To: Planning Commissioners  
From: Dale Throenle, Planning Director / Zoning Administrator  
Date: March 12, 2019  
Subject: Proposed Ordinance 67 Marijuana Facilities

Background

On November 6, 2018, Michigan voters approved Proposal 18-1, which legalized recreational marijuana and created the Michigan Regulation and Taxation of Marihuana Act (MRTMA). On December 6, 2018, the act became law, and as a result of this act, each community is required to decide if it is going to allow or prohibit state-licensed recreational marijuana establishments.

Staff reviewed the proposed law with the Planning Commissioners during the January meeting. At that time, the Commissioners reviewed a draft of proposed Ordinance 67 Marijuana Facilities, and voted to send the proposed ordinance to public hearing at the March meeting.

Staff attended a seminar in Marquette on the issue in February. The seminar, presented by two local attorneys, covered employer responsibilities and the discrepancies in the Michigan law as it stands now. The presentation also included financial data that indicated the permits, fees, and taxes acquired from opting in would be significantly lower than expected for each municipality, especially if that municipality did not provide more than one license in its jurisdiction.

Early in February, the City of Marquette was considering opting out, and at the end of February, voted to do so, with the primary reason of waiting to see what State rules and regulations are established in regards to recreation marijuana sales.

Recently, the City of Stephenson opted out, stating similar reasons.

Staff has reviewed the act, and is recommending the Township opt out of the act for the following reasons:

- Allowing recreational facilities in the Township does not necessarily increase the income for the Township. As indicated above, the presentation pointed out that it may be two years or longer before any monies are realized in the Township. Even if revenues do occur, conversations with law enforcement and the attorney indicates that most, if not all, revenues received will be redirected to law enforcement related to the establishments.

- State law is in conflict with current Federal law at this time in relation to the drug status of marijuana nationally. This does not appear to being resolved in the near future.

- Law enforcement officials have gone on record (including the County Sheriff) stating these establishments are not a good option for local communities. The sheriff also stated that there are new rules in place that would affect how the various law enforcement departments can operate in the state. He further adds it may take several years for the laws to be where people can understand what the laws say.

- The Act is ambiguous in several areas, and opt in language may be difficult to defend in court (see attached documents from the Michigan Municipal League).
Staff Recommendations

Staff is recommending the Commissioners do the following prior to the meeting:


2) Review the attached Michigan Municipal League documents.

3) Review the draft Ordinance 67 Marijuana Establishments to determine if there are changes required to the document.

Recommended Motion

___________ moved, and __________ seconded that after providing required notification to the public, holding a public hearing and considering public input, the Planning Commission recommends that the Township Board approve Ordinance 67 Marijuana Establishments as [written / revised].
ORDINANCE 67 MARIJUANA ESTABLISHMENTS

An Ordinance to prohibit marihuana establishments within Chocolay Township.

Section 1  Title

This Ordinance shall be known and cited as the Chocolay Township Marijuana Establishments Ordinance.

Section 2  Purpose

The purpose of this Ordinance shall be to provide for and protect the public health, safety and welfare of persons within Chocolay Township by prohibiting the establishing marijuana establishments within its boundaries.

Section 3  Prohibition

Pursuant to the Michigan Regulation and Taxation of Marijuana Act, Section 6.1, Chocolay Township prohibits marijuana establishments within its boundaries.

Section 4  Effective Date

This Ordinance is declared to be immediately necessary for the preservation of the public health, safety, or welfare; therefore this Ordinance is effect immediately.
Medical Marihuana Facilities Licensing Act (MMFLA) compared with Proposal 1—the Michigan Regulation and Taxation of Marihuana Act (MRTMA)

Votes required for future amendments:
- MMFLA (PA 281 of 2016) requires a simple majority of vote of the Legislature (56 House votes and 20 Senate votes).
- Proposed MRTMA will require a 3/4 vote of the Legislature (83 House votes and 29 Senate votes).

Local Control:
- MMFLA requires municipality to OPT IN.
- Proposed MRTMA requires a municipality to OPT OUT. Municipal decision to limit the number of marihuana establishments or opt out is subject to override by the voters of that municipality through initiative petition.
- MMFLA, a state operating license may not be issued to an applicant unless the municipality in which the proposed facility will be located in has adopted an ordinance authorizing that type of license.
  - If municipality does nothing, no marihuana facilities can be licensed/operate in that municipality.
  - If municipality adopts ordinance (opts in), then it may:
    - Authorize any specific or all license types
    - Limit the number of each license type
- Proposed MRTMA, a state operating license shall be issued to operate in every municipality unless a municipality enacts an ordinance to opt out.
  - Municipality can completely prohibit all license types or limit the types of establishments allowed and the total number of each license type.
  - If the municipal limit on licenses prevents the State from issuing a license to all qualifying applicants, the municipality, not the State, is required to select from the competing applicants using a competitive process intended to identify those who are best suited to operate in compliance with the Act.
- Nothing under the MMFLA nor the proposed MRTMA has direct effect on the Michigan Medical Marihuana Act (MMMA, Initiated Law 1 of 2008; patient caregiver model).
- Proposed MRTMA broadens the prohibition on the separation of plant resin by butane extraction on residential premises under the MMMA to include methods using a substance with a flash point below 100 degrees Fahrenheit within the curtilage of a residence.
- Proposed MRMTR substantially increases the amount of marihuana that may be lawfully possessed from 2.5 ounces and 12 plants by a qualifying patient to 2.5 ounces on one’s person, 10 ounces secured in one’s residence, and no more than 12 plants at a time.
- While a municipality may regulate the time, place and manner of operation of marihuana establishments, the State must approve and issue a license to a proposed marihuana establishment that is not within an area exclusively zoned for residential use and is not within 1000 feet of a pre-existing K-12 public or private school. A municipality may reduce this distance by ordinance.

License Types:
- MMFLA has five license types:
  1. Grower
     - Class A – 500 plant limit
     - Class B – 1,000 plant limit
     - Class C – 1,500 plant limit
2. Processor
3. Secure transporter
4. Provisioning center
5. Safety compliance facility

• Proposed MRTMA has six “marihuana establishment” license types:
  1. Grower (plant limits are different than MMFLA)
     ▪ Class A – 100 plant limit
     ▪ Class B – 500 plant limit
     ▪ Class C – 2,000 plant limit
  2. Processor
  3. Secure transporter
     ▪ Provides for license, but nowhere in the language is there a requirement that marihuana must only be transported by a secure transporter.
  4. Retailer
     ▪ MMFLA license is a provisioning center, not retailer.
  5. Safety compliance facility
  6. Microbusiness
     ▪ Person licensed to cultivate not more than 150 plants; process and package; and sell or otherwise transfer marihuana to individuals who are 21 years of age or older or to a safety compliance facility, but not to other marihuana establishments.

• MRTMA also defines an “establishment” as, “any other type of marihuana-related business licensed” by the State, which would include licensed “marihuana facilities” under the MMFLA.
• MMFLA prohibits a caregiver from grower, processor, or secure transporter license types.
• Proposed MRTMA does not prohibit a caregiver from holding any of the six license types.
• A person may be licensed under both the MMFLA as well as the proposed MRTMA.

Unreasonably Impracticable:
• MMFLA does not reference this term, found in proposed MRTMA.
• Proposed MRTMA prohibits any administrative rule or municipal ordinance that subjects the licensee to unreasonable risk or requires such a high investment of money, time, or any other resource or asset that a reasonably prudent businessperson would not operate the marihuana establishment.
  o Any rule or ordinance could be legally challenged if a person considers it to require too much time, money, etc.

Additional information:
• Definitions of key statutory terms are not consistent between the MMFLA and the proposed MRTMA.
• Grower license plant limits are not consistent between the MMFLA and the proposed MRTMA.
• Application process is not consistent between the MMFLA and the proposed MRTMA.
  o If the State does not begin accepting/processing MRTMA applications within one year of the effective date of the Act, applicants can submit an application to a municipality that has not opted out of the act. Municipality shall issue a municipal license to applicant within 90 days. Municipal license has same force and effect as state license, but the municipal license holder is not subject to regulation or enforcement by the State during the municipal license term.
• If proposed MRTMA passes, the MMFLA requirement that a three percent tax is imposed on each provisioning center’s gross retail receipts is no longer applicable. However, a 10 percent tax will be imposed on marihuana retailers on sales price of marihuana sold or otherwise transferred to anyone other than a marihuana establishment.
• The percent of the municipal portion of the excise tax collected is reduced from 25 percent under the MMFLA to 15 percent under the MRTMA and is paid only after the State is compensated for its implementation, administration, and enforcement of the Act; and until 2022 or for at least two years, $20 million annually is provided to FDA-approved clinical trials researching the efficacy of marihuana in treating U.S. armed services veterans for medical conditions and suicide prevention.
• If proposed MRTMA passes, it goes in to effect 10 days after the election is certified by the State Board of Canvassers.
Recreational Marijuana Proposition
We love where you live.

This paper is being provided by the Michigan Municipal League (MML) to assist its member communities.

The MML Legal Defense Fund authorized its preparation by Kalamazoo City Attorney Clyde Robinson. The document does not constitute legal advice and the material is provided as information only. All references should be independently confirmed.

The spelling of “marihuana” in this paper is the one used in the Michigan statutes and is the equivalent of “marijuana.”

Other resources

The Michigan Municipal League has compiled numerous resource materials on medical marihuana and is building its resources on recreational marihuana. They are available via the MML web site at: www.mml.org/resources/information/mi-med-marihuana.html
Introduction

This paper is intended to provide municipal attorneys and their clients an idea of what to expect and the issues to be addressed, given the adoption by Michigan voters of Initiated Law 1 of 2018 generally legalizing marihuana on November 6, 2018. The scope of this paper will outline the provisions of the initiated statute and address some of the practical consequences for municipalities while raising concerns that local governmental officials should be prepared to confront. It is assumed that the reader has a working knowledge of both the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 et seq., and in particular the Michigan Marihuana Facilities Licensing Act (MMFLA), MCL 333.27101 et seq.

While the initiated law, titled the Michigan Regulation and Taxation of Marihuana Act (MRTMA), uses some of the same terms found in the MMFLA, the language between the two Acts is not consistent. This circumstance alone, as well as other features of the initiated statute, requires a thoughtful and thorough review of the language adopted by Michigan voters and its potential impact at the local municipal level.

At its core, the MRTMA authorizes the possession and nonmedical use of marihuana by individuals 21 years of age and older, while establishing a regulatory framework to control the commercial production and distribution of marihuana outside of the medical context. While the regulatory scheme of the MRTMA is similar to that of the MMFLA, it also differs in significant ways.
When would the proposed law become effective if approved?

Under the provisions of Article II, § 9 of the Michigan Constitution, an initiated law takes effect 10 days after the official declaration of the vote. The State Board of Canvassers met on November 26 and certified the November 6 election results, so the effective date of the law will be December 6, 2018. The immediate effect of the law authorizes individuals age 21 and older to openly possess a small amount of marihuana and marihuana concentrate on their person, and possess and grow a larger amount of marihuana at their residence. Given the relatively short period to adjust to the change in the legal status of marihuana in Michigan, law enforcement officers should be provided training in advance of this change in the law so as to avoid claims of false arrest and allegations of Fourth Amendment unlawful search violations. This becomes particularly acute for law enforcement agencies that use drug-sniffing dogs that were trained to detect marihuana. Those animals will likely have to be retired from service as they cannot be relied upon to provide probable cause to support a search. Additionally, officers will have to deal with how to handle marihuana discovered in the course of a search incident to an arrest for another offense.

Another constitutional feature of a voter-initiated law is that it can only be amended by a vote of the electors or by ¾ vote of each house of the Legislature. This likely makes amending the statute difficult, but not impossible, as the MMMA has been amended at least twice since its adoption by the voters in 2008.

As for the actual licensure of businesses authorized to grow, process, and sell recreational marihuana, the Act requires that the Michigan Department of Licensing and Regulatory Affairs (LARA) begin accepting applications for state-issued licenses no later than a year after the effective date of the law and issue the appropriate license or notice of rejection within 90 days. (MRTMA § 9) Unlike the MMFLA, there is not a specific licensing board created to review and grant recreational marihuana establishment licenses. Given the deliberate speed of LARA and the Medical Marihuana Licensing Board in processing and authorizing licenses under the MMFLA, it is an open question whether the statutory deadline will be met. If it can’t, then the burden of licensing recreational marihuana establishments will fall to local municipalities, because the MRTMA specifically provides that if LARA does not timely promulgate rules or accept or process applications, “beginning one year after the effective date of this act,” an applicant may seek licensure directly from the municipality where the marihuana business will be located. (MRTMA § 16)

Under this scenario, a municipality has 90 days after receipt of an application to issue a license or deny licensure. Grounds for denial of a license are limited to an applicant not being in compliance with an ordinance whose provisions are not “unreasonably impracticable,” or a LARA rule issued pursuant to the MRTMA. If a municipality issues a license under these circumstances, it must notify LARA that a municipal license has been issued. The holder of a municipally-issued license is not subject to LARA regulation during the one-year term of the license; in other words, the municipality becomes the sole licensing and regulatory body for recreational marihuana businesses in the community in this circumstance. Any ordinance seeking to regulate recreational marihuana businesses should be drafted with the potential for this circumstance in mind.

What does the initiated statute seek to do?

The purposes actually stated in the MRTMA are many and varied. In addition to legalizing the recreational use of marihuana by persons 21 years and older, the statute 1) legalizes industrial hemp (cannabis with a THC concentration not exceeding 0.3 percent), and 2) licenses, regulates, and taxes the businesses involved in the commercial production and distribution of nonmedical marihuana. According to Section 2 of the statute, the intent of the law is to:

• prevent arrest and penalty for personal possession and cultivation of marihuana by adults 21 years of age and older;
• remove the commercial production and distribution of marihuana from the illicit market;
• prevent revenue generated from commerce and marihuana from going to criminal enterprises or gangs;
• prevent the distribution of marihuana to persons under 21 years of age;
• prevent the diversion of marihuana to elicit markets;
• ensure the safety of marihuana and marihuana infused products; and
• ensure the security of marihuana establishments.

Whether the MRTMA will actually live up to all of these intentions is open to question as many of the areas mentioned are not directly addressed in the law. For instance, since the establishments that will be authorized to grow, process, and sell recreational marihuana will not be licensed until early 2020, how is it that individuals can lawfully obtain and possess marihuana upon the effective date of the Act?

What the statute permits

Under Section 5 of the MRTMA, persons 21 years of age and older are specifically permitted to:

• possess, use, consume, purchase, transport, or process 2.5 ounces or less of marihuana, of which not more than 15 grams (0.53 oz.) may be in the form of marihuana concentrate;

• within a person’s residence, possess, store, and process not more than a) 10 ounces of marihuana; b) any marihuana produced by marihuana plants cultivated on the premises; and c) for one’s personal use, cultivate up to 12 plants at any one time, on one’s premises;

• give away or otherwise transfer, without remuneration, up to 2.5 ounces of marihuana except that not more than 15 g of marihuana may be in the form of marihuana concentrate, to a person 21 years of age or older as long as the transfer is not advertised or promoted to the public (registered medical marihuana caregivers and patients will be able to “give away” marihuana to non-patients);

• assist another person who is 21 years of age or more in any of the acts described above; and

• use, manufacture, possess, and purchase marihuana accessories and distribute or sell marihuana accessories to persons who are 21 years of age and older.

Although not a direct concern of municipalities, law enforcement and social service agencies need to be cognizant that the Act specifically provides that “a person shall not be denied custody of or visitation with the minor for conduct that is permitted by the Act, unless the person’s behavior such that it creates an unreasonable danger to the minor they can be clearly articulated and substantiated.” MRTMA § 5. Exactly what this phrase means will likely be a source of litigation in the family division of the circuit courts.

The possession limits under the MRTMA are the most generous in the nation. Most other states that have legalized marihuana permit possession of only one ounce of usable marihuana, 3.5g to 7g of concentrate, limit the number of plants to six, and do not permit possession of an extra amount within one’s residence. An additional concern arises as to how these limits will be applied. It will be asserted that the limits are per every individual age 21 or older who resides at the premises. So, the statutory permissible possessory amounts are ostensibly doubled for a married couple and quadrupled or more for a group of college students or an extended family sharing a residence. While this same concern is also present under the MMMA, the quantity of marihuana permitted to be possessed under the MMMA is significantly less than under the MRTMA, and lawful possessors (patients and caregivers) are required to be registered with the State.

What is “Not Authorized” under the statute

The initiated law does not set forth outright prohibitions, but instead cleverly explains what the “act does not authorize.” Specifically, under the terms of Section 4 of the MRTMA, one is not authorized to:

• operate while under the influence of marihuana or consume marihuana while operating a motor vehicle, aircraft, snowmobile, off-road recreational vehicle, or motorboat, or smoke marihuana while in the passenger area of the vehicle on a public way;

• transfer marihuana or marihuana accessories to a person under the age of 21;
• process, consume, purchase, or otherwise obtain, cultivate, process, transport, or sell marihuana if under the age of 21;
• separate plant resin by butane extraction or other method that utilizes a substance with the flashpoint below 100° Fahrenheit in any public place motor vehicle or within the curtilage of any residential structure (This prohibition is broader than the one limited solely to butane extraction found in the MMMA.);
• consume marihuana in a public place or smoke marihuana where prohibited by a person who owns occupies or manages property; however, a public place does not include an area designated for consumption within the municipality that has authorized consumption in a designated area not accessible to persons under 21 years of age;
• cultivate marihuana plants if plants are visible from a public place without the use of binoculars, aircraft, or other optical aids; or; outside of an enclosed area equipped with locks or other functioning security devices that restrict access;
• possess marihuana accessories or possess or consume marihuana on the grounds of a public or private school where children attend preschool, kindergarten, or grades one through 12; in a school bus; or on the grounds of any correctional facility; and
• possess more than 2.5 ounces of marihuana within a person’s place of residence unless any excess marihuana is stored in a container or area equipped with locks or other functioning security devices that restrict access to the contents of the container or area.

MRTMA § 4.5 then provides that “All other laws inconsistent with this act do not apply to conduct that is permitted by this act.” This general statement does not provide for a total repeal of existing marihuana laws, but its lack of specificity to other statutes being impacted, something that the Legislative Service Bureau helps the Legislature avoid, may portend problems in its application.

Differences in terminology between statutes addressing medical and recreational marihuana

The MRTMA does not neatly fit with the MMMA. It provides at Section 4.2 that it “does not limit any privileges, rights, immunities or defenses of a person as provided” by the MMMA. This raises the question whether registered patients and caregivers may lawfully possess marihuana exceeding the amounts permitted under the MMMA. However, this may become a moot point, since in all probability, once the commercial provisions of the MRTMA are fully in operation, the number of registered patients and caregivers under the MMMA could reasonably be expected to drop significantly, as its practical application would largely be limited to registered patients under the age of 21 and their caregivers.

Additionally, the MRTMA references the MMFLA at several places. In addition to the “does not limit” language referenced above, the statute at § 9.6 provides that for the first 24 months after LARA begins accepting applications for marihuana establishment licenses, only those persons holding a MMFLA license may apply for a retailer, processor, class B or class C grower, or secure transporter license issued under the MRTMA. And § 8.3(c), is broadly worded so as to preclude LARA from promulgating rules which prohibit a recreational marihuana establishment from operating at a shared location with a licensed medical marihuana facility.

The lack of consistency between the statute addressing medical marihuana and the recreational marihuana statute is reflected in the following chart.
### Key Differences between Medical Marihuana and Proposed Recreational Marihuana Statutes

<table>
<thead>
<tr>
<th></th>
<th>MMFLA</th>
<th>MMMA</th>
<th>Proposed MRTMA</th>
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<tbody>
<tr>
<td><strong>Grower Limits</strong></td>
<td></td>
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<tr>
<td>Class A</td>
<td>500 plant limit</td>
<td>100 plant limit (limited to Michigan residents for first two years)</td>
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<tr>
<td>Class B</td>
<td>1000 plant limit</td>
<td>500 plant limit</td>
<td></td>
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<tr>
<td>Class C</td>
<td>1500 plant limit; stackable</td>
<td>2000 plant limit; not clear if stackable</td>
<td></td>
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<tr>
<td>Microbusiness</td>
<td>-------</td>
<td></td>
<td>150 plant limit (limited to Michigan residents for first two years)</td>
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<tr>
<td>Secure Transporter</td>
<td>Required to move marihuana between licensed facilities; may move money</td>
<td>No specific requirement to use; no authority to transport money</td>
<td></td>
</tr>
<tr>
<td>Compliance with Marihuana Tracking Act</td>
<td>Required</td>
<td>No reference or requirement</td>
<td></td>
</tr>
<tr>
<td>Plant Resin Separation</td>
<td>-------</td>
<td>Butane extraction prohibited in a public place, motor vehicle, or inside a residence or within curtilage of a residential structure or in a reckless manner</td>
<td>Butane extraction or another method that utilizes a substance with a flashpoint below 100°F prohibited in a public place, motor vehicle, or within curtilage of any residential structure</td>
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<tr>
<td><strong>Possession Limits</strong></td>
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<td></td>
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<tr>
<td>Registered Patient (18 years and older, but can be less than 18)</td>
<td></td>
<td>2.5 oz. useable marihuana and 12 plants*</td>
<td></td>
</tr>
<tr>
<td>Registered Caregiver (five patient limit)</td>
<td></td>
<td>2.5 oz. useable marihuana and 12 plants per patient*</td>
<td></td>
</tr>
</tbody>
</table>
### Key Differences between Medical Marihuana and Proposed Recreational Marihuana Statutes

<table>
<thead>
<tr>
<th>Possession Limits</th>
<th>MMFLA</th>
<th>MMMA</th>
<th>Proposed MRTMA</th>
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</thead>
<tbody>
<tr>
<td>Other Persons (21 years and older under MRTMA)</td>
<td>Not permitted</td>
<td></td>
<td>(a) 2.5 oz. of marihuana, of which not more than 15 grams may be concentrate; (b) 10 oz. secured within one’s residence; (c) any amount produced by plants cultivated on the premises; and (d) 12 plants</td>
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<thead>
<tr>
<th>Inconsistent Terms</th>
<th>MMFLA</th>
<th>MMMA</th>
<th>Proposed MRTMA</th>
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<tbody>
<tr>
<td>Licensed marihuana businesses</td>
<td>marihuana facility</td>
<td>marihuana establishment</td>
<td></td>
</tr>
<tr>
<td>Equipment to grow, process or use marihuana</td>
<td>paraphernalia</td>
<td></td>
<td>marihuana accessories</td>
</tr>
<tr>
<td>Business that sells marihuana</td>
<td>provisioning center</td>
<td></td>
<td>marihuana retailer</td>
</tr>
<tr>
<td>Certain parts of marihuana plant</td>
<td>Usable marihuana and usable marihuana equivalencies</td>
<td></td>
<td>Term not used</td>
</tr>
<tr>
<td>Marihuana-infused products</td>
<td>Excludes products consumed by smoking; exempts products from food law</td>
<td></td>
<td>Does not exclude products consumed by smoking or provide food law exemption</td>
</tr>
<tr>
<td>Enclosed, locked facility</td>
<td></td>
<td>Specifically defined to address a structure, an outdoor grow area, and motor vehicles</td>
<td>Container or area within a person’s residence equipped with locks or other functioning security device that restricts access to the area or container’s contents</td>
</tr>
<tr>
<td>Limitations on scope of local regulation</td>
<td>Purity, pricing or conflict with MMFLA or LARA rules</td>
<td></td>
<td>“Unreasonably Impracticable” or conflict with MRTMA or LARA rules</td>
</tr>
<tr>
<td>Key Differences between Medical Marihuana and Proposed Recreational Marihuana Statutes</td>
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<tr>
<td><strong>Inconsistent Terms</strong></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Property rights</td>
<td>License is a revocable privilege, not a property right; facilities subject to inspection and examination without a warrant</td>
<td>Not addressed</td>
<td></td>
</tr>
<tr>
<td>Zoning</td>
<td>Municipalities specifically authorized to zone, but growers limited to industrial, agricultural or unzoned areas</td>
<td>Municipalities may not limit caregiver operations to residential districts as a “home occupation” Deruiter v Byron Twp. (July 2018) and Ypsilanti Twp. v. Pontius (Oct. 2018)</td>
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<tr>
<td><strong>License eligibility</strong></td>
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<td></td>
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<tr>
<td>Elected officials and governmental employees</td>
<td>Not eligible</td>
<td>Not addressed</td>
<td></td>
</tr>
<tr>
<td>Felony or controlled substance felony within past 10 years or misdemeanor conviction for controlled substance violation or dishonesty theft or fraud within past five years</td>
<td>Not eligible</td>
<td>A prior conviction for a marihuana-related offense does not disqualify an individual unless offense involved distribution of a controlled substance to a minor</td>
<td></td>
</tr>
<tr>
<td>Taxation</td>
<td>3 percent on gross retail receipts of provisioning centers</td>
<td>10 percent on sales price for marihuana sold or transferred by marihuana retailers and micro businesses</td>
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</tr>
</tbody>
</table>
*Under § 8 of the MMMA a patient and patient’s caregiver may also collectively possess a quantity of marihuana that is not more than reasonably necessary to ensure an uninterrupted availability of marihuana for the purpose of treatment.

There also appears to be some inconsistency within the MRTMA itself. Section 6.1 permits a municipality to “completely prohibit or limit the number of (recreational) marihuana establishments within its boundaries.” However, §6.5 provides that a municipality may not prohibit a recreational marihuana grower, processor, and retailer from: 1) operating within a single facility; or 2) “operating at a location shared with a marihuana facility operating pursuant to the (MMFLA).” (Emphasis supplied) The italicized phrase has been interpreted by some marihuana advocates as precluding a community that opted in to the MMFLA from opting out of the MRTMA since to do so would prevent recreational establishments from co-locating in a medical marihuana facility, which is prohibited. However, this argument overlooks the clear grant of authority at §6.1 permitting a municipality by either legislative action or initiative ballot from completely prohibiting recreational marihuana establishments. The real concern with §6 is for those communities that permit both recreational and medical marihuana businesses. The plain language at §6.5 seemingly permits the more intensive grower (which under the MMFLA is restricted to industrial, agricultural or unzoned areas) and processing operations to share a location with marihuana businesses more conducive to being located in commercial or office zoning districts. A legislative fix may be needed to clarify that only analogous medical and recreational marihuana businesses can be co-located.

**What may a municipality do?**

Unlike the MMFLA, where municipalities must “opt in,” under the MRTMA, a municipality must “opt out.” The proposed statute permits a municipality to “completely prohibit” or “limit the number of marihuana establishments.” Given the language used in Section 6 of the MRTMA, a municipality should not rely upon prior ordinances or resolutions adopted in response to the MMFLA, but should affirmatively opt out of the MRTMA or limit the number of marihuana establishments by ordinance, not by resolution. Further, petitions containing the signatures of qualified electors of the municipality in an amount greater than five percent of votes cast for governor in the most recent gubernatorial election, may initiate an ordinance to completely prohibit or provide for the number of marihuana establishments within the municipality.

The initiative language in the MRTMA is problematic. Given the wording, it cannot be assumed that voters can initiate an ordinance to “opt in” should the local governing body choose to exempt the municipality from the Act. Rather, the initiative options are either to “completely prohibit” or “limit the number” of marihuana establishments. It is an open question whether the initiative authority to provide for the number of establishments could be an avenue for voters to override the local governing body’s action to “opt out” of the statute. Additionally, the vague wording of the statute leaves it open to question as to whether an initiative providing for the number of marihuana establishments must (or should) set forth proposed numbers or limits for each separate type of marihuana establishment or whether the limit on establishments is collective in nature. Logic would favor the former, but the statute is not precise.

Not opting out of the recreational marihuana statute will impact existing medical marihuana facilities in a municipality because for the first 24 months of the Act, only persons holding a MMFLA license (in any community where such is permitted) may apply for a recreational retailer, class B or C grower, or secure transporter license under the MRTMA unless after the first 12 months of accepting applications LARA determines that additional recreational marihuana establishment licenses are needed. MRTMA §9.6.
A municipality choosing not to opt out of the MRTMA may adopt certain other ordinances addressing recreational marihuana and recreational marihuana establishments provided that they “are not unreasonably impractical” and do not conflict with the Act or any rule promulgated pursuant to the Act. The statutory definition of the redundant term “unreasonably impracticable,” found at Section 3(u), almost begs to be litigated. As defined by the initiated statute, the term means:

“that the measures necessary to comply with the rules or ordinances adopted pursuant to this act subject licensees to unreasonable risk or require such a high investment of money, time, or any other resource or asset that a reasonably prudent business person would not operate the marihuana establishment.”

Unfortunately, given that the possession, cultivation, processing, and sale of marihuana remains a crime under federal law, how does one assess an “unreasonable risk” or determine what constitutes such a high investment of time or money so as to deter a reasonably prudent business person from going forward? Further, does this definition remove the judicial deference and presumption of reasonableness that accompanies ordinances? The term “unreasonably impractical” was taken directly from Colorado law, and as of this writing, it does not appear to have been construed by an appellate court in that State. As an aside, would “reasonably impracticable” regulations be acceptable?

Specifically, an ordinance may establish reasonable restrictions on public signs related to marihuana establishments; regulate the time, place, and manner of operation of marihuana establishments, as well as the production, manufacture, sale, or display of marihuana accessories; and, authorize the sale of marihuana for consumption in designated areas that are not accessible to persons under 21 years of age or special events in limited areas and for a limited time. A violation of ordinances regulating marihuana establishments is limited to a civil fine of not more than $500. MRTMA § 6.2.

However, some of these regulatory authorizations are problematic. For instance, the ability to establish reasonable restrictions on public signs related to recreational marihuana, being content-based, likely runs afoul of the holding in Reed v. Town of Gilbert, 135 S.Ct. 2218 (2015). Further, the MRTMA does not, unlike the MMFLA, specifically authorize a municipality to exercise its zoning powers to regulate the location of marihuana establishments. Rather, the MRTMA authorizes ordinances that “regulate the time, place, and manner of operation of marihuana establishments.”

The use of the time, place, and manner First Amendment test on the ability of government to regulate speech is ill-suited and inappropriate to the licensure and regulation of local businesses. One cannot help but believe that the choice of the time, place, and manner language was an intentional effort so as to permit marihuana establishments to heavily borrow from established legal precedent that largely circumscribes the ability of governmental authorities to restrict speech. Specifically, valid time, place, and manner type of restrictions must:

1. be content neutral;
2. be narrowly tailored to serve a significant governmental interest; and
3. leave open ample alternative channels for communication.


The above formulation is not consistent with Michigan zoning law doctrine, which, although subject to the due process and equal protection guarantees of the Fourteenth Amendment, generally requires that there be a reasonable governmental interest being advanced by the regulation. See Charter Township of Delta v. Dinolfo, 419 Mich 253, 268 (1984). To this end, the only clear reference to the zoning power in the MRTMA is the grant to municipalities to reduce the separation distance between marihuana establishments and pre-existing public and private schools providing K-12 education from 1000’ to a lesser distance.

A municipality’s ability to authorize designated areas and special events for the consumption marihuana holds the potential to give rise to specialty businesses such as in California where restaurants make marihuana-infused food and drinks available to diners.

Section 6.5 of the MRTMA specifically precludes a municipality from prohibiting the transportation of marihuana through the municipality, even though it has otherwise opted out.
If a municipality limits the number of establishments that may be licensed, and such limitation prevents LARA from issuing a state license to all applicants who otherwise meet the requirements for the issuance of a license, the MRTMA provides that “the municipality shall decide among the competing applications by competitive process intended to select applicants who are best suited to operate in compliance with the act within the municipality.” MRTMA § 9.4. This provision presents the Pandora’s Box which confronted municipalities that attempted to cap the number of licenses issued under the MMFLA. Any competitive process that seeks to determine who is “best suited” inherently has a subjective component that may expose the municipality to legal challenges based on alleged due process violations by the municipality from unsuccessful applicants asserting that the process employed was unfair on its face or unfairly administered. While there may be good reasons to limit the number of recreational marihuana establishments, any community that chooses to do so should be prepared to defend itself from challenges by unsuccessful applicants.

A municipality may adopt an ordinance requiring that marihuana establishments located within its boundaries obtain a municipally–issued marihuana establishment license; but, the annual fee for such a license is limited to $5,000 and any qualifications for licensure may not conflict with the MRTMA or rules promulgated by LARA pursuant to the Act.

What limitations on the State are applicable to municipalities?

According to the statute, a State rule may not be unreasonably impracticable, or limit the number of any of the various types of license that may be granted, or require a customer to provide a retailer with identifying information other than to determine a customer’s age or acquire personal information other than that typically required in a retail transaction or preclude the co-location of a marihuana establishment with a licensed medical facility. MRTMA §8.3.

The State is required to issue a license under the Act if the municipality does not notify LARA that the proposed establishment is not in compliance with a local ordinance and if the proposed location is not within an area “zoned exclusively for residential use and not within 1000 feet of a pre-existing public or private school providing K-12 education.” A municipality is authorized to reduce the 1000’ separation from a school requirement. MRTMA §9.3.

Additionally, the grounds for disqualifying a license applicant based on a prior controlled substance conviction is much reduced under the MRTMA than under the MMFLA. An applicant for a medical marihuana facilities license is disqualified if they have any of the following:

- a felony conviction or release from incarceration for a felony within the past 10 years;
- a controlled substance-related felony conviction within the past 10 years; or
- a misdemeanor conviction involving a controlled substance, theft, dishonesty, or fraud within the past five years.

In contrast, under the MRTMA any prior conviction solely for a marihuana offense does not disqualify or affect eligibility for licensure unless the offense involved distribution to a minor. Thus, persons convicted of trafficking in large amounts of marihuana would be eligible for a municipal marihuana establishment license. MRTMA §8.1(c).

Additionally, LARA is precluded from issuing a rule and municipalities may not adopt an ordinance requiring a customer to provide a marihuana retailer with any information other than identification to determine the customer’s age. MRTMA §8.3(b). In this regard, the MRTMA provides an affirmative defense to marihuana retailers who sell or otherwise transfer marihuana to a person under 21 years of age if the retailer reasonably verified that the recipient appeared to be 21 years of age or older by means of government issued photographic identification containing a date of birth. MRTMA §10.2.

There are also limitations on holding ownership interests in different types of facilities. Owners of a safety compliance facility or secure transporter may not hold an ownership interest in a grower, or processor, or retailer, or microbusiness establishment. The owner of a microbusiness may not hold an interest in a grower, or processor, or retailer, safety compliance, or secure transporter
establishment. And a person may not hold an interest in more than five marihuana growers or more than one microbusiness, unless after January 1, 2023 LARA issues a rule permitting otherwise. MRTMA §9.3.

Finally, for the first 24 months after LARA begins accepting applications for licensure, only persons who are residents of Michigan may apply for a Class A grower or microbusiness license and to be eligible for all other licenses, persons must hold a State operating license pursuant to the MMFLA. MRTMA §9.6.

What if the State fails to act in a timely fashion?

If the State does not timely promulgate rules (despite the Act not providing when those must be issued) or accept or process applications within 12 months after the effective date of the Act, an applicant may submit an application for a recreational marihuana establishment directly to the municipality where the business will be located. MRTMA §16. A municipality must issue a license to the applicant within 90 days after receipt of the application unless the municipality determines that the applicant is not in compliance with an ordinance or rule adopted pursuant to the Act. If a municipality issues a license, it must notify the department that the license has been issued. That municipal license will have the same force and effect as a State license but the holder will not be subject to regulation or enforcement by the State during the municipal license term. It is unclear whether, if the State puts in place a licensing system during the term of a municipal license, the establishment can be required to seek State licensure or is merely required to renew the license with the municipality.

Municipality as an employer or landlord

The MRTMA does not require that an employer permit or accommodate conduct otherwise allowed by the Act in the workplace or on the employer’s property. The Act does not prohibit an employer from disciplining an employee for violation of a workplace drug policy or for working while under the influence of marihuana. Nor does the Act prevent an employer from refusing to hire a person because of that person’s violation of a workplace drug policy. MRTMA §4.3. In this regard, the statute appears to codify the holding of Casias v. Wal-Mart Stores, Inc., 764 F Supp 2d 914 (WD Mich 2011) aff’d, 695 F3d 428 (6th Cir 2012) permitting a private employer to discharge an employee who as a registered patient under the MMMA used marihuana outside of work hours, was not under the influence while at work, but tested positive after suffering an injury while at work. However, note should be taken that in Braska v. Challenge Manufacturing Co., 307 Mich App 340; 861 NW2d 289 (2014) the Court determined that under the terms of the MMMA, employees discharged from employment solely on the basis of positive drug tests for marihuana were not disqualified from receiving unemployment benefits.

In the event that a municipality has created a housing commission, or otherwise provides housing or otherwise leases property and therefore acts as a landlord, the MRTMA permits the lessor of property to prohibit or otherwise regulate the consumption, cultivation, distribution, processing, sale, or display of marihuana and marihuana accessories on leased property, except that a lease agreement may not prohibit a tenant from lawfully possessing and consuming marihuana by means other than smoking. MRTMA §4.4.
Municipal share of Marihuana Excise Tax Fund

Under the terms of the MMFLA, municipalities (cities, villages, and townships) in which a medical marihuana facility is located get a pro rata share of 25 percent of a medical marihuana excise fund created by the imposition of a 3 percent tax on gross retail sales at provisioning centers. However, under the terms of the MMFLA, if a law authorizing the recreational or nonmedical use of marihuana is enacted, the tax on medical marihuana sales sunsets 90 days following the effective date of the new law. MCL 333.27601. Thus by early March 2019, the excise tax just beginning to be collected by provisioning centers under the MMFLA will be repealed.

The MRTMA seeks to fill the gap created by the loss of the 3 percent excise tax under the MMFLA by creating marihuana regulation fund through the imposition of a 10 percent excise tax (which would be in addition to the 6 percent sales tax) on the sales price of marihuana sold or otherwise transferred by a marihuana retailer or microbusiness to anyone other than another marihuana establishment. However, the sale to be allocated to municipalities is reduced to 15 percent and before any money is provided to cities, villages, and townships in which a marihuana retail store or microbusiness is located, the State is made whole for its implementation, administration, and enforcement of the Act—and until 2022 or for at least two years, $20 million from the fund must be annually provided to one or more clinical trials approved by the FDA that are researching the efficacy of marihuana in the treatment of U.S. armed services veterans and preventing veteran suicide. MRTMA §14.

The net effect for municipalities could result in more money under the MRTMA than under the MMFLA. This is because: a) the tax rate levied is over three times higher under the MRTMA (10 percent v. 3 percent); b) there is a larger pool of potential consumers (registered patients and caregivers v. all persons aged 21 and older); and c) the allocation to municipalities under the MRTMA is based on the number of marihuana retail stores and micro businesses as opposed to all types of marihuana facilities under the MMFLA. However, if a municipality does not permit recreational marihuana retail establishments, it will not receive any revenue under the MRTMA, but will still have to deal with the social consequences of marihuana use.

The following table illustrates the differences between the two statutory approaches based on assumption of $1 billion in annual gross sales, State regulatory expenses being recouped by applicable fees, and a municipality having one percent of the total number of medical marihuana facilities or recreational retail businesses.

<table>
<thead>
<tr>
<th>Annual Gross Retail Sales</th>
<th>MMFLA</th>
<th>MRTMA</th>
</tr>
</thead>
<tbody>
<tr>
<td>$1,000,000,000</td>
<td>$1,000,000,000</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Applicable Excise Tax Rate</th>
<th>3 percent</th>
<th>10 percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amount of Excise Tax Fund</td>
<td>$30,000,000</td>
<td>$100,000,000</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Less Allocation for Veterans’ Health Research until 2022</th>
</tr>
</thead>
<tbody>
<tr>
<td>$30,000,000</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Percentage Allocated to Municipalities</th>
<th>25 percent</th>
<th>15 percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amount Available for Municipalities</td>
<td>$7,500,000</td>
<td>$12,000,000</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>1 percent of facilities or retail establishments in municipality</th>
</tr>
</thead>
<tbody>
<tr>
<td>$75,000</td>
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</tbody>
</table>

Seemingly to convince voters to approve the MRTMA, 35 percent of the marihuana regulation fund will be allocated to the school aid fund for K-12 education and another 35 percent to the Michigan transportation fund for the repair and maintenance of roads and bridges. Unlike the MMFLA, which allocated 15 percent split equally (5 percent each) between county sheriffs where a marihuana facility was located, the Commission on Law Enforcement Standards for Officer Training, and to the State Police, there is no allocation directly to law enforcement purposes under the MRTMA.
Conclusion

As challenging as it was for municipalities to come to grips with medical marihuana regulation under the MMFLA, the difficulties posed by the proposed MRTMA regarding recreational marihuana are likely to be significantly greater. Under the MMFLA, many municipalities took a “wait and see” position on the issue of broad commercialization of medical marihuana, which only required that the governing body of the municipality do nothing. And for those municipalities that chose to “opt in,” the MMFLA granted them a great deal of regulatory discretion, which some representatives of the marihuana industry have called “onerous” [Langwith, “Local Overreach”, 97 Mich B J 36, 37 (August 2018)], so as to reasonably safeguard the public safety, health, and welfare.

The MRTMA on the other hand, requires a municipality to affirmatively take legislative action to “opt out” of regulating recreational marihuana commercial enterprises. For those municipalities that choose to permit recreational marihuana establishments to exist in the community, the regulatory framework is much more circumscribed than under the MMFLA, and is certainly more likely to raise legal issues. Fortunately, commercialization of recreational marihuana is at least a year away, and by that time the State regulatory framework for medical marihuana will have been in place for nearly two years.

Apart from the commercialization of recreational marihuana, municipal law enforcement officials and officers will be required to know the new rules surrounding “legalized” marihuana within days of the election. At a minimum, county and municipal prosecutors should be ready to provide training on the law in early November. It is also likely that defendants who committed marihuana offenses prior to November 6 will seek dismissal of those charges given the approval of the ballot proposal. Several county prosecutors have been reported as being willing to dismiss pending marihuana possession charges issued before the election if the alleged conduct falls within the scope of the initiated law.

In the meantime, municipal attorneys would be well-advised to read through the initiated statute more than once and be prepared to advise their clients of the significant ramifications of legalized marihuana on local governmental and social services.
For the County of MARQUETTE

In the matter of: Public Notice
Charter Township of Chocolay Planning Commission
March 18, 2019
Ordinance 67 Marijuana Facilities
Ordinance 68 Rentals

State of MICHIGAN, County of Marquette ss.

JAMES A. REEVES

being duly sworn, says that he is

PUBLISHER

of THE MINING JOURNAL

a newspaper published and circulated in said county and otherwise qualified according to Supreme Court Rule, that annexed hereto is a printed copy of a notice which was published in said newspaper on the following date, or dates, to-wit

February 27, 2019

JAMES A. REEVES

Subscribed and sworn to before me this 27th day of February 2019.

HOPEY CASMAN
Notary Public for MARQUETTE County, Michigan
Acting in the County of Marquette
My commission expires: May 25, 2025