Local Overreach

By Jacqueline Langwith

The Medical Marihuana Facilities Licensing Act creates a regulatory framework around medicinal marijuana by establishing five types of state-licensed marijuana facilities: growers, provisioning centers, processors, safety compliance facilities (testing labs), and secure transporters.[1] Applicants need municipal approval to obtain a state license from the Michigan Department of Licensing and Regulatory Affairs. Under MCL 333.27205, a municipality may adopt an ordinance to authorize one or more types of marijuana facilities within its boundaries and limit the number of each type of marijuana facility—referred to as "opting in." Medical marijuana facilities cannot operate in a municipality that does not opt in under the statute, and as of May 4, 2018, only approximately 80 of the more than 1,700 municipalities across the state have opted in to the act.[2]

In addition to opting in, MCL 333.27205 authorizes municipalities to adopt other ordinances related to marijuana facilities, including zoning regulations. But they are prohibited from imposing regulations regarding the purity or pricing of marijuana or interfering or conflicting with the statute or the rules for licensing marijuana facilities.

Most of the municipalities that have opted in have enacted both a regulatory ordinance and a separate zoning ordinance.[3] Regulatory ordinances typically include provisions limiting the number and types of facilities; setting odor control, waste, and security requirements; and setting the prerequisites to obtain the local permit. Zoning ordinances specify the districts in which a facility may locate—state laws only require that growers locate in agricultural or industrial zones—and generally require buffers from land uses such as schools, churches, parks, and libraries.

Many municipalities, particularly those with caps on the number of permitted retail outlets (provisioning centers), have passed ordinances establishing complicated and subjective scoring criteria to choose which facilities get permits. For example, Lansing has developed a 100-point, five-category scoring scheme that provides points for, among other poorly defined elements, "charitable plans and strategies" by demonstrating

"commitment to fiscal and/or volunteer work" (worth up to four points).[4]

Lansing and other municipalities like Adrian, Kalamazoo, Lenox Township, and Leoni Township require applicants to meet similar onerous requirements such as providing years of bank statements, profit and loss statements, a schedule of planned capital investments in the community, proposed charitable contributions, anticipated employee pay, proof of $1 million in insurance, surety bonds, escrow accounts, or that individual owners meet a net worth threshold.

Such ordinances raise questions about whether municipalities have the constitutional power to enact the ordinances and whether they interfere or conflict with the Medical Marihuana Facilities Licensing Act.

Municipal powers

Because local governments are creatures of the state, they possess only the powers granted by the state. Local governments in Michigan have been granted regulatory authority through the Michigan Constitution and statutes.[5]

The Michigan Constitution expressly provides that cities and villages have the power to adopt ordinances related to municipal concerns, property, and government.[6] There is no specific constitutional provision for townships, however. The state constitution provides that townships are bodies corporate and have powers provided by law,[7] and township boards have legislative and administrative powers as provided by law.[8]

Statutorily, cities, villages, and townships have the power to pass ordinances for the public health, safety, and general welfare subject to the constitution and general laws of the state.[9] The Michigan Constitution also provides that its provisions and the laws concerning townships, cities, and villages shall be liberally construed in the municipalities' favor.[10]

Validity of municipal Medical Marihuana Facilities Licensing Act ordinances

When determining whether an ordinance is valid, Michigan courts consider whether it is within the range of permissible municipal powers and whether it is reasonable.[11] When assessing reasonableness, courts consider whether there is a rational relationship between the exercise of a particular police power and public health, safety, morals, or general welfare in a given case.[12]

Requirements for odor control, security, and sanitation are generally considered rationally related to public safety, health, and general welfare and are, therefore, reasonable.[13] Unpleasant odors, crime, and waste are all public safety concerns affecting the health and general welfare of the community.[14] Also rationally related to the general welfare of the community are requirements that applicants demonstrate they are in "good standing," are not indebted to the community, or are not in violation of state or local law.[15] It would be detrimental to the general welfare of the community if disreputable or tax-delinquent businesses were allowed to operate.

But it is not clear—even under the liberally construed municipal power—that requiring an applicant and its owners to provide years of bank and profit and loss statements or to demonstrate net worth is rationally related to public safety, health, and general welfare. An applicant's net worth and profit and loss statements from other companies generally do not factor into the safety of products sold or the security of the premises, nor do they affect a business's good standing in the community. Establishing a net worth threshold is also discriminatory against individuals with less financial capital.

Medical Marihuana Facilities Licensing Act preemption

Even if a local ordinance is valid under the municipality's general constitutional and statutory authority, it would be preempted if it interferes or conflicts with the Medical Marihuana Facilities Licensing Act.[16] Under principles of "field preemption," a state statute preempts regulation by the local government when it "completely occupies the regulatory field."[17] However, since the act expressly grants certain powers to municipalities, the state cannot be said to completely occupy the entire field of medical marijuana licensing.[18] Consequently, field preemption does not apply in this instance.

A state statute preempts regulation by the local government when the local regulation directly conflicts with the statute.[19] A direct conflict between a municipal ordinance and a state law exists when "the ordinance permits what the statute prohibits, or the ordinance prohibits what the statute permits."[20]

At a Glance

As of May 4, 2018, only approximately 80 of the more than 1,700 municipalities across the state have opted in to the Medical Marihuana Facilities Licensing Act.

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At its core, the state policy is somewhat confused: it recognizes marijuana as medicine but allows municipalities to decide where access occurs. Typically, we do not see a need to limit access to medicine.

However, direct conflicts with state law are not needed for state law to preempt local ordinances. If the local ordinance undermines state law, even if it is not in direct conflict, the local ordinance would be preempted.[21] For instance, a state law that permitted the local housing commission to employ certain professional consultants preempted a local ordinance subjecting the housing commission's employment of professionals to the city's charter, ordinances, and rules, but an ordinance requiring the housing commission to make monthly reports was not preempted by a state statute requiring the housing commission to make annual reports and other reports the city may require.[22]

The anticipated potential conflicts between state and local laws with regard to medicinal marijuana licensing may or may not cause preemption. The Medical Marihuana Facilities Licensing Act requires that applicants for a state license provide financial information as prescribed by the Medical Marihuana Licensing Board.[23] The act also allows the licensing board to consider the financial ability of applicants, their ability to purchase and maintain adequate liability and casualty insurance, and their sources of capitalization.[24] Under the act, a $100,000 liability insurance policy is adequate.[25] A local ordinance requiring an applicant for a medical marijuana facility license to obtain a $1 million insurance policy is more restrictive than the state requirement. Also, local ordinances requiring bank statements, profit and loss statements, and other financial documents could undermine the state law because the same financial documents could lead to state approval of a license but municipal denial.

At its core, the state policy is somewhat confused: it recognizes marijuana as medicine but allows municipalities to decide where access occurs. Typically, we do not see a need to limit access to medicine. Patients in municipalities that do not opt in will be forced to travel—sometimes significant distances—to obtain marijuana. In the state's eyes, marijuana may be medicinal, but it is not medicine as is normally understood. This confusion, when combined with contradictory local ordinances, will likely defeat the purpose of the act, which is to create a robust statewide licensing system to govern medicinal marijuana and provide safe sources to patients. ■

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ENDNOTES

1. MCL 333.27101 *et seq.*
2. MCL 333.27205(1)(a); Michigan Dep't of Licensing and Regulatory Affairs, Bureau of Medical Marihuana Regulation, *Unofficial Document: Municipality Opt In Spreadsheet* (Revised June 15, 2018) <https://www.michigan.gov/lara/0,4601,7-154-78089_83746-453722--,00.html>. All websites cited in this article were accessed June 30, 2018.
3. E.g., Kalamazoo Ordinances 1962 and 1957; Ann Arbor Ordinances 17-19 and 17-21.
4. City of Lansing, Clerk's Office, *Medical Marijuana Provisioning Centers Scoring Criteria* (November 13, 2017) <https://www.lansingmi.gov/DocumentCenter/View/4600/-Med-Marijuana-Provisioning-Center-License-Application-Scoring-Criteria-v4>.
5. *Hunter v City of Pittsburgh*, 207 US 161, 178–179; 28 S Ct 40; 52 L Ed 151 (1907); *Shelby Charter Twp v State Boundary Comm*, 425 Mich 50, 56 n 4; 387 NW 2d 792 (1986).
6. Const 1963, art 7 § 22.
7. Const 1963, art 7 § 17.
8. Const 1963, art 7 § 18.
9. MCL 117.4j, MCL 67.1, and MCL 41.181. See also *City of Grand Haven v Grocer's Co-op Dairy Co*, 330 Mich 694; 48 NW2d 362 (1951); *Hudson Motor Car Co v City of Detroit*, 282 Mich 69; 275 NW 770 (1937); *Square Lake Hills Condominium Ass'n v Bloomfield Twp*, 437 Mich 310; 471 NW2d 321 (1991).
10. Const 1963, art 7 § 34.
11. *Graham v Kochville Twp*, 236 Mich App 141, 146; 599 NW2d 793 (1999).
12. *Natural Aggregates Corp v Brighton Twp*, 213 Mich App 287, 294; 539 NW2d 761 (1995).
13. *Village of Euclid v Ambler Realty Co*, 272 US 365; 47 S Ct 114; 71 L Ed 303 (1926); *Bonner v City of Brighton*, 495 Mich 209, 231; 848 NW2d 380 (2014); *Recreational Vehicle United Citizens Ass'n v City of Sterling Heights*, 165 Mich App 130; 418 NW2d 702 (1987).
14. *Padover v Farmington Twp*, 374 Mich 622, 639; 132 NW2d 687 (1965) and *Michigan Waste Systems v Dep't of Natural Resources*, 147 Mich App 729; 383 NW2d 112 (1985).
15. See e.g., *Worthing v City of Kalamazoo*, 71 Mich App 646, 652–653; 248 NW2d 654 (1976) (ordinance providing for denial of towing and wrecker license based on applicant's prior violation of city ordinances or state laws is reasonable).
16. *Ter Beek v City of Wyoming*, 495 Mich 1, 19–20; 846 NW2d 531 (2014); *People v Llewellyn*, 401 Mich 314, 322, n 4.
17. *Id.*
18. MCL 333.27205.
19. *Ter Beek v City of Wyoming.*
20. *Id.*
21. Brilmayer, *A General Theory of Preemption: With Comments on State Decriminalization of Marijuana*, 58 BCL Rev 895, 905 (2017) <https://lawdigitalcommons.bc.edu/bclr/vol58/iss3/4/>.
22. *American Federation of State, County, and Municipal Employees v City of Detroit*, 252 Mich App 293; 652 NW2d 240 (2002).
23. MCL 333.27401(1)(i).
24. MCL 333.27402(3).
25. MCL 333.27408.