. Preemption

Neither the Act nor the administrative rules expressly preempt or limit municipal regulation of medical marijuana. However, a municipal ordinance may be preempted if it is in direct conflict with the Act or if the Act occupies the same field of regulation to the exclusion of the ordinance.

Generally, the mere fact that the state has regulated a subject does not prevent a municipality from adopting additional requirements. *City of Detroit v Qualls*, 434 Mich 340, 362; 454 NW2d 374 (1990). Thus, if the state prohibits certain conduct, a municipality may go further in its own prohibition. Id. However, a municipality may not authorize what the state has prohibited, nor may it prohibit what the state has expressly licensed or authorized. Id. Such a direct conflict will invalidate the municipal ordinance.

The Michigan Court of Appeals addressed this issue in the context of cigarette smoking in restaurants. In *Michigan Restaurant Ass'n v City of Marquette*, 245 Mich App 63, 64; 626 NW2d 418 (2001), a city adopted an ordinance banning smoking in all restaurants. A state statute prescribed the maximum number of smoking seats that a restaurant could maintain. *Id*. at 65. Thus, the city ordinance was more stringent than the state statute. *Id*.

In determining whether the ordinance was valid, the court first considered whether the ordinance and the statute were in direct conflict. *Id*. at 66. That is, the court looked at whether the ordinance prohibited what state law permitted. Id. The court found that a conflict existed. In so finding, the court focused on whether the area regulated by the ordinance was local in nature or whether it was a statewide issue, and it concluded that smoking was not a local issue because the dangers of secondhand smoke were not unique to that city. *Id*. at 66-68. The court also considered whether the ordinance was "merely an extension of state law." *Id*. at 67. The court noted that the city could properly extend the state law by creating a higher percentage of non-smoking tables. *Id*. Prohibiting smoking altogether, however, constitutes more than a mere expansion of state law. *Id*.

In light of *Michigan Restaurant Ass'n*, a person challenging an ordinance could argue that a municipality may not adopt a blanket prohibition on medical marijuana because doing so would prohibit what state law permits. *Id*. at 66. In other words, an ordinance prohibiting medical marijuana would directly conflict with the Act and

would likely be preempted.

Whether a municipality may regulate (rather than prohibit) medical marijuana is a closer question. The court in *Michigan Restaurant Ass'n* suggested that a municipality may "extend" a state law. The court noted by way of example that a city could create a higher percentage of nonsmoking tables in restaurants, but it could not impose an outright ban on smoking. The court's opinion at least opens the door to municipal regulation of medical marijuana. However, municipalities and their legal counsel should closely examine whether a particular ordinance merely extends the Act or whether the ordinance prohibits something that the Act expressly authorizes.

Furthermore, the Act provides that a qualifying patient >or primary caregiver who uses medical marijuana in compliance with the Act "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." MCL 333.26424(a), (b). If an ordinance imposes stricter prohibitions on medical marijuana use, then a person might comply with the Act but violate the ordinance. This is yet another issue that municipalities and their legal counsel should consider in drafting an ordinance regulating marijuana use.

Additionally, the ordinance may be preempted if the Act occupies the same field of regulation to the exclusion of the ordinance. This type of preemption may occur even if the ordinance and statute do not directly conflict. *People v Llewellyn*, 401 Mich 314, 322; 257 NW2d 902 (1977). Courts look to the pervasiveness of the state regulatory scheme and whether the nature of the regulated subject matter requires uniform, statewide treatment or whether it calls for regulations that are adapted to local conditions. *Id*. at 323-328.

The pervasiveness of the Act is a subjective inquiry that would require a court to evaluate the scope of the Act and determine whether the Legislature has regulated medical marijuana exclusively. As to the nature of the subject matter, medical marijuana is likely a statewide issue, not a local issue. In other words, the benefits and risks of medical marijuana are not unique to municipalities of certain sizes or in certain parts of the state.

If a court finds an ordinance is preempted by state law, it may hold that the ordinance is unenforceable. Municipalities should consult with their legal counsel regarding this risk when deciding whether to adopt an ordinance regulating medical marijuana.

2. Right to Farm Act

Proponents of medical marijuana have argued that the Michigan Right to Farm Act, MCL 286.471 *et seq*. (the "RFA"), precludes municipalities from imposing zoning or other regulations on the use of medical marijuana if those regulations conflict with the RFA.

The RFA protects farms and farm operations that conform to generally accepted agricultural and management practices, which are defined by the Michigan Commission of Agriculture. MCL 286.473; MCL 286.472(d). Conforming farms and farm operations generally cannot be deemed public or private nuisances. MCL 286.473.

The RFA expressly 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 and management practices developed under this act." MCL 286.474(6). Furthermore, local units of government "shall not enact, maintain, or enforce an ordinance, regulation, or resolution that conflicts in any manner with this act or generally accepted agricultural and management practices developed under this act." *Id*. Consequently, any municipal ordinance (including a zoning ordinance) is unenforceable to the extent that it prohibits conduct that is protected by the RFA. *Charter Tp of Shelby v Papesh*, 267 Mich App 92, 107; 704 NW2d 92 (2005).

Because medical marijuana is new to Michigan's legal landscape, the courts have not yet addressed whether it is affected by the RFA. A person challenging an ordinance could argue that the RFA restricts a municipality's ability to regulate medical marijuana because the cultivation of marijuana qualifies as a "farm" or "farm operation." The RFA defines those terms as follows in relevant part:

a. "Farm" means the land, plants, animals, buildings, structures, including ponds used for agricultural or aquacultural activities, machinery, equipment, and other appurtenances used in the commercial production of farm products.

b. "Farm operation" means the operation and management of a farm or a condition or activity that occurs at any time as necessary on a farm in connection with the commercial production, harvesting, and storage of farm products, and includes, but is not limited to:

    a. Marketing produce at roadside stands or farm markets.

c. "Farm product" means those plants and animals useful to human beings produced by agriculture and includes, but is not limited to, forages and sod crops, grains and feed crops, field crops, dairy and dairy products, poultry and poultry products, cervidae, livestock, including breeding and grazing, equine, fish, and other aquacultural products, bees and bee products, berries, herbs, fruits, vegetables, flowers, seeds, grasses, nursery stock, trees and tree products, mushrooms, and other similar products, or any other product which incorporates the use of food, feed, fiber, or fur, as determined by the Michigan commission of agriculture.

MCL 286.472.

A person challenging an ordinance could argue that marijuana is a "farm product" because it is a plant that is useful to human beings. The Legislature has determined that the marijuana has "beneficial uses" because it can be used to treat or alleviate pain. MCL 333.26422(a). Further, it is produced by agriculture. "Agriculture" is not defined in the RFA, but it is defined in the dictionary as "the science, art, or practice of cultivating the soil, producing crops, and raising livestock and in varying degrees the preparation and marketing of the resulting products." *Merriam-Webster Online Dictionary* (2009). Marijuana plants are a crop that can be produced and would therefore qualify as a plant produced by agriculture. Thus, a plain reading of the RFA suggests that marijuana qualifies as a "farm product."

The next inquiry is whether a person who grows marijuana in accordance with the Act is maintaining a "farm" or a "farm operation" under the RFA. Both of these terms require the "commercial production" of farm products. The Michigan Court of Appeals has defined "commercial production" as "the act of producing or manufacturing an item intended to be marketed and sold at a profit." *Charter Tp of Shelby v Papesh*, 267 Mich

App 92, 101; 704 NW2d 92 (2005). There is "no minimum level of sale that must be reached[.]" *Id*. at n 4.

Because the RFA may protect the commercial production of marijuana, municipalities should consult with their legal counsel to evaluate the enforceability of any ordinances regulating medical marijuana.

CONCLUSION

In light of the public debate about medical marijuana, many municipalities are considering adopting ordinances that regulate its use. However, municipalities should weigh the risk that such ordinances may be challenged on the grounds of preemption or the Michigan Right to Farm Act. It is therefore important for municipalities to carefully evaluate the enforceability of any ordinances before they are adopted.