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Five Things to Know About Adult-Use Marihuana Establishments in 2022

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- This presentation, and the materials associated with it, are comprised of general information and not intended as legal advice related to specific questions of attorney-client privilege.
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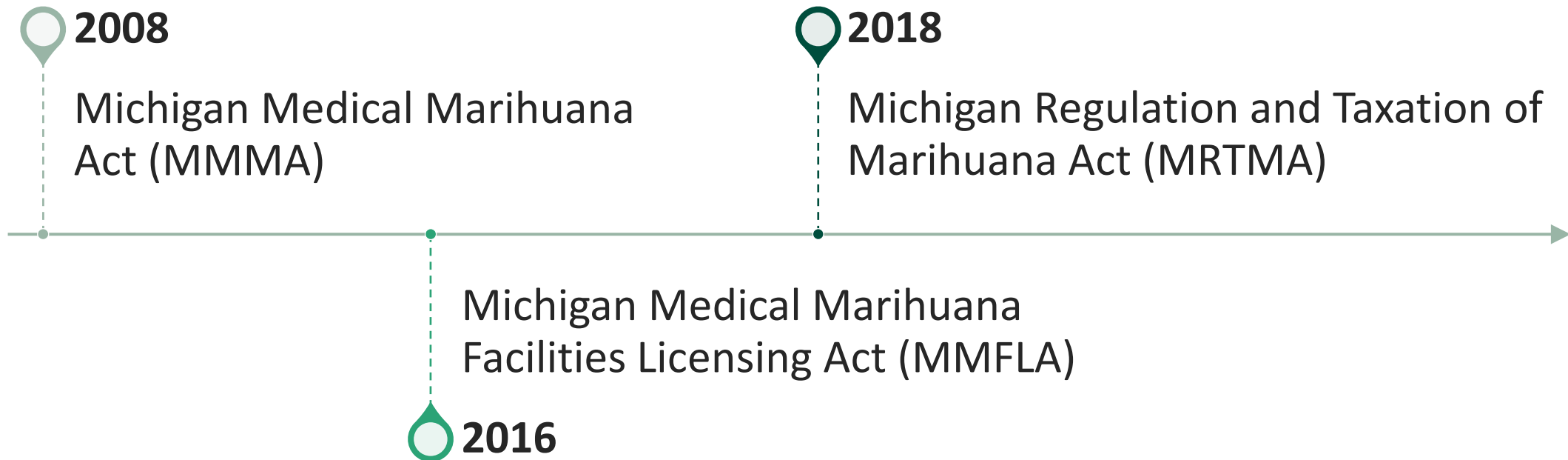


TOPICS FOR DISCUSSION

- Marihuana Regulatory Agency Changes its Name
- Treasury Distributes Marijuana Payments Exceeding \$42.2 Million
- Municipal License Selections in Desired Markets Remain Hotly Contested
- Initiated Petitions Under MTRMA Continues to Cast Uncertainty in Local Markets
- Marihuana Establishments are not Exempt as AG Under the State Construction Code



Timeline of Marihuana Legalization in Michigan



Michigan Medical Marihuana Act

1. The 2008 Caregiver Act was the first Michigan marihuana legalization statute.
2. It allows approved “patients” to use medical marihuana and allows “caregivers” to grow medical marihuana for patients. MCL 333.26421, *et seq.*
3. Each patient can keep 12 marihuana plants in an enclosed, locked facility and can possess 2.5 ounces of marihuana. MCL 333.2424. A medical marihuana “caregiver” under the 2008 Act can grow and have up to 72 plants—five patients plus themselves as a patient. MCL 333.26426(d) and MCL 333.26424(a).
4. The Township cannot completely prohibit these marihuana activities. *Ter Beek v City of Wyoming*, 495 Mich 1, 19-24 (2014).
5. However, the Township *may impose* location and land use restrictions, along with some permitting requirements. *DeRuiter v Twp of Byron*, 505 Mich 130, 147-148 (2020). The Township should consider reviewing its zoning regulations to capture this newly affirmed authority.



What's in a Name?

- With industrial hemp processing and handling increasing, Governor Whitmer signed another Executive Order renaming the MRA as the Cannabis Regulatory Agency (“CRA”)
- With that change, the Governor also transferred to the CRA the powers and duties related to licensing and regulating processor-handlers under the Industrial Hemp Act, while transferring to MDARD the powers and responsibilities related to the cultivation of industrial hemp.



MRTMA authorizes a 10% excise tax on sales of marihuana at a retail establishment or microbusiness. MCL 333.27963(1). This tax remains effective and is distributed differently than the prior MMFLA tax.

Recreational marihuana taxes are distributed with the first funds going to regulation costs and \$20 million for clinical medical trials for veterans. MCL 333.27964(3). Once those obligations are met, the school aid fund and the transportation fund will be the biggest beneficiaries. MCL 333.27964(3)(c), (d). Only 15% of the recreational marihuana tax revenue will be distributed to municipalities and then **only** to those in which “a [recreational] marihuana **retail store** or a marihuana **microbusiness is located.**” MCL 333.27964(3)(a) (emphasis added).



Incentives for Opting-In Increase

Treasury: Adult-Use Marijuana Payments to be Distributed to Michigan Municipalities, Counties

March 24, 2022

The Michigan Department of Treasury today announced that more than \$42.2 million will be distributed among 163 municipalities and counties as part of the Michigan Regulation and Taxation of Marijuana Act.

Next week, 62 cities, 15 villages, 33 townships and 53 counties will be receiving payments from the Marijuana Regulation Fund. For the state of Michigan's 2021 fiscal year, this means each eligible municipality and county will receive more than \$56,400 for every licensed retail store and microbusiness located within its jurisdiction.



Incentives for Opting-In Increase

Incentives for Opting-In Increase

This is based on over \$1.1 Billion in sales

<u>Municipality Number</u>	<u>Municipality Name</u>	<u>Municipality Type</u>	<u>County</u>	<u>Number of Licenses⁽¹⁾</u>	<u>City, Village, Township Distributions⁽²⁾</u>	<u>County Distributions⁽²⁾</u>
46-3010	Addison	Village	Lenawee	2	112,906.88	
46-2010	Adrian	City	Lenawee	8	451,627.52	
01-0000	Alcona	County	Alcona	1		56,453.44
02-0000	Alger	County	Alger	1		56,453.44
03-0000	Allegan	County	Allegan	5		282,267.20
03-2010	Allegan	City	Allegan	1	56,453.44	
80-1010	Almena	Township	Van Buren	1	56,453.44	
81-2010	Ann Arbor	City	Washtenaw	25	1,411,336.00	
06-0000	Arenac	County	Arenac	1		56,453.44
06-1030	Au Gres	Township	Arenac	1	56,453.44	
35-1020	Au Sable	Township	Iosco	1	56,453.44	
35-1030	Baldwin	Township	Iosco	2	112,906.88	
08-1020	Baltimore	Township	Barry	1	56,453.44	
09-1010	Bangor	Township	Bay	12	677,441.28	
80-2010	Bangor	City	Van Buren	2	112,906.88	
08-0000	Barry	County	Barry	1		56,453.44
13-2020	Battle Creek	City	Calhoun	9	508,080.96	
09-0000	Bay	County	Bay	24		1,354,882.56
00-0000	Bay City	City	Bay	10	564,534.40	

Competitive Review

1. The competitive review process allows a township to select and evaluate criteria important to the local community. It also brings additional challenges outside the Township's existing medical marihuana scheme.
2. The initial administrative time and energy required to organize and review the applications for completeness remains.
3. The applications will have to be evaluated based on the selected competitive review factors. There are several different models available. Although there is flexibility to establish the exact procedure, it represents an additional departure from the current administration of medical marihuana.
4. Finally, even with a fair and balanced review of competing applications, there exists a risk of litigation from applicants who do not receive a permit or whose applications are rejected.
5. Many communities are using a zoning only approach with separation distances from sensitive uses and other establishments to avoid establishing a permit cap.



Ranking Applications – Competitive Review?

4. If a municipality limits the number of marihuana establishments that may be licensed in the municipality pursuant to section 6 of this act and that limit prevents the department from issuing a state license to all applicants who meet the requirements of subsection 3 of this section, the municipality shall 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.



Factors Used by Municipalities

- The thoroughness of the Application.
- Whether the Applicant holds a state operating license pursuant to the MMFLA or MRTMA.
- Whether to give state licensed operations a preference over new Applicants.
- History of non-compliance with the Township's ordinances or other laws.
- Prior failure to pay taxes, special assessments, or other payments due to the Township.
- Impact to the character, aesthetics, safety, or welfare of surrounding businesses and neighborhoods.



Factors Used by Municipalities

- Location and proximity to densely populated areas or to other proposed or approved, non-co-located Establishments.
- Whether a building is already constructed and available.
- The architectural and engineering design of the proposed Establishment.
- Proper identification and mitigation of potential environmental issues.
- Knowledge and ties to the local community.
- Effective control against diversion of Marihuana products.
- The capital available to the Applicant for compliance with ordinance requirements.
- The Applicant's general business history.



Factors Used by Municipalities

- Experience in the Marihuana industry.
- Preparedness to provide appropriate employee working conditions, benefits, and specialized training.
- Experience using inventory tracking and seed to sale systems.
- Participation in or qualification for social equity aspects under MRA procedures.
- Other relevant experience, training, or certification.
- Receipt of a permit to operate a Medical Marihuana Facility within the Township.
- Application for a permit to operate a Medical Marihuana Facility within the Township.
- Receipt of a SUP to operate a Medical Marihuana Facility within the Township.
- Application for a SUP to operate a Medical Marihuana Facility within the Township.
- Anticipated colocation with a Medical Marihuana Facility.



Competitive Review Discussion Points

How can municipality develop a fair competitive process – if limiting numbers?

- What is best suited to operate in compliance with the act – merit based?
- What is the meaning of “within the municipality”?
- How do the other powers provided to the municipality modify or not modify the statutes reference to competitive review?
- Can we favor local property owners/residents?
- What about applicants that already have medical license and/or demonstrated record in the industry?
- Is the process in compliance with the Open Meetings Act?
- Waiver provisions/acknowledgment of state law compliance (pending on appeal in *Bluewater Cannabis Company v City of Westland*, Case Nos. 359144, 359161, 359168)



MRTMA Sections at Issue

1. MCL 333.27956(3) (Authorization to Require Operation License)
2. MCL 333.27956(5) (Co-Location Limitations)
3. MCL 333.27956(2) (Time, Place, Manner of Operation/ Unreasonably impracticable and do not conflict with MRTMA)
4. MCL 333.27959(4) (Competitive Licensing)
5. MCL 333.27959(4) (Suitability to Operate Under the MRTMA)



Initiated-Petition Language – Revolving Door?

1. Under MRTMA individuals may also “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.” MCL 333.27956(1).
2. *Coalition for Safer Detroit v Detroit City Clerk* (Case No. 300516) (Markey J. Dissenting)

clear legal duty to perform the act requested. *Id.* at 284. Plaintiff in this case failed to meet its burden of proof with respect to either of these requirements. I would hold that the trial court did not abuse its discretion by denying plaintiff’s complaint for a writ of mandamus to compel the placing of this initiative before the electors because its purpose—and admittedly so—was to adopt an amendment to Detroit’s ordinances that clearly conflicted with state law and, thus, sought to accomplish an illegal purpose. *Cheboygan Co Bd of Supervisors*, 94 Mich at 388.



Review Statutory Requirements

Michigan Regulation and Taxation of
Marihuana Act example: initiate ordinance to
prohibit or limit (MCL 333.27956(1))

- Initiate an ordinance to prohibit or limit the number of marihuana establishments
- Petition signed by qualified electors in the municipality
- Greater than 5% of votes cast for governor at last election
- Petitions subject to Michigan Election Law Sec. 488 (MCL 168.488)

What about:

- Where to file?
- Timeframe?
- Who reviews?
- Basis to reject?

2012: Death of Substantial Compliance

- *Stand Up v Sec of State*, 492 Mich 588 (2012)
- Does 14-point typeface size matter for heading? (required for state ballot initiatives)
- Requirements of Election Law for petitions are mandatory directives
- Legislature could have allowed substantial compliance, did not
- Strict compliance
- See *Oakland Cares Coalition v Gwendolyn Turner*, (Case No. 358304)



Other Issues

- The purchase of agricultural process facilities (cherries, tomato greenhouses, and cucumbers). The applicants subsequently argue there is no change in zoning use. They also are relying on the exemption in the State Construction Code Act.
 - Section 2a of Act 230: "Agricultural or agricultural purposes" means of, or pertaining to, or connected with, or engaged in agriculture or tillage that is characterized by the act or business of cultivating or using land and soil for the production of crops for the use of animals or humans, and includes, but is not limited to, purposes related to agriculture, farming, dairying, pasturage, horticulture, floriculture, viticulture, and animal and poultry husbandry.
 - See Michigan Administrative Code
 - Rule 420.206
 - Rule 420.208



Industrial Hemp

1. R 420.1003 (1) A producer may handle, process, market, or broker industrial hemp in compliance with the industrial hemp research and development act and any associated rules promulgated by the Michigan department of agriculture and rural development.
2. R 420.1003 (2) A producer may obtain industrial hemp to process as allowed under the industrial hemp research and development act and any associated rules promulgated by the Michigan department of agriculture and rural development.
3. R 420.1003 (3) A producer shall always store industrial hemp separately from marihuana products and in compliance with these rules relating to storage of marihuana products promulgated by the agency.
4. As of April 13, 2022, the CRA regulates hemp processing and Hemp Process-Handler Licenses. Executive Reorganization Order 2022-1





Questions?

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