ADULT-USE

Marijuana & Municipalities—Five Years Later

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Introduction

This is a follow-up to the Recreational Marihuana Proposition white paper issued by the Michigan Municipal League as voters considered and ultimately approved, Initiated Law 1 of 2018. This statute, the Michigan Regulation and Taxation of Marihuana Act (MRTMA), codified at MCL 333.27951 *et seq.,* legalized marijuana possession and use in Michigan by persons aged 21 and older, and decriminalized most marijuana-based offenses on December 6, 2018. It also authorized the licensure and regulation by Michigan Department of Licensing and Regulatory Affairs (LARA) and local municipalities of commercial businesses engaged in the growing, processing, testing, and sale of recreational, adult-use marijuana. [1]

This paper is intended to provide municipal attorneys and municipal officials a survey of the development of Michigan marijuana law since the adoption of the MRTMA. As such, it supplements the earlier whitepaper and will not summarize the various aspects of the MRTMA. Rather the focus will be a summary and analysis of

1. Legislature amendments to the MRTMA;
2. The administrative rules promulgated by LARA, through its Cannabis Regulatory Agency (CRA), formerly known as the Marijuana Regulatory Agency;
3. How appellate courts of this State have interpreted the MRTMA; and
4. the impact on municipalities.

In large measure both the CRA and the courts have upheld the ability of municipalities to regulate marijuana businesses in a manner that is "best suited to operate in compliance with this act within the municipality." (MCL 333.27959(4)) However, some challenges remain. This paper will outline the successes of the past five years and address continued concerns for municipalities going forward.

Legislative Amendments

As a citizen-initiated law, the MRTMA can be amended only a 3/4 majority of each chamber of the Legislature. Although difficult, it is not impossible to amend the statute. Since its adoption, the Legislature has repeatedly amended the statute to provide clarity in the definitional section, MCL 333.27953, and most recently enacted 2023 Public Acts 165 and 166 (effective October 19, 2023) addressing CRA regulation and excise tax-sharing with Michigan Indian tribes. The Acts permit the State, through the Cannabis Regulatory Agency, to enter agreements with Indian tribes regarding the regulatory issues involving tribal marijuana businesses and requires the 15 percent excise tax share allocated to municipalities and counties to include allocation to Indian tribes based on the number of retail stores and microbusinesses located on tribal lands. This will likely impact those municipalities whose boundaries include tribal land.

Also worth noting is the adoption of Public Act 192 of 2020, the so-called Clean Slate Act, which added MCL 780.621e creating a rebuttable presumption in favor of expungement for the conviction for a misdemeanor marijuana offense based on activity that would not have been a crime if committed on or after December 6, 2018. The statute includes convictions under local ordinances substantially corresponding to statutory marijuana possession and use misdemeanor offenses that were the focus of the expungement law amendment.

[1] This paper will follow the convention adopted by the Michigan appellate courts by using the common "marijuana" spelling except when referencing or quoting statutes and regulations that employ the "marihuana" spelling. *People v Carruthers, 301 Mich App 590, 593 n.1 (2013)*

Cannabis Regulatory Agency

Administrative Rules

Section 8 of the MRTMA, MCL 333.27958(2)(a) authorizes the Cannabis Regulatory Agency to "provide for the issuance of additional types or classes of state licenses to operate marijuana-related businesses." In response, the CRA has authorized several other classifications of licensed adult-use marijuana businesses. In addition to the licensure of the marijuana business establishments required by the MRTMA (growers, processors, retailers, microbusinesses, secure transporters, and safety compliance facilities) the CRA by administrative rule, R 420.21, has created the following special licenses:

- Designated Consumption Establishment: A commercial space that is licensed by the agency and authorized to permit adults 21 years of age and older to consume marihuana products at the location indicated on the state license;
- Excess Marihuana Grower: Limited to persons holding five class C marihuana grower licenses and licensed to cultivate marihuana and sell or otherwise transfer marihuana to marihuana establishments;
- Marihuana Event Organizer: A person licensed to apply for a temporary marihuana event license;
- Temporary Marijuana Event: An event held by a marihuana event organizer where the onsite sale or consumption of marihuana products, or both, are authorized at the location indicated on the state license;
- Class A Microbusiness: Permitted to cultivate not more than 300 plants (in contrast to the 150-plant; limitation on a microbusiness). Only mature marihuana plants are included in the plant count. May also package marihuana, purchase marihuana concentrate and marihuana-infused products from a licensed marihuana processor, and sell or transfer marihuana and marihuana products to an individual 21 years of age or older; and
- Marihuana Educational Research: Licensee must be registered with the United States Drug Enforcement Administration (DEA) and be affiliated with a degree or certificate program offered by an accredited institution of higher learning.

A municipality should adopt an ordinance specifically authorizing or prohibiting the operation of these additional types of adult-use marijuana businesses within its jurisdiction. This is especially important as the MRTMA assumes adult-use marijuana businesses are permitted unless the municipality prohibits or limits the type of adult-use marijuana businesses operations and/or number. See MCL 333.27956(1). To assist municipalities the CRA has available on its website a 24-page ***Municipal Guide*** which provides general guidance to the state licensing process and the role the municipality plays in that process, as well as answers to frequently asked questions. The easiest way to locate it is to type "Municipal Guide" in the search engine on the CRA website.

Because the Michigan Marihuana Facilities Licensing Act (MMFLA), MCL 333.27101 *et seq.*, which regulates commercial medical marijuana operations was enacted by the Legislature, and the statute regulating adult-use marijuana businesses was a voter-initiated law, the two statutes do not necessarily coordinate with or complement each other. The CRA has addressed this issue by adopting a rule defining "Equivalent Licenses." (See R 420.1(l)) The rule clarifies that an adult-use marihuana retailer license is equivalent to a medical marihuana provisioning center license. This permits a medical marijuana business and an adult-use marijuana business to occupy the same premises if such separately licensed but joint operation at the same location is not in violation of any local ordinances or regulations and does not circumvent a municipal ordinance or zoning regulation that limits the marijuana businesses under the MRTMA or MMFLA (See R 420.205).

This rule is important since advocates for marijuana businesses cite the text at MCL 333.27956 (5) which states in relevant part, "A municipality may not adopt an ordinance that restricts . . . or prohibits a marihuana grower, a marihuana processor, and a marihuana retailer from operating within a single facility or from operating at a location shared with a marihuana facility operating pursuant to the medical marihuana facilities licensing act" to argue that if a municipality permits medical marijuana businesses, it *must* permit the co-location of adult-use marijuana businesses. A more sensible reading of this provision taken in the context of Section 6 of the MRTMA as whole, which outlines the ability of municipal regulation of adult-use marijuana businesses, is that if a municipality permits both medical and adult-use marijuana businesses, it must permit co-location of those businesses. Although no reported appellate case has issued a definitive interpretation of this language, there exists an indication in *Cary Investments, LLC v. City of Mt Pleasant,* 342 Mich App 304 (2022) that having a medical marijuana license does not ensure the business will receive an adult use license.

Finally, note should be taken of R 420.207a. This provision permits a municipality to prohibit "contactless or limited contact transactions" which are defined to include but are not limited to "curbside service" and "drive through window service." Absent a local prohibition, such transactions are permitted by administrative rule.

In large measure the CRA has demonstrated a willingness to work with and defer to municipalities. This is best illustrated by the result in *Brightmoore Gardens v Marijuana Regulatory Agency,* 337 Mich App 149, *lv. den.* 508 Mich 983 (2021). In these consolidated appeals, entities sought to establish adult-use businesses in Detroit and Traverse City. When the entities sought a State license, neither city had an ordinance prohibiting adult-use marijuana businesses in place. The MRA required an applicant for an adult-use marijuana license to obtain the signature of the municipal clerk on Attestation Form 2-C. This form has three options for the clerk to choose from:

1. The municipality has not adopted an ordinance prohibiting adult-use marijuana businesses.
2. The municipality has adopted an ordinance allowing adult-use marijuana businesses and the applicant is not in violation of the ordinance.
3. The municipality has adopted an ordinance allowing adult-use marijuana businesses and the applicant is in violation of the ordinance.

In the Detroit case, Form 2-C applications were filed with the city clerk between October 31 and November 4, 2019 but the clerk did not act on the applications until after the Detroit Common Council adopted an ordinance prohibiting adult-use marijuana businesses on November 12, 2019. In the Traverse City matter an ordinance prohibiting adult-use marijuana businesses lapsed on December 6, 2019 and an applicant filed its Form 2-C application with the city clerk on December 8, 2019, but the clerk did not act until after December 13, 2019 when the city council adopted a new ordinance prohibiting adult-use marijuana businesses. When the MRA received the Attestation Form 2-C in each case which indicated that each city prohibited adult-use marijuana businesses, the applications for State licensure were denied.

While the Court of Appeals panel hearing the case acknowledged the potential for abuse by clerks in withholding to act on the Attestation Forms, under the facts of these cases, since action was taken by the local city legislative bodies to prohibit marijuana establishments while the applications with the State were pending, made the inaction by the respective city clerks' irrelevant.

However, with different facts, and in federal court, the *Brightmoore Gardens* case was distinguished, and a different result was obtained by marijuana business applicant. In *Naturale & Co. v City of Hamtramck*, 614 F Supp 3d 575 (2022) suit was brought by a landlord when the city refused to issue a certificate of occupancy to permit a marijuana business to operate in the leased space. The city clerk had issued the Form 2-C indicating that the proposed business could operate in the city. However, before occupancy took place the city adopted an ordinance prohibiting new marijuana businesses, while grandfathering operating marijuana businesses. However, the court found that given the issuance of the attestation forms, along with the issuance of building permits to renovate the premises to accommodate a marijuana business, and an indication by city officials that the grandfather clause extended to the landlord, was sufficient to establish a protected property interest, requiring the issuance of the certificate of occupancy and the operation of a marijuana business.

Social Equity

In the attempt to implement the provision in the MRTMA which requires "A plan to promote and encourage participation in the marihuana industry by people from communities that have been disproportionately impacted by marihuana prohibition and enforcement and to positively impact those communities," MCL 333.27958(1)(j), the CRA has implemented a multi-faceted Social Equity program. The CRA has identified 184 communities which have been disproportionately impacted by marijuana prohibition and enforcement. Persons who have resided in those communities for five cumulative years can apply for a 25 percent reduction in the State licensing fee for an adult-use business; if they have a misdemeanor (25 percent) or felony marijuana conviction (40 percent) they can also receive a further license fee reduction for one or the other, not both; and if they have been a medical marijuana primary caregiver in two of the previous five years, they can receive another 10 percent fee reduction. These reductions are applicable so long as the business operates in an eligible community. If a social equity eligible business does not operate in an eligible community, it can receive the applicable fee reduction that is good for the first two years of operation. Local municipalities can also implement their social equity program to discount licensing fees for qualifying applicants.

The CRA has also created the Joint Ventures Pathway Program (JVPP). The JVPP seeks to connect eligible social equity participants with adult-use licensees, potential adult-use licensees, and any businesses that wish to work with social equity participants interested in pursuing partnerships, including joint business ventures, mentorships, incubator programs, and employment. Some communities have established similar programs at the local level.

The CRA also announced a Social Equity Grant Program for adult-marijuana business licensees with majority (over 50 percent) social equity ownership and participation in the Agency's Social Equity All-Star Program. The first grant awards will be announced in March 2024.

As mentioned above, the CRA also has a voluntary Social Equity All-Star Program, whose goal is to encourage adult-use licensees to be proactive in their diversity, equity, and inclusion initiatives. There are three levels of recognition, bronze, silver, and gold. Municipalities may require some level of participation in the All-Star program as a condition of local license renewal.

Appellate Court Decisions

Zoning Cases

Although not adult-use cases, municipalities prevailed in a trio of medical marijuana cases regarding the use of the zoning power to regulate where cultivation of marijuana may take place. The Supreme Court in the lead case of *DeRuiter v Township of Byron*, 505 Mich 130 (2020) unanimously reversed lower courts which had held that the Michigan Medical Marihuana Act (MMMA) preempted the Michigan Zoning Enabling Act. The township limited the cultivation of medical marijuana to residential dwellings and garages as part of home occupation; the plaintiff, a primary caregiver under the MMMA, grew marijuana in a commercially zoned building. The Court held that so long as the zoning regulation did not "prohibit or penalize all medical marijuana cultivation" or impose regulations that are "unreasonable and inconsistent with regulations established by state law" Id. at 148. In addition to upholding the zoning regulation, the court also upheld the township's ability to require a primary caregiver to obtain a local permit and pay a fee before engaging in the cultivation of marijuana.

The cases of *Charter Township of York v Miller,* 506 Mich 916 (2020) and *Charter Township of Ypsilanti v Pontius,* 948 NW2d 552 (2020) were held in abeyance pending the *DeRuiter* decision and then remanded to the Court of Appeals for reconsideration. On remand, the Court of Appeals upheld the local regulations in both cases, *Charter Township of York v Miller,* 335 Mich App 539 (2021) which limited medical marijuana cultivation as a home occupation and indoor grow operation similar to the Byron Township ordinance, and *Charter Township of Ypsilanti v Pontius,* No. 340487 (Unpublished Mich App, Dec 29, 2020) which prohibited marijuana cultivation as a home occupation in single-family residential zones.

In *Golden Rockies, Inc. v City of Utica,* No. 363685 Unpublished Mich App, Oct 12, 2023) upheld an ordinance requiring a 700-foot buffer between marijuana businesses citing in support of the decision the result in the *DeRuiter* case.

In *Alosachi v Detroit,* 342 Mich App 252, lv. den. 988 Mich NW2d 428 (2023) the Court deferred to the local interpretation of whether a property was in a "drug-free zone." Although this case involved an application for a medical marijuana business, its holding is seemingly also applicable to adult-use marijuana businesses. The facts involved a combined zoning lot, consisting of several parcels on which were located a Catholic church and an associated school in the neighboring City of Grosse Pointe Park, within 873 feet of a proposed marijuana business location. Although the church was not a protected use and the actual school itself was more than 1000 feet from the business location, the Detroit Board of Appeals determined that since the church and school occupied one lot of record with a single tax identification number, the lot as a whole provided a 1000-foot drug free zone and denied licensure of the proposed marijuana business. On appeal, the Court upheld the action by the City of Detroit. This case is important for a couple of reasons; it demonstrates a deferential posture by the court to local interpretation of zoning ordinances and recognizes that an ordinance can be applied to protect uses in a neighboring community.

Likewise, in *Green Acres Collective, LLC v City of Detroit,* #359515 (Unpublished Mich App July 27, 2023) the Court upheld the denial for operation of a medical marijuana business in a "drug free zone" due to its proximity within 1000 feet to a youth center.

Although not a zoning case per se, the earlier white paper noted that any regulation of marijuana business signs should be cognizant of and comply with the U.S. Supreme Court's decision in *Reed v Gilbert,* 576 U.S. 155 (2015). However, in *City of Austin v Reagan National Advertising,* 142 S. Ct. 1464 (2022) the Court clarified its ruling in *Reed,* distinguishing and upholding the historic distinction between on-premises and off-premises advertising sign regulation. Unlike the sign ordinance in *Reed,* the Austin ordinance which prohibited digital off-premises signs (billboards) did not single out any topic or subject matter for differential treatment. The Court stated that a sign's message matters only to the extent that it informs the reader of the sign's relative location. Thus, Austin's on-/off-premises distinction is akin to ordinary time, place, or manner restrictions, which do not require the application of strict judicial scrutiny. While the Austin case should be viewed as victory for municipal sign regulation, care should still be taken that any ordinance be content-neutral to avoid strict-scrutiny review by a court. However, even a content neutral sign ordinance under must seek to achieve a significant governmental interest.

Municipal Regulation and Licensing Cases

In addition to prohibiting adult-use marijuana businesses outright, a municipality may limit the number and type of licensed marijuana business by ordinance under the MRTMA, MCL 333.27956(1). And should the number of applications exceed the number of allowed businesses, the municipality must "decide among competing applications by a competitive process intended to select applicants who are best suited to operate in compliance with this act within the municipality." MCL 333.27959(4).

In *Attitude Wellness LLC v Village of Edwardsburg,* No. 355767 (Unpublished Mich App, Nov. 23, 2021) the village by ordinance created a three person committee composed of the village president, village clerk, and a planning commission representative to evaluate and provide a licensure recommendation to the village council based on ten criteria outlined in the ordinance which included factors such as capitalization and means to operate the proposed establishment; business history and experience; integrity, moral character, and cooperation level with the village; and financial benefit to the village. The plaintiff, an unsuccessful applicant seeking licensure, sued challenging the ordinance and the selection process both on its face and as applied. Specifically, the plaintiff asserted that the village used factors in the section process that violated the MRTMA because they were not aimed at determining those applicants best suited to operate in compliance with the MRTMA.

The Court of Appeals reversed the dismissal of the suit by the circuit court and remanded the case because the trial court erred by 1) determining that the licensing decision was a quasi-judicial act, and 2) used a zoning case analysis. The Court of Appeals held that the evaluation process was not quasi-judicial in nature as it did not employ any of the hallmarks of a quasi-judicial proceeding, such as having the right to a hearing, right to counsel, the ability to submit evidence or subpoena witnesses.

The Court of Appeals also said that the trial court erred in its use of zoning law jurisprudence to analyze the matter, specifically pointing out that zoning statutes and the MRTMA do not have the same general purpose or affect similar policies. Thus, the circuit court was wrong to dismiss the case based on the lack of subject matter jurisdiction. Although the case was remanded, there was no ruling on the merits of whether the factors used by the village to evaluate the licensing applications were violative of the MRTMA.

In *Cary Investments, LLC v City of Mt. Pleasant,* 342 Mich App 304 (2022) the city had adopted ordinances authorizing the operation of three adult-use retailers and received 10 applications for licensure. The ordinance set forth nine factors to be considered in evaluating the applications and created a selection committee consisting of the city clerk, city planner, and director of public safety. Evaluations took place in an open meeting and the decision of the committee was "final," not subject to appeal to any city body such as the city commission or zoning board of appeals. Plaintiff was not awarded a license and sued asserting due process violations and other challenges to both the ordinance and application evaluation process. The circuit court dismissed the case on the city's motion based on a lack of subject matter jurisdiction and the failure to state a claim on the grounds that the matter was as an appeal of quasi-judicial decision of an administrative agency. The same basis on which the circuit court had dismissed the plaintiff's claims against the Village of Edwardsburg.

The Court of Appeals reversed the determination that the trial court did not have jurisdiction, asserting that the lower court should have viewed the matter as a due process challenge. But the appellate court ruled that the city was nevertheless entitled to dismissal of the matter since the plaintiff did not present valid due process challenges. The appellate panel ruled that to state a substantive due process claim one must allege egregious or arbitrary governmental conduct which shocks the conscience, but a refusal to issue a permit or license falls short of this standard. Turning to the procedural due process claim, the right to notice and opportunity to be heard by an impartial decision-maker applies to the deprivation of a life, liberty, or property interest; but a first-time applicant for licensure is not entitled to minimal due process since they do not hold a recognized property right, as compared to license holder seeking a renewal.

The plaintiff also asserted that as the holder of an existing medical marijuana license from the city, it should have received greater consideration for an adult-use marijuana license. However, the court held that "the City's decision to authorize plaintiff to operate a medical-marijuana facility did not obligate the City to subsequently approve plaintiff for a license to operate as a marijuana retailer for purchasers who wish to obtain marijuana for recreational purposes." This holding should counter any argument that MCL 333.27956(6) requires a municipality to grant an adult-use license to an existing medical marijuana licensee.

Although it is a medical marijuana licensing case, *Pinebrook Warren, LLC v City of Warren,* 343 Mich App 127 (2022), has been subsequently applied to cases involving adult-use marijuana licensing. The city adopted an ordinance authorizing the operation of 15 licensed provisioning centers. It received 65 applications seeking licensure. The applications were reviewed by a committee made up of the "City Attorney or his designee, the Director of the Public Service Department or his designee, and members of the Medical Marihuana Committee or alternates appointed by the City Council." This body evaluated the applications based on 17 factors listed in the ordinance but did not approve or disapprove any applicant; only the city council could approve the issuance of a license. The committee met privately over several months and forwarded all the applications along with its scores and recommendations to the city council which took action to award the licenses. Unsuccessful applicants asserted that because the review committee did not meet in public sessions, it violated the Open Meeting Act (OMA), MCL 15.161 et seq. and that the unsuccessful applicants suffered due process violations.

On appeal the appellate panel held that since the OMA only applied to "public bodies" as defined by the statute, since there was no delegation of authority to the review committee to select, deny, or cull applicants, it did not exercise any decision-making authority and thus fell outside the OMA. As for the due process assertions, the court cited the decision in the Mt Pleasant case to determine that no judiciable due process violations were plead since first-time applicants are not entitled to procedural due process and there was no assertion that the evaluation process shocked the conscience.

As of this writing, the Michigan Supreme Court has issued an order to hear argument on whether to grant leave to appeal on the question of whether the Warren Review Committee was subject to the Open Meetings Act. This is significant since it places in jeopardy several other decided cases which held that evaluation committees which made recommendations to a final decision-making body were not subject to the OMA.

Both the *Mt. Pleasant and Warren* cases were cited in the unpublished cases of *Leoni Wellness, LLC v Easton Township,* #358818 (Unpublished Mich App November 10, 2022), *Yellow Tail Ventures, Inc v City of Berkley,* # 357654, 357666, 358242 (unpublished December 15, 2022) and *Blue Water Cannabis Co., LLC City of Westland,* #359144, 359168 (Unpublished Mich App April 13, 2023). These three cases were all brought by unsuccessful applicants seeking adult-use marijuana licenses where the municipality had limited the number of such businesses. In each case an evaluation committee was tasked with scoring the applications based on criteria set forth in the authorizing ordinance, however a final determination was made by the municipality's governing board.

Of the three, the decision in the *Berkley* case is perhaps the most noteworthy since it specifically dealt with the question left open in the Edwardsburg case, addressing the scope of factors a community could use to determine whether an applicant for an adult-use business license is "best suited to operate in compliance with this act within the municipality." MCL 333.27959 (4).

The unsuccessful applicants in *Yellow Tail Ventures* asserted that the criteria used by the City of Berkley, which included whether the business was going to revitalize vacant or unused property; whether the applicant or its stakeholder have a history of acts detrimental to the health, safety, and welfare of the public; whether it has the resources to carry out its business plan; whether it will employ sustainable infrastructure and energy efficient elements and fixtures; and its size, nature, and location in relationship to previously issued marijuana business licenses were not consistent with they could operate in compliance with the MRTMA. However, the court pointed out that the plaintiffs failed to note the "within the community" language contained within the statute. This qualifying phrase the court held, "permit(ed) a municipality to craft criteria suited to its own local concerns, provided that the criteria conform to the other provisions of the MRTMA." Although as an unpublished case the *Yellow Tail Ventures* case lacks precedential standing, it nevertheless can be cited as persuasive authority. This position is buttressed by the fact that it was cited with approval by the court in the *Blue Water Cannabis* decision on the same issue.

However, in crafting the criteria used to evaluate marijuana business applicants, note should be taken of the decision in *Lowe v City of Detroit,* 544 F Supp 3d 804 (2021) which resulted in the issuance of a preliminary injunction precluding the operation of an ordinance provision that grant(ed) preferential treatment to 'Detroit legacy' applicants (i.e., those who have lived in Detroit for at least ten years) seeking adult-use marijuana licenses. The Federal court determined that such a provision whose intent was to favor Detroit residents versus non-residents seeking marijuana business licenses, violated both Michigan and U.S. Constitutional provisions that precluded discrimination based on economic protectionism for residents. Thus, criteria favoring residents over non-residents could be challenged by unsuccessful non-resident license applicants.

Law Enforcement Cases

Prior to the adoption of the Michigan Medical Marihuana Act (MMMA) in 2008, the Michigan Supreme Court held in *People v Kazmierczak,* 461 Mich 411 (2000) that the odor of marijuana may establish probable cause to conduct a warrantless search when, 1) a qualified person detects marijuana odor, and 2) either a warrant is obtained, or an exception of the warrant requirement exists. This case generally permitted the search of motor vehicles when an officer noticed the smell of burnt marijuana, due to vehicles being an exception to the Fourth Amendment warrant requirement.

In *People v Armstrong #*360693 (Unpublished Mich App Nov 22, 2022) the holding in *Kazmierczak* was questioned in light of the adoption of the MRTMA, noting that "search-and-seizure law is now much more complicated and nuanced" citing Arnold, *Criminal Law Issues After Passage of the MRTMA: Uncertainty Remains,* 100 Mich. B J 26, 29-30 (June 2021). After surveying how other states have addressed the odor of marijuana in motor vehicles, California and Massachusetts hold that "the smell of marijuana, standing alone, does not establish probable cause for a search of a vehicle...;" while in Maryland, although possession of less than 10 grams of marijuana is a civil offense, "a law enforcement officer has probable cause to search a vehicle where the law enforcement officer detects an odor of marijuana emanating from the vehicle" because marijuana in any amount remains unlawful; the Court of Appeals panel took a middle ground, relying upon cases from Pennsylvania and Colorado, holding "'the smell of marijuana may be a factor, but not a stand-alone one, in determining whether the totality of the circumstances established probable cause to permit a police officer to conduct a warrantless search of a vehicle'...." This decision has been appealed to the Michigan Supreme Court and oral argument was ordered by the Court in a November 3, 2023 order, see 996 NW 2d 481.

In *People v Perry,* 338 Mich App 363 (2021) an 18-year-old driver was involved in a crash. The responding officer detected the odor of burnt marijuana. The driver admitted to using marijuana and submitted to a blood test which was negative for alcohol, but positive for THC, the psychoactive agent of marijuana. The defendant was charged with operating a motor vehicle with a controlled substance in her body, a criminal misdemeanor. She argued that under the MRTMA her offense should be treated as a civil infraction for use and possession of marijuana by a person under 21 years of age. However, the court held the MRTMA only decriminalized possession of marijuana by persons under 21 years of age, MCL 333.27965(3)(a)(2), and that because "use" is a necessary element for the offense of operating with a controlled substance in one's system, defendant was subject to prosecution for the criminal driving offense.

People v Kejbou, #361377 (Unpublished Oct 5, 2023) involved the appeal by the prosecution asserting that the cultivation of 1156 marijuana plants by an unlicensed grow operation was a felony under the Public Health Code (PHC), MCL 333.7401(2)(d). Defendant asserted that since the MRTMA largely decriminalized possession of marijuana by persons aged 21 and older, the possession of excessive amounts of marijuana was only punishable as a misdemeanor under MCL 333.27965. Commenting that the MRTMA does not distinguish between commercial trafficking and personal use, the Court agreed with the defendant holding that the MRTMA as it concerns commercial marijuana operations has "repealed, moderated, or otherwise supplanted" Article 7 of the PHC. The practical result of this case is that similar circumstances may be referred to federal authorities for prosecution.

Excise Tax Revenue

Pursuant to MCL 333.27963, a 10 percent excise tax is levied on the sales price of marijuana sold or transferred by an adult-use marihuana retailer or microbusiness (unless such sale or transfer is to another marijuana establishment or tribal marijuana business). After the cost for the implementation, administration, and enforcement of this Act incurred by the Cannabis Regulatory Agency is reimbursed to the State general fund and $20 million is allocated for "for 1 or more development and research projects, including clinical trials, that are approved by the United States Food and Drug Administration and sponsored by a nonprofit organization or researcher within an academic institution researching the efficacy of marihuana in treating the medical conditions and preventing the suicide of United States Armed Services veterans," cities, villages and townships receive a 15 percent share of the remaining amount of excise tax collected. The amounts distributed to municipalities from the prior State fiscal year have been announced by the Michigan Department of Treasury in March of the following year. The amount that any municipality receives is based on the prorated number of marihuana retailer and microbusiness licenses in that municipality. The following table illustrates the growth in the number of cities and villages permitting adult-use marijuana business operations and revenue received per adult-use retail or microbusiness establishment in each of the past fiscal years for which figures are available.

Fiscal Year	Cities	Villages	Amount per Retailer/ Microbusiness
2020	38	7	$28,001.232
2021	62	15	$56,453.44
2022	81	26	$51,841.21

The following chart indicates the amount of excise tax revenue received by selected cities over the past three fiscal years.

CITY	FY 2020	FY 2022	FY 2023
Ann Arbor	$476,022	$1,411,336	$1,399,713
Battle Creek	$140,007	$508,081	$518,412
Bay City	$84,004	$508,081	$518,412
Big Rapids	$84,004	$677,441	$881,301
Grand Rapids	$0	$677,441	$881,301
Kalamazoo	$168,008	$564,534	$881,301
Lansing	$280,013	$903,255	$1,088,665
Muskegon	$112,005	$451,628	$622,095
Mt. Pleasant	$0	$56,463	$207,365
Ypsilanti	$140,007	$338,721	$518,412

Receipt of this money does not come with any conditions; municipalities are free to spend it as they see fit. Another aspect of marijuana legalization in Michigan is "marijuana tourism," particularly in communities along the Ohio, Indiana, and Wisconsin borders.

Conclusion

With the legalization/decriminalization of adult-use marijuana by voters in 2018, most municipal attorneys likely assured their client communities that, while the new law could present challenges, they were not insurmountable, that the sky was not falling. Rather by prudently navigating the MRTMA, and other statutes, such as the Open Meetings Act, a city or village could prohibit, limit, and regulate adult-use marijuana businesses in a manner as best served that community. To this end, both the Cannabis Regulatory Agency and the courts have generally upheld regulations and limitations imposed by municipalities.

Nevertheless, marijuana law in Michigan remains somewhat unsettled due to market factors, several outstanding cases that will be addressed by the Michigan Supreme Court in 2024, and potential changes in marijuana law in neighboring states and at the federal level. As such, municipal officials should continue to seek the guidance of their city or village attorney in navigating this evolving area of law.

We would love to hear from you.

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