



michigan municipal league



Medical Marijuana Facilities - Opt In/Opt Out

Updated to include LARA's Emergency Rules

May 4, 2018

CONSIDERATIONS FOR THE MUNICIPAL LAWYER

This publication is for municipal lawyers whose clients are considering “opting in” to allow medical marihuana uses under Public Act 281 of 2016, the Medical Marihuana Facilities Licensing Act (MMFLA), as recently amended by Public Act 10 of 2018. It will not address most of the substantive requirements of that law, or of its companion laws, Public Acts 282 and 283, or how they operate to establish the new “seed-to-sale” state regulatory scheme. It assumes that by now most municipal attorneys have familiarized themselves with the basics of how those laws operate to authorize the five kinds of facilities under consideration (grow operations, processing centers, testing facilities, secure transporters, and provisioning centers).

Rather, the purpose of this publication is to assemble some thoughts on advising municipalities about the sorts of things that they should consider when evaluating their options under the new state regulatory scheme. Collected below are some of the concerns to be addressed first in deciding whether to authorize the medical marihuana uses now allowed, and second, if your municipality chooses to do so, what sort of things should be in the regulatory ordinance(s) that must be adopted in order to do so.

The state’s Department of Licensing and Regulatory Affairs (LARA) has, since the MMFLA was enacted, been issuing Advisory Bulletins and other information that is relevant and useful as this process unfolds; these publications continue to be full of useful information and should be regularly monitored for updates. The “home page” for the Bureau of Medical Marihuana Regulation (BMMR), which is responsible for oversight of medical marihuana in Michigan, is found at www.Michigan.gov/medicalmarihuana.

As required by the MMFLA, LARA has also issued a set of administrative rules that will govern implementation of the Act at the state level. Released on December 4, 2017 (just before medical marijuana facilities could begin applying for state operating licenses), the rules were issued as “Emergency Rules”—meaning that they were not prepared in accordance with the “complete” process of the Administrative Procedures Act of 1969, MCL 24.201 *et seq.* They will therefore need to be formalized (which could include revisions) at some point in the future. In the meantime, they will govern licensing actions by LARA, and must be thoroughly reviewed by any municipality considering opting in. The Emergency Rules can be found at: https://www.michigan.gov/lara/0,4601,7-154-79571_83994---,00.html.

In early 2018, the Michigan Legislature adopted Public Act 10 of 2018. In addition to providing new protection from adverse action against CPAs and financial institutions that assist medical marijuana facilities, and establishing some new operational authorities for certain facilities, Public Act 10 amended Section 205 of the MMFLA—the municipal opt-in provision—to make it even clearer that a municipality must opt in by ordinance before the state can issue a facility license. The prior bulletins, the Emergency Rules, and now Public Act 10 together clearly confirm that if municipalities do nothing, marihuana facilities will be unable to be licensed at the state level to operate in their locality. They also implicitly confirm that there is no deadline to opt in. So, a community that has decided to wait beyond the December 15, 2017 date on which applicants were allowed to begin submitting applications to the state, has not waived any future opt-in rights. What follows is intended for use by those who might still be looking at opting in.

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 Thomas R. Schultz of Johnson, Rosati, Schultz & Joppich. The document does not constitute legal advice and the material is provided as information only. All references should be independently confirmed.

The information contained in this paper might become outdated as additional materials are released by LARA and the BMMR and administrative rules are put in place.

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

OTHER RESOURCES

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

DECIDING WHETHER TO OPT IN

What sorts of arguments have been made in favor of opting in?

FILLING A NEED

An argument that your clients will hear frequently from the industry is that allowing medical marihuana facilities will fill a need in the community and provide easier access to medical marihuana for people who are in chronic pain due to a debilitating medical condition. This argument assumes the medical benefits of marihuana and focuses on the pain-relieving aspects of it. There are some effective advocates on the industry side on this point, and you may see some very personal messaging at your meetings.

IT'S WHAT THE PEOPLE WANT

A similar argument is that the authorization of medical marihuana use in a community reflects the attitude of a majority of a particular locality. Proponents regularly point out the healthy margin by which the initial medical marihuana law passed in 2008, and the number of states where marihuana uses have been authorized over the years since then. This is obviously something that each community will need to evaluate and address; some areas seem “all in” on the issue, while others have met substantial opposition.

REVENUE GENERATION

Proponents argue that medical marihuana facilities can generate revenue for a community. The Act allows a municipality to charge a nonrefundable fee in an amount “not more than” \$5,000 annually to help “defray administrative and enforcement costs.” MMFLA, Section 205(3). Of course, the fees charged probably do need to approximate those costs, so this fee might end up a wash.

Arguments have also been made that the uses can possibly fill vacant buildings or lots and thereby increase property tax revenues. Some jobs will likely be created—i.e., provisioning centers will require retail workers, large grow operations could employ multiple people to engage in plant cultivation, etc.

EASIER MONITORING

Proponents also argue that allowing commercial medical marihuana activities, and regulating them through ordinances that focus production and distribution into fewer sites, could make law enforcement monitoring easier.

AVOIDS LEGISLATION BY CITIZEN “INITIATIVE”

Some municipal lawyers and others have pointed out the practical concern that would exist if a local elected body determines to “opt out” by not enacting an ordinance to allow marihuana facilities, only to have the initiative provisions of its charter be used to draft an ordinance to place before the voters without any input by that legislative body. Adopting an ordinance limiting the number of facilities and their location through study and debate might be preferable to leaving that task to the industry or your local residents by the initiative process where available.

Generally, the initiative process for local legislation (ordinance amendments) is available to cities under the Home Rule City Act (HCRA), MCL 117.4i(g) where a city charter permits it. There is no specific statutory authority for townships or general law villages to use the initiative process to amend ordinances, although it may be available in a charter village. There is probably no right in any municipality to amend a zoning ordinance by initiative. See *Korash v Livonia*, 388 Mich 737 (1972). Charter amendments by voter initiative are permitted in home rule cities (MCL 117.18-25) and charter villages (MCL 78.14-18).

SERVE AS A “TEMPLATE” FOR RECREATIONAL MARIHUANA?

On April 26, 2018 the Michigan Board of Canvassers voted to approve the signatures submitted by The Coalition to Regulate Marijuana like Alcohol. The Legislature has 40 days to enact the ballot proposal into law or it will go on the November 6, 2018 statewide ballot. Having a regulatory scheme in place for when that happens—even if it might need to be changed or revisited—could put the community in a better situation to react than if policymakers have never addressed the issue.

EARLY APPLICANTS THE BEST APPLICANTS?

An argument can be made that delay just means that your community is only missing out on the best, most reputable industry members—those who might be more likely to cooperate with the community as part of an early approval process. If you assume that everyone will have to opt in eventually, what could be left by the time you do might not be the best local partners.

What are the reasons to be cautious/skeptical?

FEDERAL LAW ISSUE

All of these uses are still illegal under federal law, and we don't know for sure what the federal government will do in the future with regard to these specified uses. The status quo is that federal attention is diverted away from uses that are "authorized" by and operated generally in compliance with state laws—but who knows if that will last? Attorney General Jeff Sessions has made his view clear: "Good people don't smoke marijuana."

On the other hand, the industry seems to be growing at a pace that exceeds the federal government's ability (time/resources) to do much about it. The likelihood that a community (or its elected officials) that is complying with this state regulatory scheme will face federal criminal sanctions for colluding or cooperating with individuals engaged in the violation of federal laws seems small and getting smaller. That said, there are no guarantees and your clients should be made aware of that.

In October, the National League of Cities presented a very thorough webinar "Marijuana Federalism" for state municipal leagues. It was conducted by Professor Robert Mikos of Vanderbilt University Law School. Articles and books written by Professor Mikos can be found at: <https://law.vanderbilt.edu/bio/robert-mikos>; also within the resource materials available from the Michigan Municipal League, as referenced at the bottom of Page 2.

Some providers are dangling significant amounts of cash to local government officials (on top of the fees and taxes allowed by the new law) to be used at the municipality's discretion for things like police services, patrol vehicles, etc. Those sorts of monetary exchanges, which don't have the official "cover" of a state law allowing them, seem dangerous to get involved in.

COSTS MIGHT OUTWEIGH FEES AND TAX-SHARING

A community might be required to hire additional police and/or code enforcement personnel to ensure that medical marijuana facilities are in compliance with existing laws, and to protect those facilities from theft, vandalism, and other crimes. While \$5,000 as an annual fee might seem like a significant amount of money, by the time a municipality has had an application reviewed by staff and consultants and conducted hearings (if required under an ordinance), and performed any background checks that it might want to do, the amount might not seem so generous.

Nor are most communities likely to see substantial revenue from the tax provided for in the statute. Assume for this discussion gross retail sales throughout the state of one

billion dollars (\$1,000,000,000). The state's 3% excise tax on provisioning centers would raise \$30,000,000. Under the MMFLA, only 25% (\$7,500,000) of that would go to Michigan municipalities. That amount is split among municipalities "in proportion to the number of marijuana facilities within the municipality." Assume your city gets 1% of that revenue—that's \$75,000. For many municipalities, that amount may not justify the increased costs that result from opting in (and for many smaller communities considering one or two provisioning centers, the 1% number seems high).

PROPERTY TAXES MAY TAKE SOME TIME TO SHOW UP

Under our state's property tax system, communities might not start seeing significant property tax revenue just because buildings are suddenly occupied. Headlee and Proposal A could dampen the economic benefits that might otherwise occur, and assessments are certainly subject to challenge.

Moreover, some kinds of uses may actually have a negative effect on a local tax base. For example, if a formerly industrial property becomes classified as "agricultural" as a result of a grow operation, the valuation might actually go down, as opposed to up.

LOSS OF CONTROL

Once it "opts in," a community is at the mercy of the BMMR. The language of the MMFLA is unfortunately not as clear as it could be on the state's obligation to deny a license if the applicant does not meet the requirements of a local ordinance. While we know what happens if your municipality does not opt in—no license can be issued—once an ordinance is drafted to allow a particular use, the language of the statute is unfortunately fuzzy as to whether the state has to follow it. What happens if the state does not follow it? The municipality could well find itself in court seeking to enforce its ordinance.

The Emergency Rules also make clear how extensive the state's involvement in the review and regulation of the facilities will be; concerns have been raised by some local officials regarding the extent of preemption as to things like inspections of premises by local government officials.

NUISANCE/SAFETY ISSUES

Many of these large uses do emit significant odors that some find objectionable. In addition to odors, there are noise (generators), heat, and lighting issues (either with regard to the use itself or for security). The MMFLA does allow municipalities to regulate these effects, though.

CIVIL LIABILITY

Like any land use decision, approval of these sorts of uses can be challenged. Neighbors may claim everything from nuisance to diminution in land values.

ENVIRONMENTAL EFFECTS UNKNOWN

There will be environmental effects from some of these uses, particularly the grow and processing operations: pesticides, fertilizers, energy consumption, water consumption, and disposal of waste products are all certain to result from these uses. As new uses, there may not be sufficient regulation at the state level, so these matters may fall to local governments to monitor, which may or may not be possible in every community.

COMMUNITY STAKEHOLDER OPPOSITION

Some communities have reported hearing from significant community stakeholders—e.g., large employers, health care providers, community foundations, influential business leaders, etc.—who have made known their specific opposition to the presence of marihuana facilities in the community, and corresponding intentions to react in some way if they are allowed. At a minimum, these stakeholders should be invited to participate in the discussion at the outset, so that all interests are heard.

Should you wait to see what happens with efforts to legalize “recreational” marihuana?

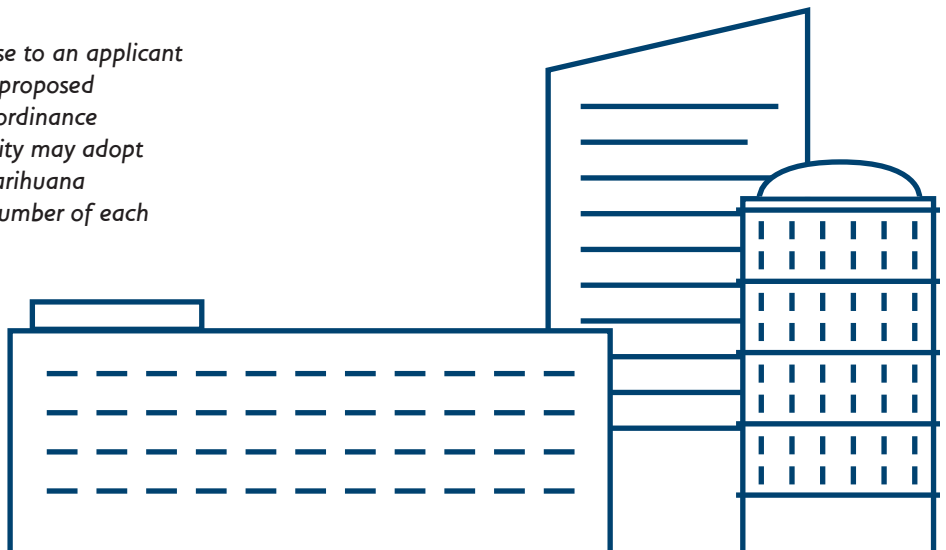
The ballot proposal states that a municipality may completely prohibit or limit the number of marihuana establishments within its boundaries. Also, individuals may petition to initiate an ordinance to provide for the number of marihuana establishments allowed within a municipality or to completely prohibit marihuana establishments within a municipality.

Depending on what happens, any regulations that are adopted now will likely need to be revisited/revise—probably through the same public process for adopting ordinances now. Does your community want to do that twice in the span of a couple years?

Opting In? Here Are the Kinds of Things You Should Think About in Drafting Your Local Regulatory Framework

As amended by Public Act 10, Section 205(1) of Public Act 281 now provides:

The board shall not issue a state operating license to an applicant unless the municipality in which the applicant’s proposed marihuana facility will operate has adopted an ordinance that authorizes that type of facility. A municipality may adopt an ordinance to authorize 1 or more types of marihuana facilities within its boundaries and to limit the number of each type of marihuana facility. A municipality may adopt other ordinances relating to marihuana facilities within its jurisdiction, including zoning regulations, but shall not impose regulations regarding the purity or pricing of marihuana or interfering or conflicting with this act or rules for licensing marihuana facilities.



LARA's Emergency Rules Confirm Substantial Local Regulatory Authority

The Emergency Rules issued by LARA on December 4, 2017 include additional detail as to some of the more important Advisory Bulletins previously issued by LARA prior to adoption of the Rules—including those relating to co-location of facilities, stacking of grower licenses, the license application and document checklist, confirmation of municipal authorization of marihuana facilities, and various capitalization and other financial requirements. The Emergency Rules also provide much greater detail on some additional subjects of interest to both prospective licensees and local municipalities regarding:

- *Requirements of the marihuana facility plan*
- *Pre-licensure investigation and inspection of the proposed facilities*
- *The grounds on which a license may be denied*
- *Renewals of licenses, changes to facilities*
- *Notifications, reporting, inspections, penalties, sanctions, fines*
- *Transition period and licensee requirements to get marihuana product into the statewide monitoring system*
- *Requirements and obligations of licensed marihuana facilities*
- *Applicable state laws/rules, fire safety, security measures, prohibitions*
- *Requirements, restrictions, and maximum THC-levels for marihuana-infused products*
- *Storage, labeling requirements, product destruction, and waste management*
- *Statewide marihuana tracking system*
- *Daily purchasing limits and marketing/advertising restrictions*
- *Employee background check requirements*
- *The hearing and review process recommended by the Michigan Administrative Hearing System*

In general, the Emergency Rules flesh out what LARA had previously indicated, through Advisory Bulletins, it expected the licensing process to be, with some clarifications. As originally enacted, the MMFLA contemplated a process under which a municipality would provide information to the BMFR within 90 days after notification from an applicant that he or she has applied for a license. Among the changes to the MMFLA under Public Act 10 was the requirement in Section

205(1) requiring any municipality that adopts an ordinance authorizing a marihuana facility to provide (regardless of any pending application) certain information about that ordinance to the department, including an attestation that the municipality has adopted an ordinance, a description of that ordinance, the signature of the clerk of the municipality, and any other information required by the department. Section 205(1), as amended, also indicates that the department may require a municipality to provide additional information in the event of an application for license renewal.

The Emergency Rules are consistent with the language of Public Act 10. Rule 6 of the Emergency Rules sets forth the requirements for a “complete” application to the state for a state operating license. In addition to all of the various information required by the state, subsection (d) of Rule 6 states:

An applicant shall submit confirmation of compliance with the municipal ordinance as required in Section 205 of the act and these rules. For purposes of these rules, confirmation of compliance must be on an attestation form prepared by the department that contains all of the following information:

- i. Written affirmation that the municipality has adopted an ordinance under Section 205 of the act, including, if applicable, the disclosure of any limitations on the number of each type of marihuana facility;
- ii. Description of any zoning regulations that apply to the proposed marihuana facility within the municipality; and
- iii. The signature of the clerk of the municipality, or his or her designee, attesting that the information stated in the document is correct.

Under Emergency Rule 4(2), a person is allowed to submit a partial application seeking to have his or her financial and criminal backgrounds reviewed under Rule 5, in order to “prequalify to complete the remaining application requirements.” Submission of the partial application gives the applicant “pending status until all application requirements in Rule 6 are completed.” This rule allows an applicant to seek municipal approval while not yet fully licensed at the state level.

Rule 12 of the Emergency Rules confirms that a license may be denied if the applicant fails to comply with Act 281 or the Emergency Rules. Rule 12(1)(f) specifically states that a license may be denied if “the applicant has failed to satisfy the confirmation of compliance by a municipality in accordance with Section 205 of the act and these rules.”

Essentially, the Emergency Rules more or less validate the expected two-step licensing process that the department previewed before the issuance of the Emergency Rules—a first step where the applicant seeks to “prequalify” at the state level as to financial and background matters, and a second step where municipal approval is sought pursuant to the ordinances authorized by the statute and adopted by the municipality. No state operating license will issue until compliance with those municipal regulations has been established.

The process described in the Emergency Rules for medical marijuana facilities that existed before adoption of the MMFLA is worth at least a mention here. Rule 19 of the Emergency Rules allowed for the temporary operation of facilities that had previously been approved for operation by a municipality (and confirmed for such use following enactment of the MMFLA). However, in order to qualify for temporary operation, an application for a state operating license was required to be filed with the state no later than February 15, 2018. Failure to submit a proper application by February 15, 2018, could be a reason for denial of a license under the Act and the rules. (Apparently, a number of facilities failed to heed the February 15 deadline.)

What Kinds of Ordinances Should You Consider?

So, other than regulating purity and pricing, or rules directly conflicting with the state regulations, we know that municipalities can regulate significant aspects of marijuana facilities within their boundaries—although, as noted above, the extent of the state’s involvement in regulating the operation of the facilities once approved (e.g., with regard to construction standards, financial operations, and inspections) has raised concerns among some that there may be more discussion in the future as to what sorts of local regulations are viewed by the state as “conflicting” with those adopted by the state. Most of the discussion about how to do that by both municipal attorneys and attorneys for the medical marijuana industry has focused on two separate kinds of ordinances:

- **ZONING ORDINANCE** amendments generally relating to the location of medical marijuana facilities and the development approval process.
- **CODE/POLICE POWER** ordinances relating to the number of facilities within the municipality, a licensing process that works with the state’s process, and listing responsibilities and obligations of facility operators, as well as some basic safety regulations aimed at new practices (e.g., butane extraction).

What makes the regulation of these uses at the local level difficult (or at least complicated) is as much timing as anything else—timing the issuance of a local license/approval of an application with the state’s licensing process, and timing the license approval process with the development approval process (i.e., getting zoning and building permits for a new/renovated facility under a different ordinance than the licensing requirements to operate within that facility).

In addition, there is the matter of deciding who gets the approval to operate a facility. Given the “prequalification” process in the Emergency Rules and the authorization for limiting the number of a particular type of facility allowed within a municipality, it can arguably be said that the local government ends up in charge of “picking” successful candidates for final licensure by the state. This may be the toughest choice facing a community that has decided to opt in.

1. Zoning ordinance

Communities can consider adopting zoning ordinance amendments to provide the following:

TYPES OF FACILITIES TO BE ALLOWED

Under the MMFLA, a community can allow all five types of facilities or can pick and choose which to allow (e.g., allow grow operation and provisioning centers, but no compliance facility, processing centers, or transport facilities). This choice will vary by community, and should be made deliberately on the basis of community needs/desires.

DISTRICTS WHERE ALLOWED

The MMFLA does not specify where these facilities may be located, except to state that a grow facility must be established in an area zoned for industrial or agricultural uses or that is un-zoned. Section 501(7). Obviously,



determining locations will need to be done on a community-by-community basis, depending on the master plan and land use goals and objectives.

Some uses seem to sort themselves into natural categories—e.g. processing plants in industrial or manufacturing areas, grow operations in industrial/agricultural. Some communities could elect to place even dispensaries (which arguably have a commercial/retail character) in industrial/agricultural districts that, depending on the community's zoning map or particular community characteristics, are better suited for such uses than traditional business districts on Main Street or in a strip mall.

Some communities have considered adopting an “overlay” zone for medical marijuana facilities. An overlay zone typically operates by adding an additional set of uses—and corresponding additional regulations—in certain areas of the community, without changing the underlying zoning district regulations. An overlay district could be considered if a community wants, for example, only certain industrially zoned areas in a particular part of town to be available to marijuana facilities.

USE PERMITTED OF RIGHT? SPECIAL LAND USE?

The community needs to determine whether these uses will be uses permitted as of right or only as discretionary special land uses. Arguments can be made in favor of either approach.

Some communities have made them uses as of right in order to avoid requiring their planning commissions to exercise discretion in determining who will be authorized to engage in the use. The discretionary element of a special land use exposes a municipality to a challenge or litigation where an applicant is denied the use, or where one applicant is granted approval and another is not. Special land use decisions can also invite challenge from adjacent property owners alleging an improper exercise of discretion when a use is granted over substantial objections at the required public hearing.

On the other hand, the special land use process affords the municipality the greatest opportunity to impose conditions allowed under the Michigan Zoning Enabling Act. MCL 125.3504. These could include important requirements for, say, building appearance, sign size, screening, access, etc.

The community could consider the “in between” approach of a “use permitted on special condition,” where the conditions are fully objective (based on physical characteristics, size, etc.)

PROXIMITY AND CO-LOCATION ISSUES

Another regulatory issue to be considered as part of the zoning ordinance amendment is a distancing requirement between marijuana-based uses. Should they be clustered or dispersed? Not unlike the question that is asked with adult/sexually oriented businesses: is it better to put these uses (to the extent possible) in one general area, for easier

monitoring, or to separate them so an area does not become known for that particular characteristic. The question presents practical issues as well as fairness issues (e.g., placing provisioning centers in only one part of town).

Also, does the community want to allow different kinds of facilities—e.g., a grower and a provisioning center—to co-locate at the same site? The Emergency Rules appear to confirm that, under Section 205 of Act 281, municipalities retain the authority to regulate these basic land use issues. The same is true as to the “stacking” of Class C grow licenses, which permit up to 1,500 plants per license. The LARA rules allow stacking if it is permitted by local ordinance.

DISTANCING REQUIREMENTS FROM OTHER USES

Municipalities might also want to consider location or spacing requirements as between medical marijuana uses and other uses. For example, the ordinance provides distancing requirements from schools, parks and playgrounds, certain types of residential districts or housing types, churches, pools and recreation facilities, rehabilitation treatment centers, correctional facilities, and the like. This is a classic sort of zoning regulation and should be carefully considered. This could also be regulated in the licensing ordinance instead.

COORDINATING SITE PLAN/BUILDING PERMIT PROCESS WITH LICENSING PROCESS.

Most likely, the typical process for finalizing site plans and issuing building and occupancy permits as set forth in the zoning ordinance can be followed. Some buildings might be built new, on vacant sites; other uses might occupy existing buildings, with little or no site work.

Either way, the *timing* of these zoning approvals with the local and state licensing processes will need to be decided and addressed. The zoning ordinance should probably acknowledge a separate process under the licensing ordinance, and make some appropriate conditions requiring that approval.

OTHER PROVISIONS

The ordinance should contain the other usual elements:

- A statement of purpose/intent—which, as explained further below, should refer to the applicable state laws as the basis for inclusion of these uses.
- A definitions section that matches the terms from the state laws.
- A section dealing with nonconforming sites/uses. This may be particularly relevant if there are currently some marijuana-based facilities operating in the community, which the community may or may not want to assist in continuing under the new regulatory scheme.
- Provisions relating to application review fees (for planners, engineers, landscape architects, etc.).

2. Police Power/Code of Ordinances amendment to deal with licensing facilities at the local level

Again, the most difficult aspect of crafting a licensing ordinance for most communities will be timing the local license approval with the state's licensing process and the zoning/building occupancy approval process. Because the applicants at the municipal level will not yet have their final state approval (because under the Emergency Rules proof of "municipal compliance" is required to get a state operating license), there will likely need to be some sort of "conditional" aspect to the local license— i.e., it becomes effective only upon securing the state operating license and all zoning/land use approvals.

A related complication arises when the local regulatory scheme limits the number of a type of use. The first concern is how those applicants are chosen (special land use? first come, first served? random?). Problems can also result if a conditional license is granted, but then conditions are not in fact met. Should the ordinance have provisions to deal with choosing an alternative applicant?

Among the things a municipality will want to consider in its licensing/general regulatory ordinance:

PURPOSE AND INTENT CLAUSE

If nothing else, in addition to describing the general goals and objectives as relates to the particular facilities and licensing applicants regulated, a community might want to consider some explanation that the ordinance is being enacted specifically pursuant to an invitation in the state law, and with the recognition that the state law may be at odds with the federal regulatory scheme relating to marihuana. The clause should also include a recognition that if the legislative body does not act, then someone else might act in its stead (through the initiative process, assuming it is applicable).

DEFINITIONS

These need to match up with the state law, particularly as to the uses allowed. Additional definitions may be needed depending on the nature of local regulations.

LIMITATIONS ON THE NUMBER OF FACILITIES ALLOWED IN THE COMMUNITY, BY TYPE

The MMFLA does not describe how a community arrives at a limitation, just that it can. Limitation criteria can be found by way of population (e.g., x number of dispensaries per y number of residents in the community) or by area and location. Some explanation during the process (or in the purpose section) would be appropriate.

It should also address successor uses. Once the limit is reached, will no further applications be accepted? Or will they be held in order received if/when license becomes available again?

In addition, where the number of facilities is limited, the community might want to consider imposing a time frame in which the use must be established and a certificate of occupancy issued (e.g., six to nine months), with an obligation to surrender the license if the use is not established. This would limit the possibility of issuing a license to someone who wants to obtain a license but not use it (for purposes of limiting the market, or precluding a use) or, if a community allows license transfers, as an investment to transfer to another entity.

LOCATION CRITERIA

This should be cross-referenced to the zoning ordinance (assuming there is one); or the location criteria can be established in the licensing ordinance itself.

FEES

The MMFLA allows "not more than" \$5,000 per licensed facility as an annual non-refundable fee. However, because the purpose is stated as helping to defray actual costs of enforcement/oversight, a community should take care to justify the fee based upon what the community expects the actual costs to be.

REQUIRED INFORMATION

The community can get as specific as it wants. Information required can include:

- Personal information about the applicant.
- Information about the applicant's professional experience.
- Proof of ownership or other occupancy rights for the property at issue.
- Information about the facility and operations plan.
- Proof of interest in land.
- Proof of adequate insurance (describe).

What the municipality **does** with such information (especially information of a personal or professional nature as to each applicant) is addressed below.



CRITERIA FOR ISSUING OR DENYING THE LICENSE

- Who issues the license: The city/village/township clerk?
Some other officer or body?
- What is the process? Should there be a hearing?
Public input allowed?
- Standards for issuing:
 - First come, first served?
 - Lottery/pick from hat?
 - Evaluation on the basis of discretionary criteria?

This is the step with the most “exposure” to the municipality as noted above. The more subjective the process is or seems, the greater the likelihood of challenge. Some municipal attorneys have cautioned their communities against evaluating individual applicants and picking/choosing on the basis of such reviews—focus on the site, in other words, not the applicant. Other attorneys note that the language of Section 205 of the MMFLA is quite broad, and that the only sorts of regulations that the municipality is prohibited from enacting relate to purity, pricing, or those things “conflicting with statutory regulations for licensing.” The state law and the Emergency Rules do not appear to contain any specific prohibition on evaluation of individual applicants. Again, however, in addition to veering into the realm of “picking winners and losers,” an applicant-specific process invites a challenge by those who are unsuccessful.
- Do existing facilities get priority?

STANDARDS FOR DENYING

These could incorporate the state laws, and could include additional limitations if appropriate.

Conditioned on all other appeals—state licenses, zoning/site plan review, occupancy permits. This contemplates a record documenting the “provisional” or “conditional” approval and specific requirements for a “final” approval.

Denial at state level revokes local approval.

OCCUPANCY PERMITS

The practice of allowing occupancy before all aspects of the building and use are finalized, by issuing a “temporary certificate of occupancy,” or TCO, is typical in many communities. Doing so with these uses—which will likely be limited in number, and are essentially a “new” use with which we are not yet completely familiar—seems unnecessary. Consideration should be given to withholding occupancy rights until a final certificate of occupancy can be issued. Note that ADA compliance will be required for provisioning centers.

APPEAL OF DENIAL OF A LICENSE

As a police power (as opposed to zoning) ordinance, the Zoning Board of Appeals (ZBA) may not be an ideal appellate board; however, many township boards and city councils might not relish the thought of having to be the deciding body. While the ZBA would need to be informed of its slightly different reviewing role, it is one that they are generally used to. Alternatives could also include a separate body or commission to hear appeals.

SALE OR TRANSFER OF A LICENSE

Given the nature of the review process and the approvals given, the best practice would likely be to indicate that the license is personal to the applicant—no transfers allowed. The license should be clearly made “personal” to the applicant.

RENEWAL

The annual fee assumes a renewal of businesses that remain in compliance with the local ordinances.

REVOCATION (BY LOCAL ORDINANCE)

Revocation of a license should be a permissible result in the event of things like failure to comply with the licensing ordinance or any other ordinance of the municipality; change in ownership; change in operational plan; conviction of certain crimes; etc. Similar to a licensing revocation for liquor license.

“PERFORMANCE STANDARDS” RELATING TO THINGS LIKE:

- Noise
- Odor
- Heat
- Light
- Continued compliance with all other ordinances, including zoning ordinance.

While a local code of ordinances might already contain some general standards in these areas, medical marijuana uses have unique aspects that merit particular attention. There are resources available to communities to confirm the ability of these facilities to mitigate—with appropriate capital investments—many of these adverse effects.

ENVIRONMENTAL CONCERNS

Information about the environmental effects of these sorts of uses is limited at this point. But municipalities should at least be aware of the likely use of fertilizer and pesticides with regard to a grow operation in particular, and the ordinance could at least provide for basic standards for storage and use in accordance with other laws and regulations. Water and energy consumption may be significant with these uses as well. Both the grow operations and the processing centers raise waste disposal concerns. These areas are all fair game

under the limits set forth in Section 205(1) of the MMFLA, and the community should require information on all these aspects of all permitted uses before setting its regulations.

SECURITY/PRIVACY

Fencing. Lighting. Access controls. Video surveillance. All these should be addressed in the ordinance or as part of any approval. Due consideration for the effects of these on neighboring properties should be taken into account in crafting regulations and approvals, and perhaps in determining permitted locations under the zoning ordinance.

SIGNAGE

Signage for these uses could be offensive to some. While commercial signage is subject to greater regulation than non-commercial speech, there are obvious limitations, particularly under the *Reed v Gilbert* case. This is an important aspect of any of these uses, and the community will need to carefully research its options and closely draft its sign regulations.

INSPECTION PROVISIONS

These provisions should be comprehensive and rigorous. Consideration should be given to those including:

- A statement that the premises are subject to inspection during business hours for purposes of determining compliance with state and local laws, without a search warrant.
- An acknowledgement that the application of a facility license constitutes consent to routine inspections of the premises and examination of surveillance and security camera recordings for purposes of protecting the public safety.
- Significant penalty provision for failure to comply.

ADDITIONAL REQUIREMENTS ON THE BASIS OF THE SPECIFIC TYPE OF FACILITY

- For example, the community may want to regulate hours of operation or the physical appearance of buildings.
- List of specific prohibited acts by use (e.g., no consumption on premises at provisioning centers; requirement for all activities to occur indoors).
- Consider limitations on use of butane, propane, and other flammable products and require compliance with state and local laws for such products.

VIOLATIONS AND PENALTIES SECTION

- Civil infraction, not misdemeanor.
- Each day a separate offense.

INDEMNIFICATION

Given the nature of this use, the applicant/licensee could be required to indicate that it will hold the local municipality and its officials harmless, and indemnify them against claims related to the use.

RIGHT TO FARM CONSIDERATIONS

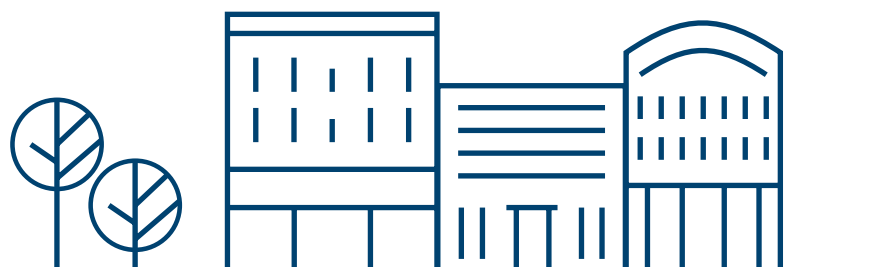
There is a question whether the Right to Farm Act, MCL 286.473, et seq., will apply to grow operations. While it is good to have the law in mind, it seems unlikely at this time, since to date no Generally Accepted Agricultural and Management Practice (GAAMP) regulation has been issued for medical marijuana.

CONTINUING STATE EDUCATIONAL EFFORTS

On March 26, 2018, LARA hosted an educational session for medical marijuana license applicants. It included presentations on:

- Designing and constructing facilities, with an emphasis on compliance with state construction codes (and how the state will conduct its compliance inspections).
- MIOSHA standards and regulations pertinent to medical marijuana facilities.
- Fire protection rules and standards.
- Dealing with the State's Department of Treasury.

The Power Point presentation is available at <https://www.michigan.gov/lara/0,4601,7-154-79571---,00.html>. Municipalities may find the information of assistance.





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