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Township Law *E-Letter*

Medical Marihuana in Michigan: Legal Update and Land Use Strategies

Townships are entrenched in the puzzling practical aspects of enforcing the Michigan Medical Marihuana Act ("MMMA"), including appropriate land use regulations associated with medical marihuana. Few townships have ordinances equipped to handle the myriad medical marijuana issues, like mixed commercial, agricultural, and residential uses, industrial uses in residential or commercial areas, or uses that could be incompatible with public uses such as schools. Here are a few legal updates and strategies to assist your township in emerging from the mysterious maze of the MMMA.

Changing Legal Backdrop of the MMMA

Federal law is clear on the matter of who can decide what substances are or are not legal within the states: the federal Controlled Substances Act (CSA) supersedes any state law under the Supremacy Clause of the U.S. Constitution. Therefore, the U.S. Department of Justice asserts that a state law that legalizes medical marihuana (like the MMMA) is superseded by the CSA unless and until the CSA is amended to exclude marihuana as a controlled substance.

Legal theory and practical realities with respect to medical marihuana have not yet merged in Michigan. But the state and its courts are moving closer to that conclusion. A few state court judges have recently ruled that the CSA supersedes the MMMA and, as a result, the MMMA is unconstitutional and unenforceable. While these opinions are not binding in jurisdictions outside of Dearborn and Midland County, they hint at a growing movement toward invalidating or demanding changes to the MMMA.

Other cases involving medical marihuana seem to be on a fast-track through the state judicial system, including a case currently before the Michigan Court of Appeals involving patient to patient transfers of medical marihuana and a number of other state and federal court cases, many related to the manner in which the local government has elected to regulate (or not regulate).

Also notable are recent communications from the U.S. Department of Justice on the issue of the interplay of federal and state laws, which we discuss briefly here.

The Ogden Memo: Hands Off!

On October 19, 2009, Deputy United States Attorney General David W. Ogden issued a memorandum explaining that the federal government considers marihuana an illegal substance, but that the federal government did not consider investigation and prosecution of persons complying with their state medical marihuana laws to be an efficient use of time or federal resources. This memo was early misinterpreted as demonstrating that the federal government was well aware of the medical marihuana movement in some states, but that federal authorities would, essentially, turn a blind eye unless citizens were clearly acting outside the bounds of the state law—a "hands off" type policy that seemed to express some deference for state law.

Beyond the Ogden Memo

The Ogden Memo was followed by a series of letters from federal prosecutors to states with medical marihuana laws like the MMMA, implying that state and local officials who allow possession or use of medical marihuana could be considered co-conspirators who are violating the federal Controlled Substances Act.

On June 29, 2011, that implied threat of legal consequences for state and local officials became an all out warning. Deputy United States Attorney General James M. Cole issued a new memorandum, clarifying that pursuing seriously ill individual marihuana users remains an inefficient use of limited federal resources. However, Cole's memorandum also clarified that the recent increase in the scope of commercial cultivation, sale, distribution and use of marihuana under state medical marihuana laws and local ordinances allowing large-scale, private marijuana cultivation centers raise serious federal concerns.

As a result, the Department of Justice now considers people in the marihuana business and "those who knowingly facilitate" such activities to be violating the CSA, regardless of state law or local ordinances to the contrary. The memo's reference to "troubling local laws" sets a tone that any township or township official could be considered facilitators of these illegal marihuana schemes, even if they involve medical marihuana.

The legal activity and changing rules in this field can be overwhelming and leave your township wondering, "What can we do?" Read on for some ideas!

Township Regulatory Options

There are a number of methods available to address medical marihuana in your township, including total bans, special use permits, home occupations, and no regulation at all. Foremost in your decision-making regarding your township's chosen options should be avoiding actions that present high litigation risk.

Although municipalities have selected options across this broad continuum, we are hesitant to recommend regulatory action that could be construed as "allowing" or "facilitating" possession of a federally controlled substance, because of the Attorney General warning letters.

We would also caution that, although a total ban on medical marihuana activity is probably within the letter of the law, your township should consider the possibility that such a ban may be an unnecessary target for expensive litigation, as we see in the media and in court cases around the state. You may be successful in the end, but at no small cost.

Among the other primary considerations when planning how your township will regulate medical marihuana, if you so choose, is the extent of the use permitted. Will you permit only medical marihuana home occupations that are limited to one patient or caregiver per dwelling? If you allow marihuana to be cultivated in buildings other than a dwelling, where will you allow it? Mixed-use, agricultural, industrial, or limited industrial areas? Much of that decision is tied to the nature of your township, but it is a guiding factor for the remainder of your medical marihuana planning.

With that in mind, you might consider the following as reasonable, less litigious options for regulating medical marihuana activities in your township.

Home Occupations

A zoning amendment for medical marihuana home occupations is among the simplest and most logical methods for regulating home-based medical marihuana activity, whether by patients or caregivers. When drafting your ordinance, you can and should include a number of criteria for marihuana-specific ordinances. Such criteria or standards might include:

- No more than 12 plants may be grown by a caregiver or patient as a home occupation.

- A medical marihuana home occupation shall not be located within 1,000 feet of any school, church or day care facility, or other incompatible public uses, particularly those involving minors.
- Not more than one caregiver or patient per parcel shall be permitted to grow or cultivate medical marihuana on any residential parcels.
- All marihuana must be contained in an enclosed, locked facility in a primary (or accessory) building.
- No marihuana may be cultivated outdoors.
- All building, electrical, plumbing, and mechanical permits shall be obtained where electrical wiring, lighting, or watering devices support growing marihuana.
- That portion of the building where energy usage and heat exceeds typical residential use (such as a grow room) and the storage of any chemicals such as herbicides, pesticides, and fertilizers shall be subject to inspection and approval by the Fire Department to ensure compliance with the relevant fire protection regulations.

Special Use Permits

Consider the special use permitting options in the event that your township would like to (a) limit this type of use or activity to one medical marihuana patient or caregiver per non-residential building or (b) provide for multiple patients and caregivers to join together in one non-residential building or facility.

Regardless of the option your township selects, to further insulate your township from liability, consider including language in special use applications and a condition to each medical marihuana special use permit stating that the permit allows its holder to engage in the use, cultivation, or distribution of medical marihuana only to the extent that it is lawful under state and federal law.

Further, your special use permit section should clearly and carefully lay out all of the township's expectations as to sites, strict compliance with the MMMA (to the extent that it is legal, if at all, under federal law), and a host of other criteria to ensure that your township knows what is being grown and distributed, and where. Such criteria are advisable not just to protect the township, but the patient or caregiver as well.

SUP for One Patient or Caregiver

This option could permit

- one patient to grow or cultivate, and use, but not distribute, his/her own medical marihuana, and/or
- one caregiver to grow or cultivate and distribute medical marihuana to his/her patients (up to the maximum of 5 patients).

SUP for Multiple Patients / Caregivers

This option might include, as special uses, medical marihuana growing facilities, distribution facilities, and/or clubs. Although such uses should be specifically defined in your code of ordinances, in general they could be defined as follows:

- A ***medical marihuana club*** is a where multiple patients grow and make available medical marihuana for their individual use.
- A ***medical marihuana distribution facility*** is where caregivers store and distribute to their patients (***up to 5 patients per caregiver***) medical marihuana in accordance with state law – and where growth and cultivation of marihuana is prohibited.
- A ***medical marihuana growing facility*** is where caregivers may grow, possess, and store up to the maximum amount of medical marihuana allowed pursuant to state law – and where use or distribution of marihuana is prohibited.

Note that in this option, caregivers' growth and distribution operations are not permitted in the same facility.

Michigan Attorney General Schuette recently issued an opinion stating that ***joint cooperative cultivation or sharing of marihuana plants under the MMMA is prohibited***, but this opinion focused primarily on the open cultivation or sharing of plants among patients and caregivers, where each patient's marihuana is not kept in an enclosed, locked facility.

The types of facilities we have outlined here could still be permissible under the Attorney General's opinion, provided that the special use permits specifically require that each patient's cultivation and use of marihuana is limited to his or her own access and use, and each caregiver is required to ensure that each of his or her patients' marihuana is cultivated and stored in separate enclosed locked facilities to which only the caregiver has access. This would be permitted even if more than one patient or caregiver use a building, provided that each patient or caregiver has a separately locked room, closet, or locker to which only that person has access.

Defining the Different Uses or Facilities

Be sure to assess your list of defined terms and uses in your ordinance for:

- Inclusion of statutory definitions of "patients," "caregivers," "marihuana," "medical marihuana," etc., and
- Inclusion of definitions for the different types of facilities where medical marihuana activities may be conducted, if any.

When it comes to medical marihuana, go by the statute itself. Define marihuana, medical marihuana, and the like using language straight from the MMMA. Also include statutory definitions of "patients," "caregivers," and the different types of facilities where medical marihuana activities may be conducted, if any.

"Dispensaries"

The MMMA does not address how caregivers or patients are to obtain the necessary supplies to grow or use their own medical marihuana. The Act was designed as a defense to criminal prosecution for the medical use of marihuana, but still recognizes that marihuana is a controlled substance under Michigan's Public Health Code.

We do not read the MMMA to permit the establishment of the commonly labeled "dispensary" where medical marihuana is provided or sold as a supply for caregivers or patients—or anyone else, for that matter. We therefore suggest a very clear statement in your ordinance that any business or operation, profitable or not, whose inventory or goods are or include medical marihuana or medical marihuana paraphernalia are expressly prohibited within the township, unless the criteria of a home occupation or special use permit and all other state and federal laws are satisfied.

Create a safety net

While no one can guarantee that any ordinance is "bullet-proof," there are certain other steps your township can take to strengthen yours.

- Consider including in both your zoning ordinance and your code of ordinances a statement or regulation stating that whatever is illegal under federal and state law is illegal in the township.
- Your medical marihuana ordinances should include other provisions explicitly demanding that anyone seeking to utilize medical marihuana under the MMMA must strictly comply with its requirements.
- Be clear: state upfront in your code of ordinances that a business or commercial operation that sells or includes marihuana as a part of its inventory is prohibited in the township, except as expressly provided by township ordinances.

- As discussed above, a "dispensary"—a marihuana shop where marihuana is sold to patients, caregivers and the public—can be banned in your township. This is consistent with the MMMA, because the MMMA clearly lacks any provision through which patients or caregivers can grow or sell marihuana to the public and does not discuss or provide any protection for marihuana suppliers.
- Finally, your ordinance should also clearly state that nothing in the ordinance is intended to grant immunity from prosecution under state or federal law, including users, patients, caregivers, or owners of property on which medical use of marihuana occurs.

We Can Help!

Fahey Schultz Burzych Rhodes PLC, your Township Attorneys, work with townships to help develop strategies to achieve the best balance of public health, safety, and welfare in your Township, and to balance that the perceived statewide demand for avenues for medical marihuana use under the MMMA. Please contact our office if you need any assistance in drafting, amending, or implementing a medical marihuana ordinance in your township.

— Lizzie Mills

The Author

Helen E. R. ("Lizzie") Mills is a lawyer with Fahey Schultz Burzych Rhodes PLC, specializing in representing townships and other municipal governments. She distinguished herself at the Thomas M. Cooley Law School, graduating second in her law school class, ***magna cum laude***. While in law school, Lizzie earned 11 Certificates of Merit—the highest honor for academic performance. In 2010, she was awarded one of the inaugural "book award" scholarships by the Real Property Law Section of the State Bar for excellence in advanced property law courses. Lizzie handles general municipal law, labor and employment, real property, and Freedom of Information issues. She can be reached at 517.381.3209 (direct line) or hmills@fsblawyers.com

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