



# Marihuana: Where Are We Now?

Michigan Association of Mayors  
Sault Ste Marie, MI  
August 13, 2021

## Fractured *Miranda* Warnings

1. You have the right to remain silent; but please don't.

***Ask questions, that is why we're here***

2. Anything I say might be used against me.

***These are my views, not necessarily those of the City of Kalamazoo***

3. You have a City Attorney; one won't be otherwise provided.

***Consult with him or her, their advice might be different from mine and that is OK***

William **“Don’t Fear the Reefer”** Shakespeare, *Romeo & Juliet*, Act 2, Scene 2 writes:

**“What's in a name? That which we call *marihuana* by any other name would smell as sweet.”**



Marihuana vs. Marijuana vs. Cannabis

Delta-9 and Delta-8 (Remember your Organic Chem 102 class?)

Adult Use v. Recreational Use

And then there is the question of Industrial Hemp

(which is not to be confused with the late Shemp Howard of Three Stooges fame)

## What I Hope to Cover

1. How did we get here?

2. Where are we now?

Opt-in or not?; (That is the question for your hamlet)

Police powers: What is a city allowed to do?

Local Licensing: What is permitted? How Many?

Zoning: The best all-around Swiss Army Knife ordinance tool?

Social Equity: Exactions? Dormant Commerce Clause?

Expungement: Get Out of Jail Free Card?

“Show Me the Money” or “Greed is Good”?

## Some Initial Observations on How We Got Here

“The MMMA was both an avenue for allowing society to explore the medical uses of marijuana and a first step in legalizing marijuana in Michigan.”

“The problem, however, is that the MMMA is inartfully drafted . . .”

Concurrence of Judge Peter O’Connell in People v. Redden, 290 Mich. App. 65 (2010)

**November 2008:** Michigan voters approve Michigan Medical Marihuana Act (MMMA).

Provides registered patients and their caregivers certain rights;

Act fails to provide for dispensaries or commercial sale of medical marihuana to qualifying patients or caregivers.

**September 2016:** Michigan Legislature adopts 3 acts permitting the commercialization of medical marijuana:

**Medical Marihuana Facilities Licensing Act**

**Marihuana Tracking Act**

**Amendment of MMMA to permit edibles/ restrict butane extraction**

**November 2018:** Michigan voters approve Michigan Regulation and Taxation of Marihuana Act (MRTMA). Ballot initiative by ***Coalition to Regulate Marijuana like Alcohol***

**Marihuana Timeline (or How We Got Here)**

## **MRTMA Legalization/Decriminalization** As of December 6, 2018:

Individuals 21 and older may possess the following amounts:

- ❖ 2.5 oz. of marihuana which may include up to 15 grams (.53 oz) of plant resin concentrate on their person or in a vehicle
- ❖ 10 oz within person's residence stored in a container or area equipped with locks or other functioning security devices that restrict access (This language parallels language in the MMMA.)



What 12.5 ounces of weed looks like!



## **MRTMA Legalization/Decriminalization** As of December 6, 2018:

Individuals 21 and older may possess the following amounts:

- ❖ up to 12 plants at any one time on the premises for personal use\*
- ❖ Any marijuana produced by the plants cultivated on the premises
- ❖ May assist person 21 or older in growing, refining, consuming marijuana
- ❖ May give away or transfer without remuneration up to 2.5 oz./ 15 grams of concentrate “as long as the transfer is not advertised or promoted to the public”

## Legalization/Decriminalization (Continued)

- ❖ May not operate motor vehicle, aircraft, snowmobile, off-road recreational vehicle or motorboat (a) **under influence of marihuana** or (b) **consume** marihuana while operating or in control of any of the above or (c) **smoke** marihuana in the passenger area of vehicle upon a public way
- ❖ Operating While “Impaired” is omitted from the statute but the Court of Appeals in **People v. Dupre** (2020) held that the MMMA does not preclude a medical marijuana cardholder from being convicted for impaired driving.

## Legalization/Decriminalization (Continued)

- ❖ May not consume marijuana in a “public place”. Not defined but in ***People v Carlton*** (2015) MMMA patient smoking in car parked in casino parking lot, was determined to be in “public”
- ❖ Public place is where members of the public are invited and welcome  
***People v Harding*** (1955)
- ❖ Special Events: A Temporary Marijuana Event (license by the MRA) may only be held at a venue expressly approved by the municipality for the purpose of holding a temporary marijuana event. MRA Rule 420.25

## Opting In: State Regulation of Commercial Marihuana

- ❖ **Marijuana Regulatory Agency** (MRA) within the Michigan Department of Licensing and Regulatory Affairs (LARA) is given the responsibility of promulgating rules under the MRTMA to fill the statutory gaps “necessary to implement, administer and enforce” the Act.
- ❖ MRA replaced the Marijuana Licensing Board by Executive Order 2019-2
- ❖ MRA will grant or deny applications for licensure and will abide by local ordinances. See ***Brightmoore Gardens v. Marijuana Regulatory Agency*** (May 2021) *Held that Detroit and Traverse City ordinances prohibiting marijuana establishments adopted while state applications for licensure were pending permitted MRA denial of those applications.*
- ❖ The cultivation, processing, distribution, and sale of industrial hemp is regulated by **Department of Agriculture and Rural Development** under the Industrial Hemp Research Act. This act precludes municipal regulation of hemp and hemp (CBD) products

# Michigan Medical Marihuana Facilities Licensing Act (2016)

Created 5 types of Medical Marihuana Commercial Establishments:

## 1. Grower

Class A – 500 plants

Class B – 1000 plants

Class C – 1500 plants, but stackable

**2. Processor:** extracts resin from plant /creates marihuana-infused products

**3. Secure Transporter:** transports marihuana & cash between facilities;

**4. Safety Compliance Facility:** tests samples of marihuana for contaminants and its active ingredients

**5. Provisioning Center:** sells marihuana/marihuana-infused products **only** to caregivers and patients registered under the Michigan Medical Marihuana Act (MMMA)

# Michigan Regulation and Taxation of Marihuana Act or MRTMA (2018)

Creates 10 types of Recreational Marihuana Establishments:

## 1. Grower

Class A – 100 plants (vs. 500 plants under MMFLA)

Class B – 500 plants (vs. 1000 plants under MMFLA)

Class C – 2000 plants (vs. 1500 plants under MMFLA)

## 2. Processor:

**3. Secure Transporter:** MRTMA does not explicitly require use of licensed transporters

## 4. Safety Compliance Facility:

**5. Retailer:** sells marihuana/marihuana-infused products **only** to person 21 and older

**6. Microbusiness:** grow up to 150 plants, process, package and sell marihuana

*Class A Microbusiness: 300 plants being contemplated by MRA*

## 7. MRA created 4 additional licenses:

-**Designated Consumption Establishment**

-**Excess Marihuana Grower** available to holders of Class C Rec & Med licenses

-**Marijuana Event Organizer** permits holder to stage a marijuana event

-**Temporary Marihuana Event** requires municipal permission

## Four Quadrants: Where is your community?

**Quad I:** No to both medical and adult-use commercialization

- ❖ Registered patients & care-givers may operate, subject to ordinances
- ❖ Private adult use permitted
- ❖ CBD sales permitted
- ❖ **Likely subject to ballot initiatives to permit adult use commercialization**

**Quad II:** No to medical; Yes to adult-use commercialization

- ❖ Likely very few of these communities exist,
- ❖ Same as outlined above
- ❖ **Less likely to see initiatives, unless it is to expand scope of adult-use businesses**

## Four Quadrants: Where is your community?

**Quad III:** Yes to medical; No to adult-use commercialization

- ❖ Same rights as outlined above
- ❖ Licensing/Zoning of medical marijuana businesses
- ❖ **Likely exposure to ordinance/charter amendment ballot initiatives**

**Quad IV:** Yes to both medical and adult-use commercialization

- ❖ Same rights as above
- ❖ Licensing/Zoning of all marijuana businesses
- ❖ **Challenges in limiting number of businesses by using “competitive process”**
- ❖ **Challenges associated with “social equity” implementation**



## Local Regulation of Commercial Medical Marihuana

Must opt-in to MMFLA;

“The [MRA] 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.” MCL 333.27205

Stands in contrast with MRTMA language

# Local Regulation of Commercial Recreational Marihuana

Must opt-in to MMFLA; But how can this be accomplished?

Statute says “ordinance”, and

City Charters are not required to provide for the power of initiative

But Home Rule Cities Act provides Charter amendment process:

Requires submission to and review by Attorney General (MCL 117.21)

Requires review and approval or objection by Governor (MCL 117.22)

But Michigan Election Law (MCL 168.646a) supersedes local/statutory deadlines

# Local Regulation of Commercial Recreational Marihuana

Several smaller cities were recently beset by “bedsheet” petition to require the opting into medical marijuana which:

- 1) Imposes certain administrative duties upon the City Clerk or City Manager
- 2) Creates a “Department of Marihuana” as an administrative division of the city
- 3) Precludes a robust local licensing/permit process, but instead requires the issuance of a local license if the State has granted approval to an applicant to operate in the community
- 4) Sets limits on the number of medical marihuana facilities
- 5) Must accept applications 10 days after Board of Canvassers certify approval
- 6) Creates an application process intended to award provisional licenses to “applicants who are best suited to operate in compliance with the MMFLA
  - 1) Up to 50 points for holding an existing medical or adult use license
  - 2) Up to 20 points for being a stand-alone business, additional 10 points for a building between 2,000-5000 sq ft
  - 3) Up to 30 points broken into categories for local hire, use of local contractors, use of vacant buildings versus use of vacant land, and contribution of \$10,000 a year to food bank

## Local Regulation of Commercial Medical Marijuana

Must opt-in to MMFLA; Stands in contrast with MRTMA language:

“[A] municipality may completely prohibit or limit the number of marijuana establishments within its boundaries.

Individuals may petition to initiate an ordinance to provide for the number of marijuana establishments allowed within a municipality or to completely prohibit marijuana establishments within a municipality[;] and

such ordinance shall be submitted to the electors of the municipality at the next regular election when a petition is signed by qualified electors in the municipality in a number greater than 5% of the votes cast for governor by qualified electors in the municipality at the last gubernatorial election.”

# Local Regulation of Commercial Recreational Marihuana

Must opt-in to MMFLA; opt-out of MRTMA

Beware of saying yes to one, but no to the other. **See MRTMA §6.5:**

**A municipality may not adopt an ordinance that:**

**a) restricts the transportation of marihuana through the municipality or**

**b) prohibits a marihuana grower, a marihuana processor, and a marihuana retailer from:**

**1) operating within a single facility or**

**2) from operating at a location shared with a marihuana facility operating pursuant to the medical marihuana facilities licensing act.**

## Local Regulation of Commercial Recreational Marihuana

May completely prohibit or limit the number of adult use establishments but how is this accomplished? By resolution, ordinance, or charter amendment? (**MRTMA is silent**)

However, citizens may initiate ordinance to prohibit or limit number of marijuana establishments by petition signed by 5% of votes cast in last gubernatorial election.

Importantly, voters may not use initiative to adopt zoning ordinances. See ***Korash v City of Livonia*** (1972)

**Recent Wave of Charter Amendments:** It may be that the adult use businesses are attempting to amend city charters to create a “Department of Marijuana” to regulate medical marijuana businesses and then rely upon MRTMA §6.5 to require adult-use establishments.

## Municipal Regulation of Commercial Recreational Marihuana

MRTMA permits the adoption of **Ordinances** that are “**not unreasonably impracticable**” (*Caution, this term taken from Colorado and almost begs to be litigated*) **and not in conflict with statute or administrative rules**; Specifically, MRTMA §6.2 permits:

(a) establish reasonable restrictions on public signs related to marihuana establishments;

(*Caution, see Reed v. Town of Gilbert as content-based regulations are presumptively unconstitutional unless narrowly tailored to serve a compelling governmental interest. However as “commercial speech” such might be regulated under Central Hudson v. New York Public Service Commission.)*)

## Municipal Regulation of Commercial Recreational Marihuana

(b) regulate the time, place, and manner of operation of marihuana establishments and of the production, manufacture, sale, or display of marihuana accessories;

*“any equipment, product, material, or combination of equipment, products, or materials, that is specifically designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, ingesting, inhaling, or otherwise introducing marihuana into the human body.”*



## Municipal Regulation of Commercial Recreational Marihuana

(c) authorize the sale of marihuana for consumption in designated areas that are not accessible to persons under 21 years of age, or at special events in limited areas and for a limited time;

*This language gives cities control over Consumption Lounges and Special Events*

## **Municipal Regulation of Commercial Marihuana**

A municipality **may** adopt an ordinance requiring a marihuana establishment with a physical location within the municipality to obtain a municipal license but may not impose qualifications for licensure that conflict with this act or rules promulgated by the department.

A municipality **may** charge an annual fee of not more than \$5,000 to defray application, administrative, and enforcement costs associated with the operation of the marihuana establishment in the municipality.

***There is no requirement that municipality issue its own license for recreational establishments to operate but may otherwise rely upon the MRA, except for Special Events which require local authorization.***

## **Municipal Regulation of Commercial Recreational Marihuana**

State will issue license if business is “not within an area zoned exclusively for residential use” and not within 1000 feet of a “preexisting public or private school” providing K-12 education. Local municipality may reduce this distance to less than 1000 feet.

*(Also note the earlier reference to time, place and manner authority.)*

## Municipal Regulation of Commercial Recreational Marijuana

If the number of applicants for licensure exceed the number of allowed establishments, then municipality must use a “**competitive process**” to select applicants “**who are best suited to operate in compliance**” with the MRTMA.

*This has proven to be a sword used by attorneys for adult use businesses against municipalities attempting to limit adult use businesses.*

*Is there a competitive process that has survived a challenge?*

*“I don't think such a thing exists.” -Brandon Grysko, City of Westland Attorney*

## ❖ Imposing a “Hard Cap” on Number of Facilities Creates Problems

### **First Come, First In; Lottery/Blind Draw**

Use of these two methods is based on the assumption that all applicants are equally qualified, but that assumption may not be valid.

### **Evaluative Criteria Matrix**

Use of this method, given the use of discretion/scoring will invite legal challenges by “losers”;

## ❖ Recommend Use of a “Soft Cap” to Limit Facilities

### **Zoning Tools and Separation Distances from Protected Uses & Other Facilities**

Under zoning law, no vested right until certificate of occupancy or substantial physical improvements pursuant to a validly issued building permit.

**Let the Free Market & MRA sort it out**

## ❖ Renewal

**Use clear objective standards**

**Provide Due Process in cases of proposed Revocation, Suspension, Nonrenewal**

# Picking the Winners

- ❖ **Zoning Power should not be overlooked**
- ❖ **1. Ability to regulate Time, Place & Manner is explicitly recognized in MRTMA**
- ❖ **2. MRTMA recognizes the need/desire to protect K-12 schools with 1000' buffer**
- ❖ **3. MRTMA businesses not permitted in exclusively zoned residential areas**
- ❖ **4. MMFLA limits growers to industrial, agriculture zones or unzoned areas.**

## ❖ Recent Michigan Marijuana Zoning Power Cases

**terBeek v. City of Wyoming** (2014) ordinance prohibiting uses unlawful at State or Federal law held to conflict with MMMA

**DeRuiter v. Byron Township** (2020) upheld zoning ordinance limiting medical caregiver services to a home occupation; upheld local licensing permit, but reserved on reasonableness of regulations issue

**York Township v. Miller (2020)** on remand, held that medical marijuana could be limited to main residence of home; no outdoor grow allowed.

**Ypsilanti Township v. Pontius** (2020) on remand, upheld ordinance prohibiting caregiver services as a home occupation; grow operations limited to light industrial zone

**Jazz Club 2 v Detroit Zoning Bd of App. (2020)** lack of precise definition causes court to say a “greenway” is not a “park” permitting medical caregiver business to locate within 1000 feet.

## ❖ **Social Equity or a Pipe Dream?**

MRTMA, §8.1 (j) “promote and encourage participation in the marijuana industry by people from communities that have been disproportionately impacted by marijuana prohibition and enforcement and to positively impact those communities”

## ❖ **ACLU Reports:**

- ❖ *The War on Marijuana in Black and White, (2013)*
- ❖ *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform, (2020)*

## ❖ **MRA Report:**

- ❖ Racial Equity Advisory Group Final Recommendations (2021)
- ❖ July 2021 Update available

# Social Equity/Community Benefits Agreements



*Need to be mindful of:*

**Michigan Constitution, Article 1, Section 26:** “shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”

**Commerce Clause,** Congress has the power to regulate Commerce among the several States

**Fourteenth Amendment,** can’t “deny to any person within its jurisdiction the equal protection of the laws.”

**Favored Residents’ Clauses:** triggers equal protection, dormant commerce clause

**Low v Detroit:** preliminary injunction granted against ordinance favoring Detroiters

**Community Benefit Agreements, subject to challenge on basis of:**

- ❖ Not an indicator of “who is best suited to operate in compliance with MRTMA”
- ❖ Unlawful exaction

# Social Equity/Community Benefits Agreements

## Recent Michigan Statutory Changes

- ❖ Change in Expungement Law (Public Act 192 of 2020)
  - ❖ *Any conviction for a misdemeanor marijuana offense based on activity that would not have been a crime if committed on or after December 6, 2018 (i.e. possession or use) carries a rebuttable presumption in favor of expungement*
  - ❖ *Prosecuting official has 60 days to object and present evidence to rebut the presumption*
- ❖ Definition of Marihuana
  - ❖ *Plant of the genus Cannabis (either sativa or indica)*
  - ❖ *Exceeds 0.3% on a dry-weight basis of **delta-9 tetrahydrocannabinol** (THC) concentration*
  - ❖ *Amended to include any “extract, acid, isomer, salt of an isomer”*
  - ❖ *Effective October 11, 2021, must have license to sell **delta-8 THC** products*
- ❖ *Possible legislation to tax and limit # of plants by Caregivers??*

## Federal Law Update

- ❖ Marijuana Opportunity Reinvestment and Expungement (MORE) Act, (H.R. 3884) passed U.S House in the last session
- ❖ Has been reintroduced as H.R. 3617 in current session of Congress
- ❖ Would do the following:
  - ❖ Remove marijuana and THC as controlled substances
  - ❖ Create an Opportunity Trust Fund through a federal 5% excise tax on cannabis products, similar to the existing excise tax on tobacco products
  - ❖ Create a Community Reinvestment Grant program to fund nonprofit organizations that provide services to those most affected by War on Drugs
  - ❖ Create a Cannabis Opportunity Program within Small Business Administration
  - ❖ Provide for expungement of federal non-violent marijuana arrests and convictions retroactive to May 1, 1971; re-sentencing for those persons presently incarcerated

## Federal Law Update

- ❖ **Cannabis Administration & Opportunity Act** (Discussion Draft)
- ❖ Senators Booker (NJ), Wyden (Ore) and Schumer (NY) issued report
- ❖ Proposed legislation mirrors MORE Act, would impose a federal tax on cannabis products beginning at 10% up 25% in the 5<sup>th</sup> year then a rate would be set based on quantity of THC sold for other than flower
- ❖ Small cannabis producers (less than \$20 million in sales) would be eligible for a 50% reduction in tax

## Federal Law Update

- ❖ Recent statement by Justice Clarence Thomas in *Standing Akimbo v. U.S.* case
- ❖ Questions continued viability of *Gonzalez v Raich*, 545 US 1 (2005) a case based the Commerce Clause case

## State Law Update

- ❖ "Of course, an employee discharged for knowingly using an intoxicating substance at work could be disqualified for benefits, whether the substance was a legal one like alcohol or marijuana, or an illegal one. But employers cannot use a code of acceptable conduct to avoid paying unemployment benefits to workers who, on their own time, engage in legal behavior the employer simply does not like." – AG Dana Nessel in UIAC brief

# Marihuana Excise Tax or “Show Me the Money”

*“There's always cash when we sell drugs. That's why we sell drugs.”*

-- Nancy Botwin (Character from the Showtime series Weeds)

*“(She's so fine, there's no tellin' where the money went)”*

-- Robert Palmer lyric from Simply Irresistible

**Medical:** 3% excise tax eliminated under Prop 2018-1; **6% sales tax only**

**Local municipalities receive 13% of General Sales Tax**

**Adult Use:** 10% excise tax and 6% sales tax

**Local municipalities receive 15% of Excise Tax**

# Marihuana Excise Tax or “Show Me the Money”

MRTMA replaced the 3% MMFLA excise tax with a 10% excise tax, to be divided among those municipalities which permit “marihuana retailers” and “marihuana microbusinesses”, but municipal cut of pool of money is 15%

For the 2020 Fiscal Year, State collected \$31 Million in Adult Use Excise Tax, **municipalities received \$28,000 for every Retailer/Microbusiness**

# Marihuana Excise Tax or “Show Me the Money”

It has been estimated that in the 4 to 6 years it will take for the Michigan marijuana industry to mature, it will generate \$3 billion a year in gross revenue.

**This would result in \$298.6 million in excise tax revenue, of which 15% or about \$44.8 million to be doled out to municipalities with retailers and microbusinesses.**

--Knudson & Miller, *“The Market for and Economic Impact of the Adult Use Recreational Marijuana Industry in Michigan”* MSU Extension Service (March 2020)



# Marihuana Excise Tax or “Show Me the Money”

It has been estimated that in the 4 to 6 years it will take for the Michigan marijuana industry to mature, it will generate between **\$767 million and \$1.4 billion** a year in gross revenue.

This would result between **\$77 - \$135 million** in excise tax revenue, of which 15% or **\$11.5 - \$20.25 million** to be doled out to municipalities with retailers and microbusinesses.

-- Giroux & Betz, *“Tax Revenues from Legalizing Recreational Marijuana under Michigan’s Proposal 2018-1”* Anderson Economic Group (Oct 2018)

# Marihuana Excise Tax or “Show Me the Money”

**In January 2020**, Rachel Eubanks, treasurer for the state of Michigan, and Jeff Guilfoyle, chief deputy treasurer predicted:

Marijuana sales tax revenue of \$97.5 million in **2020** and \$143 million in **2021**

**In 2020 the State only collected \$31 million**

# Marihuana Excise Tax or “Show Me the Money”

Perhaps this is why the actual amount collected didn't meet expectations, since these sources are not taxed:

Medical marijuana remains viable: **16% of the market**

**Another 30%** is caregiver/personal grow consumption

**About 39%** of marijuana sales still occur in **black market**

See handout *“Michigan Cannabis Market Growth and Size”*

## Final Observations

“Yet, in its summary of the intended effect of the MMMA, this ballot proposal obfuscated the more confusing and contradictory aspects of the actual legislation. The statutory language creates a maze for the reader, making the statute susceptible to multiple interpretations.”

Concurrence of Judge Peter O’Connell in *People v. Redden*, *supra*

Questions?