



TO: Mayor and Members of Troy City Council
FROM: Lori Grigg Bluhm, City Attorney
DATE: January 18, 2010
SUBJECT: The Michigan Medical Marihuana Act: A Municipal Lawyer's Perspective Article

Enclosed please find a feature article titled *The Michigan Medical Marihuana Act: A Municipal Lawyer's Perspective*, which was authored by Assistant City Attorney Christopher J. Forsyth for the January issue of *Laches*, the Oakland County Bar Association's monthly publication. In addition to this article, Chris is a featured presenter on this topic for the State Bar of Michigan Public Corporation Law Section winter seminar, which is scheduled for February 5, 2010. The Michigan Medical Marijuana Act was passed by the Michigan voters on November 4, 2008.

As always, if you have any questions concerning the above, please let me know.

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The Michigan Medical Marihuana Act: A Municipal Lawyer's Perspective

by Christopher J. Forsyth

On November 4, 2008, Michigan voters approved state proposal 08-1, a legislative initiative to create the Michigan Medical Marihuana Act ("the MMMA"). This act allows the use and cultivation of marihuana for specific illnesses or conditions. This unique law poses unique issues for a municipality, ranging from local control to ordinance enforcement and prosecution. This article provides an overview of the MMMA from a municipal lawyer's perspective. Specifically, this article provides a summary of the statutory requirements and protections set forth in the MMMA. It then turns to two issues the municipal attorney is facing or will likely face. First, this article will discuss a municipality's ability to regulate businesses or other entities that desire to grow or cultivate marihuana as dispensaries or caregivers. Second, it will discuss the interplay between the MMMA "affirmative defense" provision and ordinance prosecutions of marihuana-related misdemeanors.

An Overview of the MMMA

The MMMA gives qualifying patients and primary caregivers who have obtained a registry identification card from the Michigan Department of Community Health (MDCH) the limited right to cultivate and use marihuana for medical purposes. A "qualifying patient" is "a person who has been diagnosed by a physician as having a debilitating medical condition."¹ A "primary caregiver" is "a person who is at least 21 years old and who has agreed to assist with a patient's medical use of marihuana."² "Medical use" means "the acquisition, possession, cultivation, manufacture, use ... of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition..."³ The MMMA defines "debilitating medical condition" as specific illnesses including cancer, glaucoma, positive status for HIV, and Crohn's disease.⁴ Alternatively, the MMMA defines debilitating medical condition as "a chronic or debilitating disease or medical condition that causes cachexia or wasting, severe and chronic pain, seizures, and muscle spasms."⁵ The

MMMA also allows for the future expansion of this definition to include "any other medical condition or its treatment approved by the department [of community health]."⁶

A qualified patient or primary caregiver can lawfully possess marihuana if he or she obtains and possesses a registry identification card through the MDCH.⁷ A qualifying patient must complete and submit an MDCH application together with a physician certification form.⁸ This form must be signed by the patient's treating physician, who states that the applicant suffers from a debilitating medical condition and the patient will likely receive a therapeutic or palliative benefit from the medical use of marihuana.⁹ A primary caregiver does not have to submit an application. Instead, if a primary caregiver is designated in the qualifying patient's application and a registry identification card is issued to the qualifying patient, then a registry identification card shall also be issued to the designated primary caregiver.¹⁰ The MDCH is required to issue a registry identification card to a qualified patient or caregiver if the form is complete. Further, the MDCH may only reject an application if it is incomplete or if the MDCH determines that the information in the application is false.¹¹

Once a qualified patient possesses a registry identification card, he or she can lawfully grow up to 12 marihuana plants and possess 2.5 ounces of usable marihuana.¹² Usable marihuana is defined as "the dried leaves and flowers of the marihuana plant, and any mixture or preparation thereof, but does not include the seeds, stalks, and roots of the plant."¹³ A primary caregiver can also grow up to 12 marihuana plants and possess up to 2.5 ounces of usable marihuana for each patient, and can have up to five qualified patients, allowing a total of 60 plants.¹⁴ Both the primary caregiver and qualified patient must keep the plants in an enclosed locked facility, which is defined as a "closet, room, or other enclosed area equipped with locks or other security devices that permit access only by a registered primary caregiver or registered qualifying patient."¹⁵

A qualified patient or primary caregiver who possesses a registry card and complies with the above quantity restrictions is provided with very broad protection from "arrest, prosecution, or penalty in any manner, or [shall not be] 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 for the medical use of marihuana in accordance with this act..."¹⁶ Furthermore, a doctor who provides a written certification to the MDCH is also given an equally broad protection from "arrest, prosecution or penalty in any manner ... including ... disciplinary action by the Michigan board of medicine, the Michigan board of osteopathic medicine and surgery..."¹⁷

While the MMMA provides protection to patients and caregivers engaged in the medical use of marihuana as well as protection for treating physicians, the MMMA does provide for penalties and prohibitions. For example, the MMMA prohibits any person from performing any task under the influence of marihuana when doing so would constitute negligence or professional malpractice. It also prohibits anyone from operating any motor vehicle, aircraft or motorboat while under the influence of marihuana.¹⁸ Qualifying patients are also prohibited from smoking marihuana in a public place including public transportation; or from possessing, acquiring, using or possessing marihuana in a school bus, on school grounds, or in a correctional facility.¹⁹ Finally, a qualified patient or registered primary caregiver who sells marihuana to a person "who is not allowed to use marihuana for medical purposes" faces a felony punishable by two years imprisonment and /or \$2,000 fine.²⁰

Local Control and the MMMA: Prohibit or Regulate

The MMMA states: "A registered primary caregiver may receive compensation for costs associated with assisting a registered qualifying patient in the medical use of marihuana. Any such compensation shall not constitute the sale of controlled substances."²¹ Given this language, a cottage industry of for-profit caregivers, grow operations, pot shops, or marihuana dispensaries will likely seek to become entrepreneurial businesses in communities all across Michigan. Faced with this new type of industry, a municipal attorney should be prepared to answer whether the community can prohibit such businesses or can regulate the business through licensing or zoning ordinances.

The first approach is to prohibit establishments or businesses engaged in the commercial growth or cultivation of marihuana.²² This could be accomplished with existing ordinances, or with a simple zoning ordinance or amendment requiring all uses or businesses seeking approval or permits from the municipality to comply with federal, state and local law. Under the Federal Controlled Substance Act, it is a crime to manufacture, cultivate or distribute marihuana.²³ Although the United States Justice Department recently stated in a memorandum addressed to the United States Attorneys that prosecutorial resources should not be used to investigate and prosecute seriously ill persons who medically use marihuana, the memorandum also states that "prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department."²⁴ Further, the United States Supreme Court recently upheld the validity of Federal Controlled Substance Act after being challenged by a cultivator of medical marihuana in *Gonzales v. Raich*.²⁵ The *Raich* Court held that Congress has the ability to regulate marihuana under the Federal Controlled Substance Act pursuant to the Constitution's commerce clause, even if the cultivation of marihuana is for legitimate medical use.²⁶ In an earlier opinion, the Supreme Court also held the use of marihuana for medical reasons is not a necessity defense to a prosecution under the Controlled Substance Act.²⁷ Given that cultivation of marihuana is still a crime under federal law, even if for state-sanctioned medicinal reasons, a municipality could take the position that it cannot authorize or permit the violation of any law, whether such law is a state statute or federal statute.

Prohibiting commercial grow operations or dispensaries may not be the appropriate approach for every municipality. Certainly, such an approach is novel and not without risk of litigation. An alternative approach would be to regulate such businesses through a licensing ordinance or through special-permit process. In fact, some Michigan municipalities are permitting medical marihuana facilities or dispensaries to operate, but are regulating them as a special land use.²⁸ Special land use approval is a valuable tool because it gives a community the ability to control negative effects of a particular use through the application of specific discretionary standards.²⁹ Examples might include: minimum distance requirements from other dispensaries; minimum dis-

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tance requirements from schools, daycares or residentially zoned districts; and permitting dispensaries or commercial grow operations only in commercial or industrial districts.

Prosecution and the MMMA: Section 8 Affirmative Defense

Now that the medical use of marihuana is legal in Michigan, a municipal attorney handling ordinance prosecutions will more than likely be faced with a defense motion to dismiss an unlawful possession of marihuana case. Specifically, defendants will cite to Section 8 of the MMMA, which is entitled, "Affirmative Defense and Dismissal for Medical Marihuana."³⁰ This section requires the court to dismiss a case if the affirmative defense is successfully raised. To assert this defense, a defendant must prove at an evidentiary hearing three elements: first, a physician has stated that, in his or her professional opinion, the defendant is "likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition"; second, the defendant and his caregiver, if applicable, did not possess more marijuana than "was reasonably necessary to ensure the uninterrupted availability of marihuana for the purpose of treating or alleviating the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition"; and third, the defendant and his caregiver, if applicable, were engaged in "acquisition, possession, cultivation" for the purpose of using marihuana to "treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating condition."³¹

The defense bar most certainly will ask a court to take a very broad reading of the Section 8 affirmative defenses, arguing that Section 8 provides protection for those who possess or use marihuana above and beyond the limita-

tions or requirements set forth in other sections of the MMMA. Unfortunately for prosecutors, there are some anomalies in the law that are inconsistent with other provisions of the MMMA. For example, Section 8 could be read to provide an affirmative defense to all patients, not just "qualified" patients.³² Section 8 also fails to specify a quantitative limit, and instead allows for the possession of marihuana "that was not more than was reasonably necessary to ensure the uninterrupted availability of marihuana," which obviously is different than the 2.5 ounces/12 plants limitation found in an earlier section of the MMMA. Section 8 also is inconsistent with the rest of the MMMA in that it allows an affirmative defense to be raised not only for a debilitating medical condition but also for a "serious medical condition."³³

Even though Section 8, at first glance, appears to be inconsistent with the rest of the MMMA, this section must be read with the other provisions of the MMMA.³⁴ The first clause of the statute states, "Except as provided in section 7..."³⁵ Section 7 in turn provides, "The medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with the provisions of this act."³⁶ Section 8 also employs the term "medical use of marihuana," which, as noted earlier in this article, requires a patient to be registered with the MDCH.³⁷ Thus, a prosecutor should argue when faced with a motion to dismiss brought pursuant to Section 8 that the defendant must comply with all the requirements provided in the MMMA in order to raise a valid affirmative defense.

Section 8 does not allow post-arrest self-medication or retroactive registration. For example, suppose a defendant is arrested on June 1 for possession of marihuana. He has a small zip-lock bag of marihuana in his possession, but not a registry identification card. The defendant then sees a physician on July 1, who diagnoses him with glaucoma and states in the form of an affidavit or written certifica-

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tion that the defendant will receive a therapeutic benefit from the medical use of marihuana. The defendant then files a motion to dismiss citing Section 8 and the doctor's affidavit. A municipal prosecutor should cite to *People v. Rigo*,³⁸ a California case that decided this issue in the context of California's Compassionate Use Act, which is similar to the MMMA. The *Rigo* court determined that the intent of the Compassionate Use Act was to allow the use of marihuana under the supervision of a physician, but not to sanction or protect "self medicating."³⁹ *Rigo* is persuasive authority in Michigan because it is consistent with the intent expressed in the ballot proposal. When Michigan voters cast their vote on this issue, they were informed that the proposed law would:

Permit physician approved use of marihuana by registered patients with debilitating medical conditions including cancer, glaucoma, HIV, AIDS, hepatitis C, MS and other conditions as may be approved by the Department of Community Health.⁴⁰

Conclusion

The MMMA allows persons suffering from a serious illness or medical condition the limited right to use marihuana as a means of alternative treatment through a registry identification system. It also shields patients, caregivers and physicians from prosecution, discipline and other penalties. Michigan municipal attorneys will likely face creative arguments based on this law. Vigilance and forethought are recommended to ensure that the Act is used for the MMMA's objectives of limited legalization and protection, while simultaneously preserving local control of grow operations or dispensaries, and municipal prosecutions.

Christopher J. Forsyth is an assistant city attorney for the City of Troy. He received his B.A. from the University of Michigan in 1997 and J.D. from Wayne State University in 2001. He represents the City of Troy in zoning and land use disputes, condemnation cases, civil rights claims, personal injury/property damage claims, and other miscellaneous cases. He currently serves as the legal advisor for the City of Troy Planning Commission. He also served as legal counsel for the Board of Zoning Appeals and Liquor Advisory Committee. He is a member of the State Bar of Michigan Public Corporation Section, the Oakland County Bar Association Municipal Law Committee, and the Michigan Association of Municipal Attorneys. He is admitted to practice before the United States Court of Appeals for the Sixth Circuit, and the United States District Court for the Eastern District of Michigan.

Footnotes

- 1 MCL 333.26423(h).
- 2 MCL 333.26423(g).
- 3 MCL 333.26423(e).
- 4 MCL 333.26423(a)(1).
- 5 MCL 333.26423(a)(2).
- 6 MCL 333.26423(a)(3).
- 7 MCL 333.26424.
- 8 MCL 333.25426.
- 9 *Id.*; MCL 333.25423.
- 10 MCL 333.26426(d).
- 11 MCL 333.26426(c).
- 12 MCL 333.26424(a).
- 13 MCL 333.26423(j).

- 14 MCL 333.26424(b).
- 15 MCL 333.26424, MCL 333.26423(c).
- 16 MCL 333.26424(a)(b).
- 17 MCL 333.26424(f).
- 18 MCL 333.26427.
- 19 MCL 333.26427(b) (2) & (3), and 333.26423(e).
- 20 MCL 333.26424.
- 21 MCL 333.26424(e).
- 22 As explained, this is not advocating a specific and complete ban on all qualified patients or primary caregivers. Such an approach would probably conflict with the MMMA and thereby be invalid.
- 23 See e.g. 21 USC 841.
- 24 See U.S. Department of Justice, Office of the Deputy Attorney General, Memorandum for Selected United States Attorneys, dated October 19, 2009. The Memorandum further states, "Finally, nothing herein precludes investigation or prosecution where there is a reasonable basis to believe that compliance with state law is being invoked as a pretext for the production or distribution of marijuana for purposes not authorized by state law." Page 3.
- 25 545 US 1; 125 S Ct 2195 (2005).
- 26 *Id.*
- 27 *United States v. Oakland County Cannabis Buyers' Cooperation*, 532 US 483; 121 S Ct 1711 (2001).
- 28 See e.g. City of Auburn Hills Code of Ordinances, Zoning Ordinance Article IX Section 902.29, which regulates medical marihuana dispensaries as a special land use allowable in the City's general business district.
- 29 GERALD FISHER, ET AL., MICHIGAN LANDUSE, ZONING AND PLANNING, Page 104, Section 3.31 (ICLE 2008).
- 30 MCL 333.26428.
- 31 *Id.*
- 32 *Id.*
- 33 *Id.*
- 34 See *People v. Conley*, 270 Mich App 316; 715 NW2d 377 (2006) "...statutory language should be read in the context of the entire act."
- 35 MCL 333.26428.
- 36 MCL 333.26427.
- 37 MCL 333.26423(e).
- 38 69 Cal App 4th 409; 81 Cal Rptr 2d 624 (1999).
- 39 *Id.*
- 40 www.electionmagic.com/archives/mi/2008/novgen/E23results/proptext.htm, emphasis added.

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