



**A PRIMER
ON REAL ESTATE
— AND —
CANNABIS
UNDER
MICHIGAN LAW**

By Gregory J. Gamalski

Michigan has a complicated history related to marijuana legalization. Essentially banned nationally as a controlled substance, in part to control immigrant workers in the Southwest during the Great Depression, and as a means to continue employment of law enforcement officers formerly engaged in Prohibition enforcement (it has been claimed),¹ the law on cannabis has moved from dread of reefer madness to socially acceptable and nearly entirely legal recreational use under the Michigan Regulation and Taxation of Marihuana Act (MRTMA), the Medical Marijuana Facilities Licensing Act (MMFLA), the Michigan Medical Marijuana Act (MMA), and the Industrial Hemp Research and Development Act.² Thus, the law's relationship with cannabis, marijuana, THC, hemp, and CBD (a hemp derivative) has changed considerably. Today, the cannabis legal environment is dynamic and now further complicated by new hemp and CBD markets.

Cannabis law often evolves faster than publication deadlines allow. For instance, on October 4, 2019, the Michigan Supreme Court heard *DeRuiter v Charter Township of Byron*.³ The case involved zoning preemption under the MMA and revisited issues from a prior case, *Ter Beek v City of Wyoming* and its cryptic "Footnote 9."⁴ Draft USDA federal regulations on hemp came out October 31, 2019, but are problematic and in flux,⁵ and on October 29, 2019, the Michigan Department of Licensing and Regulatory Affairs (LARA) announced that recreational marijuana use applications would be accepted as of November 1, 2019, nearly a month before the mandatory date, and the first licenses were actually issued December 1, 2019.⁶ While production of psychoactive cannabis is thoroughly regulated, rules dealing with CBD and hemp are less stringent. CBD is a nonpsychoactive derivative of hemp. The MRTMA legalized hemp and CBD, fiber, oil, or feed production from hemp. Products that include CBD as a supplement nonetheless fall under the FDA jurisdiction, and USDA rules govern hemp growing, but even those rules are in flux. In all forms, the marijuana and hemp industries inevitably involve real estate. Important issues are highlighted below.⁷

Banking

Banking is a difficult issue for all marijuana-related businesses. Most marijuana-related businesses have great difficulty opening legitimate bank accounts because the business activity still violates current federal laws. The American Bankers Association believes "any contact with money that can be traced back to state marijuana operations could be considered money laundering and exposes the bank to significant operation risks."⁸ In the real estate context, for instance, how do landlords collect rent if the tenant is involved in marijuana activity that violates federal law and the tenant is only able to pay with cash? Large cash deposits will require suspicious activity reports to be filed by the bank.⁹ Might the landlord's bank decide it no longer wants the landlord's deposit relationship

as a result? In the context of a real estate purchase and sale, how will a deal close if it is literally a cash sale? Who would be willing to handle a briefcase full of cash at a closing, and what bank would accept that deposit? Practically speaking, the industry has found various workarounds, proceeding on a wink and a nod for the most part, with some credit unions with state charters entering the market.¹⁰ Hope is on the horizon with the recent passage by the U.S. House of Representatives of the Secure and Fair Enforcement Banking Act (the SAFE Banking Act), but the bill has not been acted on by the Senate.¹¹

The MMA and real estate

Other than the *Ter Beek* and *DeRuiter* rulings, the MMA does not present many real estate issues, especially with the passage of the MMFLA and MRTMA changing the markets. Since the MMA was not intended for commercial sales—commercial real estate is not typically an issue in caregiver-patient relationships—caregiver grows don't usually involve commercial real estate.

Background information is necessary


Since marijuana use remains controversial at the local level, counsel for a licensee needs to understand policy issues to make thoughtful and informed presentations at local zoning and permit public hearings. Typical questions include: Is marijuana a gateway drug?¹² Does marijuana use increase impaired driving?¹³ What impact does marijuana have on the opiate crisis?¹⁴ Does a licensed facility bring increased risk of crime?¹⁵ An informed advocate must have well-documented answers to these questions.

Real estate transactions overview and planning

Real estate is key to business activity under the MMFLA and MRTMA because a physical presence is a must. A virtual presence will not suffice for obvious reasons given state-imposed

At a Glance

Hemp production and cannabis for medical and recreational use have moved from the shadows and into the limelight. With hemp production, CBD sales, marijuana cultivation, and marijuana use legalized under four different statutes, real property lawyers must know the issues. An overview of legal and practical issues creates a roadmap to successfully guide clients.



DRUG-FREE SCHOOL ZONE

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controls. While it does not seem likely that drones will be delivering marijuana in the near future and internet sales are not viable in the current licensed environment, a facility could arrange delivery of products under the MRTMA.¹⁶ Set forth below is a list of issues relating to the purchase of real estate for a marijuana business.

Zoning

Zoning issues are interrelated and potentially complicated. For instance, MMFLA grow facilities can only be located in industrially zoned areas or agriculturally zoned areas.¹⁷ The MMFLA provides that LARA will not issue a license unless the municipality in which the proposed facility will operate has adopted an ordinance that authorizes that type of facility.¹⁸ In contrast, the MRTMA requires municipalities to affirmatively opt out of the recreational marijuana market.¹⁹ Ordinances adopted in various cities often have different provisions. Investigating zoning status is a must. Some municipalities may decide to authorize only certain types of licenses, making zoning review under the MMFLA and MRTMA complicated.

Should a licensee buy or lease the real estate?

Landlords may be reluctant to enter into the gray area between federal law and state marijuana authorizations, but expenditure of the capital needed to acquire a site outright might be a stretch for the operator. On the other hand, owned real estate might satisfy capitalization requirements under the MMFLA rules, although capitalization requirements no longer apply under the rules related to the MRTMA.²⁰

Site selection

Zoning regulations make site selection complicated. For instance, distances from other licensed facilities, churches, schools, and daycare centers all affect site selection.²¹

Private use restrictions

Private use restrictions are a separate issue from local ordinances. Are there use restrictions or condominium restrictions that limit undesirable or illegal uses? The informed view is that current restrictions on illegal substances preclude otherwise state-legalized marijuana activities. But if federal law changes, are these uses still legally undesirable?

Financing

Consideration must be given to whether an owner of a facility might breach loan covenants prohibiting illegal activities. Mortgages often have provisions barring leases for illegal or unsavory activities. Could a lease with a marijuana establishment breach a loan covenant and cause a default under the loan documents?

Existing users

Landlords and investors considering entering into leases for facilities should review leases of other tenants. Could the landlord's new lease with the facility breach some lease covenant with other tenants?

Integration

Consider carefully how uses might be combined. A provisioning center, a grow facility, and a processor can be owned by the same or related parties and co-located. But secure transporters or testing facilities cannot be vertically integrated.

Site control

Consider how important complete site control might be. For instance, would a licensee be better off acquiring an entire building, even if the licensee only needs part of the space for its operation, and avoid issues with other occupants or lessees? Careful consideration must also be giving to explicitly requiring seller cooperation in any transaction. One would not wish to risk a seller, tempted by a competing later higher offer, becoming recalcitrant during the application process.

Future tenants

What risks might other potential tenants fear if a facility is in the building? Should one include a waiver that the tenant will not object to, and acknowledges the existence of, the facility already located in the premises?

Co-location issues

Rules suggest that passing inventory from a grower to a processor to a provisioning center in the same complex might not require a secure transporter to move products.²² For instance, they may be able to avoid the transporter requirement through a common corridor used mutually by a grower, processor, and provisioning center to transfer products.

Designated consumption establishments

An interesting aspect of the MRTMA is that consumption establishments for recreational use are allowed, analogous to perhaps cigar bars or hookah lounges.²³

Marijuana events and temporary event licenses

The equivalent of a pop-up is allowed when licensees can sell wares for a short time. Property owners approached for these purposes will need to carefully consider various liability and other issues before allowing such activities on their premises.²⁴

Practical issues

Like any real estate development, matters aside from the law must be considered:

- **Area:** How much space is needed? In a "grow," each plant needs four or more square feet, for instance.
- **Buildout:** The buildout will be complicated and expensive; it's not a do-it-yourself project. The rules under the MMFLA and MRTMA about buildout, safety, and security are detailed and complicated.²⁵
- **Consultants:** Successful facility licensing and design requires a strong working relationship between licensee, contractor, architect, engineer, and lawyer.
- **Utilities:** Grow facilities are utility hogs. Existing electrical and ventilation systems will be insufficient. Backup power systems are needed in the event of an outage. Utility costs were \$750 per pound in Colorado as of 2015.²⁶
- **Emission control:** In *Safe Streets Alliance v. John Hickenlooper*,²⁷ adjoining property owners brought a Racketeer Influenced and Corrupt Organizations Act claim. A pertinent allegation was that the operation had caused noxious odors, suggesting such a complaint might be actionable. The MMFLA and MRTMA rules also address emission control issues.²⁸
- **Waste disposal and waste management:** Emergency rules mandate waste must be managed consistent with the Natural Resources and Environmental Protection Act.²⁹ Licensees must dispose of marijuana in a secured receptacle or using a manned and permitted solid waste landfill, a manned compostable materials operation or facility, or an in-vessel digester, and must meet all applicable state and local laws and regulations.
- **Site security:** Some facilities are cash businesses with readily disposable, marketable, and transportable inventory. Does the facility lend itself to the necessary security measures required under LARA rules?³⁰
- **Marketing, signage, and advertising:** Local ordinances typically control commercial signage, and LARA rules regulate signage and advertising. For instance, the MMFLA Emergency Rule 42(2) specifically states: "A licensee shall not advertise marijuana product where the advertisement is visible to members of the public from any street, sidewalk, park or other public place."
- **Long-term considerations:** What happens if the facility does not prosper? Unlike an ordinary retail outlet, the facility might not be immediately adaptable for a non-licensed user. On the other hand, might a better-licensed operator pay a premium for an approved facility?

- **Landlord inspection rights:** The licensing regimen suggests that a landlord will not be able to readily inspect a facility.³¹ Generally speaking, only the licensees and their authorized employees are allowed in parts of the building where marijuana is grown, processed, and tested.
- **The title insurance problem:** National underwriters are skittish about marijuana-related transactions, although there are one or two underwriters with a toe in the market. Many companies instruct agents and closers that transactions which appear to involve a marijuana real estate establishment may not be underwritten, insured, or closed using their services.
- **Local units of government:** Local government is a player or, in many cases, a non-player. There is no affirmative right to locate a facility in every municipality under the MMFLA, and municipalities may opt out under the MRTMA. Thus, a crucial preliminary step is to determine if the municipality has elected to opt in or opt out, depending on the license being sought under the MMFLA or MRTMA. Licensees can submit applications if opt-in has not occurred, but the license will not issue until the necessary ordinance has been adopted.

Three parallel systems control the distribution of marijuana: the MMA, MMFLA, and MRTMA. A fourth covers hemp. Under the caregiver model, the Michigan Supreme Court ruled that caregivers' activities cannot simply be banned. An open question is whether other ordinances, such as those requiring caregiver registration, are enforceable because a jurisdiction cannot control caregiver growers under the MMA³² but can decide not to allow grow facilities under the MMFLA or opt out under the MRTMA. Local units of government can also elect to allow only specific licensees. They do not have to globally opt in; they can pick and choose. They can also limit the number of facilities in the jurisdiction. Contrast this with the provisions of the MRTMA, which specifically require a decision to opt out.

Conclusion

Cannabis laws are in flux, but ultimately, complete marijuana legalization seems inevitable. Currently, the area is complicated with court rulings and new rules contributing to uncertainty. Final rule adoption must be undertaken soon. While one might not expect a total rewrite, final regulations may not be a verbatim adoption of the original emergency rules. All lawyers can do is try to stay up to date and provide timely advice to licensees and clients on marijuana-related matters, both for real estate and other purposes. ■



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ENDNOTES

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17. MCL 333.27501(9): "A grower license does not authorize the grower to operate in an area unless the area is zoned for industrial or agricultural uses or is un-zoned and otherwise meets the requirements established in Section 205(1)."
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19. MCL 333.27956.
20. R 333.212. This and other related departmental rules are found under Medical Marihuana Facilities, Bureau of Medical Marihuana Regulation, LARA (filed November 27, 2018), available at <https://www.michigan.gov/documents/lara/2017-042_LR_-_Final_-_Medical_Marihuana_639287_7.pdf> [<https://perma.cc/GSB7-5KRY>].
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29. R 333.237 and Emergency Rule 37.
30. R 333.235 and Emergency Rule 35.
31. Emergency Rule 35(2) requires visitors to be escorted, but see R 333.231(2)(d), which poses more restrictions on access.
32. Pending the Michigan Supreme Court's decision in *DeRuiter v Byron Township*, see n 3 above.