WHITE PAPER

A LOCAL GOVERNMENT VIEW

OF THE

MICHIGAN MEDICAL MARIHUANA ACT

BY

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* This White Paper was prepared at the request of the Michigan Municipal League and Michigan Townships Association to be a resource for Michigan local governments. The views and conclusions expressed are those of the author and do not necessarily represent the positions of either the Michigan Municipal League or Michigan Townships Association. Gerald A. Fisher is a professor of law at the Thomas M. Cooley Law School, Auburn Hills, Michigan. Prior to becoming a professor, he served as counsel for Michigan cities, villages and townships for some thirty years.

I. INTRODUCTION

Michigan's "medical marihuana" law was proposed and enacted based on the "initiative" process established in the Michigan Constitution, and is known as Initiated Law 1 of 2008, the Michigan Medical Marihuana Act ("the Act"). The passage of the Act would appear to reflect a sentiment by many in the state that assistance should be provided to those truly suffering, and for this purpose a defined medical use exception should be made to the general policy that activities involving marihuana must be treated exclusively as criminal acts. Based on the decisive approval of the Act by the electorate, this report will take the predominant theme of permitting the fundamental intent of the Act to be carried out.[1] However, an examination of this subject from the standpoint of local government should not ignore the point that certain provisions and omissions in the Act give rise to a legitimate basis for local government concern for the protection of important public interests.

This report provides a view of the Act primarily in terms of alternative responses available to local government. A number of criminal law issues that need to be considered, as well as issues germane to this report, were identified in a published decision of the Michigan Court of Appeals entitled *People v Redden*.[2]

The essence of the Act involves the creation of a relatively loose procedure by which a "qualifying patient" (referenced as "patient" in this report) may obtain a certification from a physician and a "registry identification card" from the State Department of Community Health, which will authorize the patient to avoid prosecution and other penalty for cultivating up to twelve marihuana plants and consuming marihuana. The Act also contains an even looser process by which a "primary caregiver" (referenced as "caregiver" in this report) can obtain a "registry identification card" authorizing such person to lawfully cultivate and distribute to patients marihuana from up to twelve marihuana plants per each patient with whom the caregiver is formally associated. A caregiver may cultivate marihuana for, and sell to, not more than five patients (i.e., not more than 60 plants). If a caregiver has been issued a registry identification card as a patient, he or she may cultivate up to an additional twelve plants, with such plants being theoretically restricted for personal consumption.

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[1] The primary exception to this theme is a suggestion in part V of this report that consideration could be given to the initiation of a federal declaratory judgment action in order to clarify whether the Act violates the Supremacy Clause of the United States Constitution, and is thus invalid.

[2] The *Redden* case was joined with *People v Clark,* case numbers 295809 and 295810, respectively, released for publication on September 14, 2010 (WL 3611716). The decision includes a two-judge majority opinion as well as a concurring opinion representing a unique effort by the concurring judge to provide what he perceived to be needed guidance and in which he intended to establish a "framework for the [medical marihuana] law and address those issues not resolved by the majority opinion." Slip Opinion, p 5. References below to the opinions in this Court of Appeals decision will be made to "*Redden* majority" and "*Redden* concurrence." While the *Redden* concurrence will be referenced several times in this report with regard to certain important insights, it must be recognized that it is the opinion of one judge and thus may not be relied upon as precedent.

A reading of the Act as a whole reveals a design for a close relationship between the caregiver and the patient, with the caregiver "assisting" the patient. Of critical importance to municipalities, while the Department of Community Health maintains the name and address of both the caregiver and the patient on a confidential registry, such names and addresses must all be withheld from disclosure by the Department – even to law enforcement. Thus, it would seem fair to say that the fundamental purpose of the Act is the creation of a private and confidential patient-caregiver relationship to facilitate the lawful cultivation, distribution, and use of marihuana strictly for medical purposes.

The long status quo in both Michigan and the United States is to classify marihuana as a Schedule 1 controlled substance, and to treat its cultivation, sale, and use as serious criminal offenses. The Act carves out from this long status quo an exception for purposes of Michigan law. To the extent marihuana is cultivated, sold, and used in conformance with the Act, neither a patient nor a caregiver is subject to criminal prosecution or other penalty under state law. However, there is no counterpart exception carved out from the laws of the United States, and therefore all cultivation, distribution, and use of marihuana for any purpose – medical or otherwise – is unlawful under federal law.[3] This direct conflict between state and federal law is an issue that will ultimately need to be addressed in some manner, and this subject will be discussed at greater length below.

In the *Redden* concurrence, it is reported that an affidavit filed in that case disclosed that the Act "is based on model legislation provided by the Marijuana Policy Project (MPP), a Washington, D.C.- based lobbying group organized to decriminalize both the medical *and* recreational uses of marijuana. The statutory language of the [Act] was drafted by Karen O'Keefe, the Director of State Policies at the MPP in Washington D.C."[4] In addition, at a Michigan Townships Association/Michigan Municipal League symposium, held on July 20, 2010, credit for at least part of the Act's authorship was claimed by the Michigan Medical Marihuana Horticultural Institute. A representative of this group appeared at the symposium and announced that the Michigan Medical Marihuana Horticultural Institute became involved in the initiated Act, and remains interested, with the specific purpose of acquiring warehouses in various locations of the State, with the view to dividing each warehouse into a number of condominium units that would be sold to caregivers for the distribution of marihuana to patients. Seemingly consistent with the motives espoused by these two groups, a substantial portion of the Act is devoted to the goal of insulating patients and caregivers from criminal prosecution or the imposition of other penalties. Accordingly, patients and caregivers are very well protected under the Act. On the other hand, there are important provisions and omissions in the Act that suggest that local government and the general public are not as clearly protected; this point is addressed in greater detail in section III of this report.

[3] There is an exception under federal law for strictly controlled research, not relevant to this discussion.
[4] Slip Opinion, p 5 (Emphasis in original). By footnote 6, a website is provided: http://www.mpp.org/about/history.html.

Given the approval of the Act, and the premise of permitting its fundamental intent to be carried out, the challenge for local government is determining how to best represent the interests of the public, recognizing that each community will need to evaluate this question within the context of its own policies and unique circumstances. One option available to local government is to take no action.[5] Other options are also available, and several will be discussed in this report.

Specifically, this report will present for consideration the prospect that one or more local governments or other interested parties may determine to seek a declaratory determination under the Supremacy Clause of the United States Constitution with regard to the apparent direct conflict between the law in Michigan and that of the United States concerning the cultivation, distribution, and use of marihuana within the framework of the Act. In addition, the Act was promulgated by the initiative process, and consequently was not forged in a process that exposed its terms to the scrutiny of competing interests. The public would be served if the Legislature would make certain adjustments that would render the Act more workable for local government. Such adjustment would be particularly challenging, however, given the rigors required in the Michigan Constitution for altering an act approved by the initiative process. Finally, local government must be able to carry out its legitimate mission of protecting the public health, safety, and welfare in connection with medical marihuana which may involve the enactment of local regulations to, among other things, protect children, facilitate safe and efficient law enforcement efforts, and provide for inspections of electrical and plumbing installations.

[5] If policy-makers in certain local governments conclude that the concerns found in the Act represent an acceptable trade-off for a movement away from the criminalization of marihuana, a decision on their part to take no action may be determined to be the right course, notwithstanding the risks associated with that position. On the other hand, this report identifies a number of issues that may lead many local government policy-makers to conclude that one or more of the responses outlined in this report may be appropriate. The *Redden* concurrence expresses that the Act badly needs a response in order to avoid "an untoward risk for Michiganders," (Slip opinion, p 7) however the Court in this concurring opinion focuses on a response at the state level. In this regard, the Court noted that state officials "can either clarify the law with legislative refinements and a comprehensive set of administrative rules, or they can do nothing," and suggests that if no decision is made, this would be, "in fact, a decision to do nothing." *Redden* concurrence, Slip opinion, p 29.

II. SUMMARY OF RELEVANT PORTIONS OF THE MICHIGAN MEDICAL MARIHUANA ACT

Under the long-standing provisions of both Michigan and Federal law, the cultivation, distribution, and use of marihuana are criminal acts.

However, the Act carves out certain acts of cultivation, distribution, and use of marihuana to be lawful. Thus, in Michigan, as in several other states[6] the general law is that the acts of cultivation, distribution, and use of marihuana are all unlawful, with the concurrent carve-out of exceptions that cause the same acts by certain individuals to be lawful under specified circumstances.

The Act defines a "debilitating medical condition" of a patient, describing the condition to include a number of alternative specified conditions. While some of the conditions relate to very specific diseases, a fair reading may allow that "severe and chronic pain" arising out of a "medical condition" will suffice as a basis for having a debilitating medical condition. A physician is authorized by the Act to sign a "written certification," which specifies the patient's debilitating condition, and states that, in the physician's professional opinion, the medical use of marihuana will (in simple terms) help the patient's condition or the symptoms associated with the condition.[7] The written certification *need not* specify the quantity of marihuana the patient is to consume, and *need not* specify the frequency of consumption recommended. In other words, the physician is not *prescribing* the medical use of marihuana in the customary sense, but merely stating that marihuana will help the patient with the debilitating condition or its symptoms.[8]

Having a certification in hand, the patient may then secure a "registry identification card" ("ID Card") by filing an application with the State Department of Community Health ("Department"), presenting the certification, a fee, and providing the

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[6] It appears that some fourteen states and the District of Columbia now permit the medical use of marihuana by certain individuals, generally described as patients: Alaska, California, Colorado, Hawaii, Maine, Michigan, Montana, New Jersey, New Mexico, Nevada, Oregon, Rhode Island, Vermont, and Washington.

[7] In section 2 of the Act, MCL 333.26422(a), the "people of the State of Michigan find and declare" that a March 1999 report of the National Academy of Sciences' Institute of Medicine concluded that marihuana has beneficial uses in treating or alleviating pain, nausea, and other symptoms associated with a variety of debilitating medical conditions. As described by the ACLU, the report also "strongly recommended moving marijuana to the status of a schedule II drug, available for prescription by doctors" and identified several supposed ill affects that are "false or unsubstantiated by scientific evidence". On the other hand, Marihuana is classified as a Schedule 1 substance in Michigan, and the Public Health Code specifies that, "The administrator shall place a substance in schedule 1 if it finds that the substance has high potential for abuse and has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision." MCL 333.7211, 333.7212(1)(c). In addition, *Gonzales v. Raich,* 545 U.S. 1, 14 and 27, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005) explained that, Congress concluded that marihuana "lack[s] any accepted medical use, and [that there is an] absence of any accepted safety for use in medically supervised treatment." But, see footnote 37, 545 U.S. at 28.

[8] The *Redden* majority and concurrence send a signal that the basic physician-patient relationship intended to support the certification will be scrutinized by the courts for legitimacy.

patient's name, address, and date of birth – unless the patient is homeless, in which case no address is required.[9] In addition, the patient must provide to the Department the name, address and phone number of the patient's physician,[10] the name, address, and date of birth of the patient's "caregiver," if any, and also specify whether it will be the patient or the caregiver that will be permitted to cultivate marihuana plants for the patient's use. *None* of the information submitted for the ID Card is provided, *nor may it be disclosed*, to state, county or local law enforcement.

The full extent of information that may be disclosed to law enforcement involves a *verification* provided by the Department to law enforcement on whether an ID Card is valid, "without disclosing more information than is reasonably necessary to verify the authenticity of the ID Card." In other words, law enforcement must first have an encounter with a person believed to be engaged in the cultivation, distribution or use of marihuana, have an ID Card presented, and then attempt to verify whether the ID Card is valid.

A minor under the age of 18 may be a patient with the certification of two physicians submitted by the minor's parent or guardian along with the parent or guardian's consent both to allow the minor's medical use of marihuana and to serve as the minor's caregiver.

A caregiver is defined in the Act as a person who is at least 21 years old who has agreed to assist with a patient's medical use of marihuana, and who has never been convicted of a felony involving illegal drugs – although the Department has acknowledged that when it does its check on a prospective caregiver, it does not check out-of-state records on past convictions. The Department issues an ID Card to the caregiver named in a patient's application. A patient can have only one caregiver, and a caregiver may "assist" no more than 5 patients with their medical use of marihuana. Again, the information concerning the identity and address of the caregiver is *not* provided, and *may not be disclosed*, to state, county or local law enforcement.

A caregiver is expressly authorized under the statute to receive "compensation for costs associated with assisting" a patient. While many terms and actions are carefully defined and described in the Act, the terms "compensation" and "costs" are not defined, and such ambiguity will undoubtedly require judicial construction.[11]

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[9] Both the *Redden* majority (Slip opinion, pp 6-11) and concurrence (Slip opinion, pp 18-19, 21) have established as precedent, at least for the present, that there is a distinction between a "qualifying patient" addressed in § 4 of the Act, and a "patient" addressed in § 8 of the Act, holding that the defenses set forth in the latter section are available to a person who has not acquired a registry identification card. It is suggested by the author that this conclusion is worthy of further review. First, no separate definition is provided in the Act for "patient" independent of the definition of "qualified patient." Second, when rights are set forth for a "patient" in § 8 of the Act, the critical phraseology relates to rights that may be asserted by "a patient and a patient's primary caregiver," and under § 4 only a "qualified patient" may have a primary caregiver.

[10] The statute is not clear on whether the "patient's physician" must be the certifying physician.

[11] The *Redden* concurrence expresses the view that the Act does not authorize the "sale" of marihuana in Michigan (Slip opinion, pp 14, 21), indicating that a caregiver is authorized only to recover costs, and that there is no permission for a caregiver to financially profit.

Theoretically, a caregiver may cultivate for, and distribute/sell marihuana to not more than five patients (i.e., not more than 60 plants). Absent local regulation on this subject, the five-patient/60 plant limitation is not subject to effective verification and enforcement. The gap in regulation under the Act arises out of the withholding from law enforcement of the names and addresses of both patients and caregivers, information expressly prohibited from Department disclosure. Officers may only secure a verification of the validity of the ID Card.

The Act does not expressly make provision for a use or operation that some have referred to as a "dispensary" or "marihuana store." The absence of such reference in the Act has led to controversies. This subject will be addressed further in part III of this report, below.

Nor does the Act make any provision with respect to the manner in which a patient or caregiver may lawfully acquire marihuana plants or seeds. However, once acquired, plants must be kept in an "enclosed, locked facility," which means "a closet, room, or other enclosed area equipped with locks or other security devices that permit access only by" a registered caregiver or registered patient. This definition has ambiguities which, if not legislatively clarified, may require judicial interpretation, including: the meaning of "security device;" and whether access is limited only to *the* caregiver cultivating it, and limited only to *the* patient for whom it is being grown.[12]

The fundamental thrust of the Act is to create a right on the part of registered patients to use medical marihuana for help with a debilitating condition or its symptoms, and the right on the part of registered caregivers to cultivate and distribute medical marihuana to patients for their use. This two-party relationship is a constant throughout the Act, with one exception. One provision of the Act, subsection (i) of section 4,[13] contains a provision that would appear to be disconnected from all of the concise terms establishing the exclusive relationship between patients and caregivers. This subsection ignores the reference to caregiver, and declares that "a person" shall not be subject to arrest or other penalty *for assisting a patient with using or administering marihuana.* The intent of this subsection is quite unclear. The work of a caregiver is to "assist patients," including the cultivation and distribution of medical marihuana. Subsection (i) allows "a person" to assist patients. A fair reading of the Act as a whole would suggest that this "person" must be a caregiver. Yet, there is little question that a non-caregiver "person" being prosecuted will offer this provision in his or her defense. Was this subsection (i) intentionally inserted to expand the authorization of the Act?[14] Without suggesting that a court would do so, concern has been expressed by some that this provision, along with other ambiguities in the Act, could be read to broaden the authorization of the Act in a manner that approaches the legalization of marihuana

[12] Also see footnote 9, above.
[13] MCL 333.26424
[14] Perhaps this subsection (i) was included in the Act to cover a particular circumstance that was foreseeable by the drafters. If this was the case, it would have been beneficial to spell out the particular circumstance.

cultivation and distribution,[15] an authorization well-beyond the fundamental intent reflected throughout the Act as a whole.[16]

[15] This concern was expressed at a symposium presented on July 20, 2010 in Ypsilanti by the MTA, MML, and MAC.

[16] It is not suggested here that the provision at issue was intentionally inserted for nefarious purposes. Indeed, the fundamental intent of the Act, gleaned from a reading of the Act as a whole is, as noted in the text of this report, to create a private and confidential patient-caregiver relationship to facilitate the lawful cultivation, distribution, and use of marihuana strictly for medical purposes.

III. THE ACT EXPOSES LOCAL GOVERNMENT TO PROBLEMS THAT NEED TO BE ADDRESSED

The Act was promulgated based on the process of "initiative," rather than through the customary legislative process. Electors were presented with the following language on the ballot:[17]

> PROPOSAL 08-1
> A LEGISLATIVE INITIATIVE TO PERMIT THE USE AND CULTIVATION OF MARIHUANA FOR SPECIFIED MEDICAL CONDITIONS
>
> The proposed law would:
>
> - Permit physician approved use of marihuana by registered patients with debilitating medical conditions including cancer, glaucoma, HIV, AIDS, Hepatitis C, MS, and other conditions as may be approved by the Michigan Department of Community Health.
> - Permit registered individuals to grow limited amounts of marihuana for qualifying patients in an enclosed, locked facility.
> - Require Department of Community Health to establish an identification card system for patients qualified to use marihuana and individuals qualified to grow marihuana.
> - Permit registered and unregistered patients and primary caregivers to assert medical reasons for using marihuana as a defense to any prosecution involving marihuana.
>
> Should this proposal be adopted?
>
> Yes □
> No □

[17] Taken from House Legislative Staff material placed online before the election. See: http://www.procon.org/sourcefiles/Michigan_Ballot_Proposal_2008.pdf

Subject to certain issues that will be discussed below, the fundamental intent of the Act must be recognized, namely, the creation of a *private and confidential patient-caregiver relationship to facilitate the lawful cultivation, distribution, and use of marihuana strictly for medical purposes.* There is a sentiment by many in the state that assistance should be provided to those truly suffering, and for this purpose a defined medical use exception should be made to the general policy that activities involving marihuana are to be treated as criminal acts. It must also be recognized, however, that this exception from the general policy of illegality creates a parallel system in which the same conduct is deemed both lawful and unlawful depending on whether the engaged persons have ID Cards. The problems inherent in such a parallel system are exacerbated by the mandate of the Act that the identity and address of those having ID Cards are not to be disclosed – even to law enforcement.[18]

A reading of the detailed language of the Act reveals that this parallel system gives rise to critical issues that would justify local regulation to at least mitigate certain problems within the purview of local government. In addition to the issues outlined below, the Act as a whole creates the question whether state and local governments, and their respective officials, risk federal prosecution or other punishment by affirmatively authorizing the activities that purport to be permitted under the Act. Similarly, it would be inappropriate to ignore the issue of private rights that could be created and vested by local governments granting approval of activities permitted under the Act. If the Act is found to be invalid, what private claims might be asserted against local governments by persons who have acted in reliance upon these approvals, or by neighboring property owners, arguing that damages were caused due to government action taken without lawful authority?

A discussion of at least some of the issues that affect local government follows.

1) Law enforcement officers are required to investigate and pursue prosecution with regard to the *unlawful* cultivation, distribution or consumption of marihuana. Yet, the Act concurrently authorizes as lawful undertakings the same actions by those who meet the terms of the Act. Although this places a burden on law enforcement to make a distinction relating to very similar conduct, the Act expressly denies law enforcement officials advanced access to the identity and location of those authorized to lawfully engage in the cultivation, distribution or consumption of marihuana – critical information needed to distinguish unlawful undertakings from lawful ones, particularly at critical investigatory stages. The experience of law enforcement indicates that the presence of significant quantities of *unlawful* controlled substances is often accompanied by large quantities of cash, and by weapons

[18] The confusion and problems created by this dual system are discussed throughout the *Redden* concurrence. It is appropriate to note that there are also parallel systems relating to the sale and consumption of alcohol and prescription drugs, however, considering the significant state licensing and regulation applicable to these activities, law enforcement issues are quite distinct.

used to protect the controlled substances and cash. Thus, confrontations between law enforcement and persons engaged in unlawful drug enterprises can be extremely dangerous, and there is a need to use the element of surprise in order to protect the lives of officers and members of the public. Under the Act, before the occurrence of a direct confrontation between law enforcement and persons engaged in cultivation and distribution of marihuana, law enforcement officers are prevented from securing the information necessary to determine whether such activities are being conducted by persons authorized under the Act or by persons engaged in criminal enterprise. This in turn leads to the condition that, if there is a suspicion that an unlawful enterprise is being perpetrated, officers may need to seek a voluntary entry into premises, and may be met by a weapons-based confrontation without being permitted to utilize the element of surprise. Moreover, if an unlawful enterprise is not involved, substantial resources can easily be expended by law enforcement on a baseless investigation. Accordingly, the licensure of facilities used for cultivation and distribution of medical marihuana in compliance with the Act, which need not undermine the privacy and confidentiality of the patient-caregiver relationship, could be important to law enforcement in order to identify and distinguish sites of lawful activity from sites of unlawful activity.

2) The experience in the State of California, a state that approved the medical use of marihuana more than a decade ago, is that concentrations of marihuana distribution activity lead to the following significant and serious secondary effects:

i. California law enforcement reported in 2009 (White Paper),[19] that nonresidents in pursuit of marihuana, and *out of area criminals in search of prey*, are commonly encountered just outside marihuana dispensaries, as well as drug-related offenses in the vicinity—like *resales of products just obtained inside*—since these marihuana centers regularly attract marihuana growers, drug users, and drug traffickers. *Sharing just purchased marihuana* outside dispensaries also regularly takes place. *There have been increased incidents of crime including murder and armed robbery*.

[19] See: http://www.californiapolicechiefs.org/nav_files/marijuana_files/files/MarijuanaDispensariesWhitePaper_042209.pdf

ii. In a 2009 California law enforcement presentation (Power Point),[20] referring again to the existence of a concentration of distribution activities, the Los Angeles Police Department reported:
(1) 200% increase in robberies,
(2) 52.2% increase in burglaries,
(3) 57.1% rise in aggravated assaults,
(4) 130.8% rise in burglaries from autos near cannabis clubs in Los Angeles.
(5) Use of armed gang members as armed "security guards"

iii. California law enforcement reported in 2009 (White Paper) that the dispensaries or "pot clubs" are often used as *a front by organized crime* gangs to traffic in drugs and launder money.

iv. California law enforcement reported in 2009 (White Paper) that besides fueling marihuana dispensaries, some monetary proceeds from the sale of harvested marihuana derived from plants grown inside houses are being used by *organized crime syndicates* to fund other legitimate businesses for profit and the *laundering of money*, and to *conduct illegal business operations like prostitution, extortion, and drug trafficking*.

v. California law enforcement reported in 2009 (White Paper) that *other adverse secondary impacts* from the operation of marihuana dispensaries include street dealers lurking about dispensaries to offer a lower price for marihuana to arriving patrons; marihuana smoking in public and in front of children in the vicinity of dispensaries; acquiring marihuana and/or money by means of robbery of patrons going to or leaving dispensaries; an increase in burglaries at or near dispensaries; a loss of trade for other commercial businesses located near dispensaries.

3) *Secondary effects with regard to children*: Presumably it is agreed that children should not be encouraged by example to undertake uses and activities which are unlawful. However, considering that marihuana possession and use is generally prohibited criminal activity, but the Act authorizes an undisclosed group of individuals to possess and use marihuana, and because children are not capable

[20] See:
http://www.californiapolicechiefs.org/nav_files/marijuana_files/files/DispensarySummitPresentation.ppt

of making distinctions between lawful and unlawful use and possession by individuals based upon the intricacies of the Act, there is a need to insulate children from the narrowly permitted use and possession activity permitted under the Act. California law enforcement reported in 2009 (White Paper) that minors exposed to marihuana at dispensaries or residences where marihuana plants are grown may be subtly influenced to regard it as a generally legal drug, and inclined to sample it.

4) Local regulation of marihuana distribution activities is implicitly contemplated under the Act in view of the glaring gaps opened by the terms of the Act which would, absent local regulation, render it impossible for law enforcement to investigate and pursue criminal activity not protected by the Act. By way of example:

   i. While the Act limits a caregiver from distributing marihuana to more than five patients, because the Act withholds direct advanced information that would allow a connection to be made by law enforcement between a caregiver and particular patients (without regard to specific name and address), especially if caregivers operate in the same facility or in close proximity, the five-patient limit upon a person acting as a caregiver would be practically impossible to investigate or enforce.

   ii. While the Act limits the number of plants a caregiver may cultivate on behalf of patients, because the Act withholds direct advance information that would allow a connection to be made by law enforcement between a caregiver and particular grow locations, the limitation on the number of plants cultivated at multiple sites would be practically impossible to investigate and enforce.

5) The Act, by necessary implication, invites the clarification that can be provided by local regulation which is feasible without undermining the fundamental intent of the Act. The inability of law enforcement officials to access relevant and often critical information needed to investigate violations of the Act amounts to a material barrier to the effective investigation/enforcement model. Without information necessary for distinguishing those operating under the Act from those engaged in illegal trafficking, law enforcement is precluded from undertaking adequate operational planning, again exposing law enforcement and innocent third parties to substantial and unnecessary risks.

6) The Act leaves a substantial gap in terms of preventing dangerous plumbing and electrical installations which are unlawful under applicable construction codes. No provision is made for inspection of a premises at which substantial facilities are installed to facilitate the cultivation of marihuana plants, including plumbing and electrical facilities, and there have been reports of such violations as unauthorized power lines that by-pass meters. These installations represent unlawful activity and create a threat to public safety, and result in a fire risk. Reports from California are similar, and also note that other unintended circumstances have resulted from the employment of facilitating installations, such as the creation of mold.

7) Although expressly authorized in certain other states that permit medical marihuana use,[21] the Act does not expressly define or authorize "marihuana stores," "dispensaries," "compassion centers," or "medical marihuana business." It has been reported to the author by several sources[22] that there have been requests to establish this type of use or operation in Michigan communities. Given the absence of definition or express authorization in the Act, such communities have struggled with these requests. The *Redden* concurrence comments that, "[m]any Michiganders are faced with the often unwelcome intrusion of medical marijuana (sic) dispensaries in their communities, and local governments are faced with the difficult task of determining whether they are obliged to allow such dispensaries to operate in their communities."[23] To some degree, the controversy is definitional in nature. On the one hand, an operation in which marihuana is being dispensed with no regard for caregiver relationships with particular patients would undoubtedly fall outside the intent of the Act. Likewise, a reading of the Act as a whole would suggest that a violation issue arises when a patient dispenses medical marihuana to another patient. On the other hand, a location at which one or more caregivers *each* acts to dispense medical marihuana to not more than five patients who have formally designated that person as their "primary

[21] Under its statutes, Title 21, §21-28.6-3(2),, Rhode Island, permits the following: "Compassion center" means a not-for-profit entity registered under § 21-28.6-12 that acquires, possesses, cultivates, manufactures, delivers, transfers, transports, supplies or dispenses marijuana, or related supplies and educational materials, to registered qualifying patients and their registered primary caregivers who have designated it as one of their primary caregivers. Also see footnote 76, setting out a Boulder, Colorado provision defining "medical marijuana business." "Dispensaries" are referenced prominently in the White Paper of the California Police Chiefs, reference above.

[22] Sources include municipal attorneys, community planners, and building officials. This subject may also be found in local newspaper stories that report on medical marihuana activities.

[23] Slip Opinion, p 12, fn 15; the *Redden* concurrence continued in the same line to express that, under a reading of the Act, "the dispensary would have to be operated entirely by one individual, and could have, at most, five customers." Also see footnote 11, above.

> caregiver" would not appear to be in contravention of the Act. In terms of bricks and mortar, caregivers may raise an issue with regard to the permissible size of a building and the number of caregivers who may occupy that building. Issues such as these should be subject to regulation within local government's customary scope of zoning and other regulatory authority. Indeed, it is suggested that many issues that arise under the Act, including whether more than one caregiver should as a matter of local policy be permitted to occupy a specified premises, are proper subjects for communities to address by ordinance. There is an important role for local regulation to play in bringing stability and providing clarity with regard to several areas in which the Act contains provisions and omissions that promise to create unnecessary controversy.

In summary, provisions and omissions of the Act open the door to:

- Potential serious adverse influence of children;
- Substantial increases in criminal activity;
- Danger to law enforcement and other members of the public;
- Discouragement and impairment of effective law enforcement with regard to unlawful activity involving the cultivation, distribution, and use of marihuana;
- The creation of a lawful commercial enterprise involving the cultivation, distribution, and use of marihuana that is not reasonably susceptible of being distinguished from serious criminal enterprise;
- Uninspected installations of plumbing and electrical facilities that may create dangerous health, safety, and fire conditions;
- Downgrading of areas in which concentrations of marihuana distribution exist.
- Regulatory gray areas that signal the need for local regulation to establish clarity and stability.

These shortcomings are in addition to two other considerations: (1) the legal uncertainty that exists with regard to whether state and local governments, and their officials, are susceptible to federal prosecution or other penalty under federal law for affirmatively authorizing the cultivation, distribution, and use of marihuana permitted under the Act; and (2) the potential for private rights to be created and vested as a result

of local governments approving authorizations of activities permitted under the Act, and for these rights to be asserted as a basis for private claims against local governments if the Act is ultimately held to be invalid. For both of these considerations, a complete analysis would require examination of complex legal and circumstantial matters that are beyond the scope of this report.

While there are many details in the Act, there does not appear to be language reflecting the intent to preempt local regulations reasonably calculated to clarify ambiguities and fill gaps inherent in the Act. If an ordinance goes further in its regulation than a statute, but not counter to it, and where a municipality does not attempt to authorize by ordinance that which the legislature has forbidden or forbid that which the legislature has expressly licensed, authorized, or required, there should be nothing contradictory between the provisions of statute and ordinance that would prevent both from coexisting. In the Act, there does not appear to be a clearly articulated intent to restrict local regulation with regard to matters on which the Act has provided insufficient guidance. Thus, it would appear that local regulation can be accomplished without undermining the fundamental intent of the Act: the permission for a private and confidential patient-caregiver relationship to facilitate the lawful cultivation, distribution, and use of marihuana strictly for medical purposes.

IV. PROSPECT OF A STATE LEGISLATIVE SOLUTION

The Act was promulgated by the initiative process. It was thus not fashioned in the crucible of the customary legislative process that would have exposed its terms to the scrutiny of competing interests. The Act could become more workable for local government if certain adjustments were made. Accomplishing this task requires a reference to the provisions of the Michigan Constitution governing the initiative process.

The Michigan Constitution[24] provides that, "[t]he people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative." It was under this constitutional provision that the Act was proposed and approved.

The approval of an initiative ballot gives rise to the constitutional directive that, "no law adopted by the people at the polls under the initiative provisions of this section shall be amended or repealed, except by a vote of the electors unless otherwise provided in the initiative measure or by **three-fourths of the members elected to and serving in each house of the legislature**." (Emphasis supplied).

In light of the fact that the Act was firmly approved by the electors, it is presumed that members of the State Legislature would be hesitant to broadly amend the Act, and the three-fourths vote requirement poses an additional challenge.

On the other hand, there are a few areas of concern that may be considered in terms of a legislative solution:

1. Anecdotal discussions would suggest that the public is not generally aware that the Act would authorize children to be patients, and thus cultivate and use marihuana lawfully. While minors are not immune from certain chronic pain that might be relieved by the consumption of marihuana, it may be appropriate for the Legislature to conduct hearings in order to weigh this potential benefit against the potential harm that may befall children and society by permitting marihuana usage as permitted in the Act.

2. Likewise, there appears to be no public awareness that law enforcement and citizens will be endangered, and that the terms of the Act would effectively tie at least one hand of law enforcement behind its back in attempting to investigate and prosecute Michigan law relating to the cultivation, distribution, and use of marihuana – both in terms of effectively enforcing the terms of the Act and enforcing the general laws of the state under which all of such activity is unlawful. Thus, it may be appropriate for the Legislature to consider requiring the licensure and regulation of sites used by caregivers for cultivation and distribution of

[24] Art 2, § 9.

marihuana. (the provisions of the licensure and regulation ordinance attached as Appendix 1 to this report may provide ideas for consideration).

3. It could not have been imagined by those drafting the Act that plumbing, electrical, and fire inspections might be by-passed, thus endangering the health and safety of many. Therefore, expressly requiring permits and inspections would be appropriate.

4. The public is becoming aware – by billboard and other advertising – that the process of certifying patients is questionable at best. Providing clarity in the following would lend more credibility to the use of medical marihuana: a realistic definition and clear limitation of the debilitating diseases that would serve as the bases for certification; a physician-stated duration of ID Card effectiveness; and, a physician-stated dosage and frequency of marihuana consumption for each patient.

In these particular areas of public interest, if the Legislature and citizens are educated to a sufficient degree on the shortcomings now present in the Act, it may be feasible to secure at least a partial solution by way of legislation. The author has been advised that informal and/or preliminary discussions are taking place in the legislative arena. Representatives of both the Municipal League and Townships Association are involved, as are representatives of various medical marijuana proponent groups, local law enforcement and prosecutors. Although it is too soon to know if these discussions will form a basis for drafting what would be a consensus-driven improvement over the current Act, discussions of this sort have led to legislative revisions on controversial subjects in the past, e.g., casino gambling. Perhaps the uncertainty on whether the Act would be upheld in the face of a Supremacy Clause challenge would provide the motivation for all parties to enter a consent judgment providing for a consensus for a legislative revision of the Act, including a resolution of the legitimate concerns of law enforcement.

As a final note on the concept of amendatory legislation, the *Redden* concurrence makes reference to the prospect of amending the Michigan Public Health Code to make marihuana a Schedule 2 or Schedule 3 substance, which would then enable marihuana to be prescribed "if, in the prescriber's professional opinion, this drug would effectively treat the pain, nausea, and other symptoms associated with certain debilitating medical conditions.[25] Establishing a system based on this concept, or other arrangement such as state licensure for distribution, would presumably require hearings to determine whether marihuana has "high potential for abuse and has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision," and thus must remain classified as a Schedule 1 substance.[26] If it is found

[25] Slip opinion, p 6. Reference here is made to MCL 333.7303a, which provides that, "A prescriber who holds a controlled substances license may administer or dispense a controlled substance listed in schedules 2 to 5 without a separate controlled substances license for those activities." This may be a complicated matter, particularly if a change in federal law schedules is also required.
[26] MCL 333.7211.

that good science justifies it, a revision of the Act could be made to allow and require the distribution of medical marihuana to occur on prescription or licensure basis.

V. CONSIDERATION OF FEDERAL DECLARATORY JUDGMENT ACTION

One or more local governments may wish to consider the institution of a federal declaratory judgment action to determine the validity of the Act under the Supremacy Clause of the United States Constitution. It is the opinion of the author that the decision to do so might be motivated by the following:

- The concern about the Act's authorization for marihuana usage by minors, and the associated implications relating to performance in school, employment, and social contexts.[27]

- The conclusion that law and code enforcement issues[28] emanating from the provisions and omissions in the Act create significant health, safety, and quality of life problems not fully curable by local regulation.

- The concern that private individuals who are unaware of the risks associated with the Supremacy Clause issue may rely on the Act in making choices and investments to use marihuana and establish caregiver facilities and equipment, and that such choices could lead to prosecutions or render investments useless.[29]

- The risk that exists, albeit slight at present, that state and local government and officials are susceptible to prosecution or other liability under federal law for affirmatively authorizing the cultivation, distribution, and use of marihuana permitted under the Act.[30]

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[27] The indication that long-term use of marihuana leads to addiction is supported by many on-line sources, and *Gonzales v. Raich*, 545 U.S. 1, 14 (2005), referring to the federal classification of marihuana as a Schedule 1 Controlled Substance, noted the decision of Congress to include marihuana as a Schedule I drug was based, in part, on its high potential for abuse, and the absence of any accepted safety for use in medically supervised treatment. To the same effect, see also, MCL 333.7211, 333.7212(1)(c).

[28] See part III of this report, above.

[29] The *Redden* concurrence indicates that both the prosecutor and defense counsel in that case expressed that the Act does not provide the guidance necessary to adequately inform clients, including prospective defendants as well as municipalities, police, and others. Slip opinion, p 4.

[30] The risk involved here can be illustrated by a hypothetical: assume the federal government significantly changes its current policy (see footnote 40, below) and prosecutes a caregiver who has complied with the Michigan Act. At the time of arrest, the defendant asserts to the arresting federal officers that he has established his cultivation and distribution operation in reliance on the affirmative approval granted by the local community. Again acting based on its newly changed policy, the federal government then joins the local community and officials in the prosecution, alleging that they aided and abetted the defendant in violating federal law. *See* 18 U.S.C.A. § 2(a) which provides that (a) [w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. The U.S. Code provisions on Drug Abuse Prevention and Control, 21 U.S.C.A. § 846, provide that, [a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy. Although not related to public officials, § 846 was unsuccessfully challenged in an indictment that charged a person with conspiracy, possession with intent to distribute and aiding and abetting unlawful distribution of cocaine (which, like marihuana, is a Schedule 1 controlled

Should a community determine to pursue a Supremacy Clause action, the following material would be relevant.

"Under the Commerce Clause of the United States Constitution, Congress may ban the use of cannabis even where states approve its use for medical purposes."[31] Indeed, Congress has included marihuana on its schedule of unlawful controlled substances.[32]

In the Act,[33] it is acknowledged that federal law prohibits any use of marihuana except under very limited circumstances. However, the Act then states, without citation of authority, that states are not required to enforce federal law. It does appear that the federal government may not compel the states to implement, by legislation or executive action, federal regulatory programs.[34] And, it will be assumed for purposes of this report that a State official or local government is not required to enforce the federal prohibition on the cultivation, distribution, and use of marihuana.

However, the juxtaposition of the Act and the federal prohibition on the activities permitted in the Act raises the question whether a State may affirmatively authorize specified acts, such as the cultivation, distribution, and use of marihuana, when the same acts are expressly prohibited under federal law. This question directly presents an issue under the Supremacy Clause of the United States Constitution.

The Supremacy Clause[35] provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The history of this clause is interesting and insightful, as recounted by the Supreme Court:

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substance). *U.S. v. Kremetis,* 903 F.Supp. 250 (New Hampshire, 1995). An official may attempt to seek shelter under 21 USC 885(d), which provides immunity to officials who are "lawfully engaged" in the enforcement of any law or municipal ordinance relating to controlled substances. However, a federal court in California, in *United States v. Rosenthal,* 266 F Supp 2d 1068, 1078 (2003), affirmed, 454 F 3rd 943 (9th Cir, 2006), held that, for an official to be "lawfully engaged" in the enforcement of a law relating to controlled substances, and therefore entitled to immunity, the law which the municipal official is "enforcing" must itself be consistent with federal law.

[31] *Gonzales v Raich,* at 14.
[32] 21 U.S.C. § 812(c).
[33] MCL 333.26422(c).
[34] *Printz v United States,* 521 U.S. 898, 926 (1997).
[35] Article VI, Clause 2.

> Enforcement of federal laws by state courts did not go unchallenged. Violent public controversies existed throughout the first part of the Nineteenth Century until the 1860's concerning the extent of the constitutional supremacy of the Federal Government. During that period there were instances in which this Court and state courts broadly questioned the power and duty of state courts to exercise their jurisdiction to enforce United States civil and penal statutes or the power of the Federal Government to require them to do so. But after the fundamental issues over the extent of federal supremacy had been resolved by war, this Court took occasion in 1876 to review the phase of the controversy concerning the relationship of state courts to the Federal Government. Claflin v. Houseman, 93 U.S. 130, 23 L.Ed. 833. The opinion of a unanimous court in that case was strongly buttressed by historic references and persuasive reasoning. It repudiated the assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign. Its teaching is that the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, 'any-thing in the Constitution or Laws of any State to the contrary notwithstanding.[36]

In terms of the breadth and application of the Supremacy Clause, the Supreme Court has more recently had occasion to observe that:

> Article VI, cl. 2, of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Consistent with that command, we have long recognized that **state laws that conflict with federal law are "without effect**." *Maryland v. Louisiana,* 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981).
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> Our inquiry into the scope of a statute's pre-emptive effect is guided by the rule that " '[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case." *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (quoting *Retail Clerks v. Schermerhorn,* 375 U.S. 96, 103, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963)). . . . Pre-emptive intent may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an **actual conflict between state and federal law.** *Freightliner Corp. v. Myrick,* 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995).[37] (Emphasis supplied)

As it may relate to the conflict between state and federal law in terms of drug enforcement, the Supreme Court has also clarified that, "[t]he purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would

[36] *Testa v. Katt*, 330 U.S. 386, 390-391, 67 S.Ct. 810, 172 A.L.R. 225, 91 L.Ed. 967 (1947).
[37] Altria Group, Inc. v. Good, 129 S.Ct. 538, 543, 172 L.Ed.2d 398 (2008).

follow if the Government's general authority were subject to local controls."[38] As it relates to marihuana, the Court has held that:

> [L]imiting the activity to marijuana possession and cultivation "in accordance with state law" cannot serve to place respondents' activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is " 'superior to that of the States to provide for the welfare or necessities of their inhabitants,' " however legitimate or dire those necessities may be.[39]

In the present matter, we have a Michigan initiated statute that permits the cultivation, distribution, and use of marihuana as an exception to the generally applicable criminal prohibition under state law. More importantly for the present consideration, the permission of such activities in the Act has every appearance of being an actual and direct conflict with federal law, which specifies that such activities are all unlawful, without the counterpart exception provided by Michigan in the Act.

On its face, this conflict would appear to be irreconcilable. Yet, the United States Justice Department has not initiated or even threatened litigation against Michigan or any of the other thirteen states that have created this conflict by the enactment of medical marihuana laws. Moreover, this position has been in place for a considerable period, and the Justice Department has indicated that it presently does not intend to prosecute medical marihuana activities that occur in accordance with state law.[40] Although the federal-state conflict created by these laws has every appearance of being direct, thus giving rise to Supremacy Clause preemption of state laws, it is worth questioning whether the Justice Department's position and inaction might undermine a Supremacy Clause preemption claim. The answer to this question may raise the issue whether the Executive Branch of the federal government, by its inaction, may influence the meaning and interpretation of a federal statute enacted by the Legislative Branch.[41]

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[38] *U.S. v. Allegheny County, Pa.*, 322 U.S. 174, 183, 64 S.Ct. 908, 88 L.Ed. 1209 (1944).

[39] *Raich,* 545 U.S. at 29. See also the cases cited in the *Redden* concurrence, p 2.

[40] By letter dated October 19, 2009, the Deputy Attorney General provided a Memorandum to United States Attorneys in those states in which laws authorizing medical marihuana have been enacted. In this carefully worded memo, the Justice Department affirms its commitment to efficiently enforce the federal controlled substances Act in all states, and also confirms that marijuana (sic) is a dangerous drug and that its illegal distribution and sale is a serious crime and provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. However, the memo also directs that, as a general matter, "pursuit of . . . priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing states laws providing for the medical use of marijuana.".

[41] This issue would appear to have similar qualities as the state law issue of whether a municipality may be estopped in the enforcement of lawful enacted ordinances due to the actions and inactions of local officials. *See, generally, Fass v. City of Highland Park*, 326 Mich. 19, 39 N.W.2d 336 (1949), *Township of Pittsfield v. Malcolm,* 375 Mich. 135, 134 N.W.2d 166 (1965). The general rule of nonestoppel of enforcement of a duly enacted law may be stronger in the present context considering that the law that might be estopped prohibits acts constituting felony offenses.

The Supremacy Clause issue was addressed earlier this year in the State of Oregon in a case in which an employer sought review of an administrative decision concluding that such employer had engaged in disability discrimination when it discharged an employee based on medical marijuana use. The employer contested the validity of the state act. In *Emerald Steel Fabricators, Inc v Bureau of Labor and Industries*,[42] the Supreme Court of Oregon faced the Supremacy Clause issue head-on in connection with that state's medical marihuana exception. The Court's analysis, which has relevance to the Michigan situation, started with a review of the federal Controlled Substances Act, reciting that,

> The central objectives of that act "were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances. Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels." . . . To accomplish those objectives, Congress created a comprehensive, closed regulatory regime that criminalizes the unauthorized manufacture, distribution, dispensation, and possession of controlled substances classified in five schedules.
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> * * *
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> Schedule I controlled substances lack any accepted medical use, federal law prohibits *all* use of those drugs "with the sole exception being use of [Schedule I] drug[s] as part of a Food and Drug Administration preapproved research project.". . . Congress has classified marijuana as a Schedule I drug, 21 U.S.C. § 812(c), and federal law prohibits its manufacture, distribution, and possession, 21 U.S.C. § 841(a)(1).[43]

This analysis led the Oregon Supreme Court to the conclusion that, "[t]o the extent that [the state statute] affirmatively authorizes the use of medical marijuana, federal law preempts that subsection, leaving it 'without effect.'"[44]

A dissent was filed in *Emerald Steel* asserting that "[n]either the Oregon Medical Marijuana Act nor any provision thereof permits or requires the violation of the Controlled Substances Act or affects or precludes its enforcement. Therefore, neither the Oregon act nor any provision thereof stands as an obstacle to the federal act."[45]

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[42] 348 Or. 159, 230 P.3d 518 (2010).

[43] *Id* at 173-174.

[44] *Id* at 178.

[45] *Id* at 190-191. For a more detailed California state court discussion that is consistent with the dissent's position in *Emerald Steel*, *see, County of San Diego v San Diego NORML*, 165 Cal App 4th 798 (2008).

The legal analysis presented here is certainly not complete, and further investigation of this issue will be required. In all events, seeking an ultimate answer to the underlying question whether a state may affirmatively authorize the cultivation, distribution, and use of marihuana when the same acts are expressly prohibited under federal law may cause one or more communities to seek a judicial clarification. There is a likelihood that litigation filed by proponents of medical marihuana use will ensue soon after the enactment of local ordinances.[46] Until the Supremacy Clause issue is resolved, those who are cultivating, distributing, and using marihuana in compliance with the Act cannot consider themselves immune from federal prosecution and forfeiture. On the other side of the regulatory issue, until the Supremacy Clause issue is resolved, state and local governments in Michigan, and their respective officials, cannot consider themselves immune from federal prosecution to the extent they affirmatively authorize the cultivation, distribution, or use of marihuana.[47] Even though it is unlikely that the United States Attorney General now in office would pursue actions of local officials taken in compliance with state law (the Act), the presence of a Supremacy Clause issue will continue to have a haunting existence until it is resolved.

[46] This likelihood has been demonstrated by July 29, 2010 letters sent by the ACLU to the cities of Bloomfield Hills and Birmingham alleging that their local ordinances violate the Act. In both cities, ordinances implicitly respect the federal law prohibition on the cultivation, distribution and use of marihuana, and prohibit activities contrary to federal, state or local law.

[47] *See* footnote 30, above.

VI. LOCAL ORDINANCE STRATEGY

A. Introduction

Again for purposes of this section of the report, the dichotomy created by the Act must be recognized. On the one hand, the approval of the Act is the manifestation of a fundamental intent on the part of many in the state that assistance should be provided to those truly suffering, and for this purpose a defined medical use exception should be made to the general policy that activities involving marihuana must be treated as criminal acts. On the other hand, this exception from the general policy of illegality creates a parallel system in which the same conduct is at once deemed lawful and unlawful depending on whether the engaged persons have ID Cards.

It would appear that many communities perceive the need to respond to the Act in some manner.[48] Some communities have recognized the prohibition under federal law and have adopted the view that the Act's authorization for the cultivation, distribution and use of medical marihuana is insufficient to countermand federal law. Other communities have seen fit to regulate the activities permitted in the Act by way of an exercise of the zoning authority provided in the Zoning Enabling Act,[49] or by way of a regulatory enactment.[50]

The discussion in this section of the report will focus on the types of ordinances most frequently enacted to date, and for each type identify the legal basis for regulating, followed by an examination of basic ordinance concepts. In addition, a new concept of a licensing and regulation ordinance will be presented. Because a large number of communities have enacted or are considering the establishment of a "moratorium" on the establishment of medical marihuana uses, this subject will also be examined. Finally, a suggestion will be made for consideration of local government initiation of a state declaratory judgment action relative to the validity of enacted ordinances.

An important introductory point on the subject of establishing ordinances is the need on the part of community officials to bear in mind the potential consequences of ordinance authorizations in light of alternative future scenarios with regard to the Act. This admonishment covers significant ground, and requires consideration that the Act may remain intact, it may be amended, or it may be found to be invalid under the Supremacy Clause of the United States Constitution. Thought should be given to minimizing the creation of any adverse outcome based upon steps taken to respond to the Act. Thus, communities should not only take into account those in pain who were understood to be the real beneficiaries of the Act, but should also attempt to protect the

[48] This report has discussed the need for regulation, and it is worth noting that the Detroit Free Press (L.L. Brasier, Staff Writer) reported on September 26, 2010, that Oakland California, where distribution is licensed by both state and local authorities, has had success in regulating.
[49] MCL 125.3101, et seq. This act provides enabling authority for cities, villages, townships, and counties.
[50] A large number of communities have adopted moratoria in order to provide the time and opportunity to study the most appropriate response to the issues generated by the Act.

present and future interests of children, consider property owners who will be neighbors to persons granted medical marihuana authorizations, and endeavor to avoid, to the extent feasible, the creation of private vested land use rights that could later be undermined.

B. Recognition of Federal Law

1. Legal Basis

For communities opting to recognize the prohibition under federal law, and not accept the Act's authorization as a countermand of federal law, the legal issue is straightforward. Whether a state has the *obligation* to enforce federal law is not the issue. Rather, the question is whether a local government may recognize the applicable mandate of federal law, even in the face of contrary state law.

In discussions on this subject, some have indicated that public officials taking the oath of office commit to federal law enforcement. This proposition would require interpretation of a constitutional oath to extend not only to the United States Constitution itself, but also to statutes enacted by the Congress. The oath of office for legislative, executive, and judicial officers specified in the Michigan Constitution requires support for the United States and Michigan Constitutions, but does not expressly specify support for federal laws.[51] Consistent with this constitutional model, the oath specified by the Michigan Townships Association, the Secretary of State for notary publics, and that specified for school board purposes, requires support of the United States Constitution, but not of federal law.[52] Thus, to be successful, the argument on this point would require the conclusion that the requirement to support the Constitution includes the recognition of the Supremacy Clause which, in turn, prohibits enactments in direct conflict with federal law.

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[51] Art XI, § 1 of the Michigan Constitution provides: "Sec. 1. All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of . . . . . ….. according to the best of my ability. No other oath, affirmation, or any religious test shall be required as a qualification for any office or public trust."

[52] The MTA material suggests: "I do solemnly swear (*or affirm*) that I will support the Constitution of the United States, and the Constitution of this State, and that I will faithfully perform the duties of the office of _____ in and for the Township of _____, County of _____ and the State of Michigan, according to the best of my ability, so help me God." *See:* http://www.michigantownships.org/downloads/oath_of_office_revised_nov_2008.doc. The Secretary of State prescribes the following: "Do you solemnly swear that you will support the Constitution of the United States and the Constitution of this State, and that you will discharge the duties of the office of Notary Public in and for said County to the best of your ability?" *See:* http://www.michigan.gov/sos/0,1607,7-127-1638_8736-85768--,00.html. For school board purposes, it appears that the oath prescribed for notary purposes is utilized: " I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of this State, and that I will faithfully discharge the duties of the office of Member of the Board of Education of _____ according to the best of my ability." *See: http://www.michigan.gov/documents/sos/Accpt_of_Off_New_299490_7.pdf.*

The questions concerning the extent of a state's authority to enforce federal law (even in the absence of federal enforcement of the same law within the state), and whether the federal law must be deemed to be preemptive in order to give rise to such state authority, are beyond the scope of this report. However, for some communities these issues may become important. Certainly a legitimate argument for refusing to *affirmatively grant rights* to parties who are in violation of federal law (which would include all individuals who cultivate, distribute, and use marihuana) would be that, although unlikely, such action might subject the community and the officials involved to prosecution under federal law for participating in a criminal enterprise.[53]

However, a challenge likely to be asserted against this regulatory approach would be that it is "exclusionary." The customary "exclusion" case arises under MCL 125.3207 with regard to an exercise of the zoning authority. This section of the ZEA provides:

> A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a local unit of government in the presence of a demonstrated need for that land use within either that local unit of government or the surrounding area within the state, unless a location within the local unit of government does not exist where the use may be appropriately located or the use is unlawful.

At least some of the communities that have recognized federal law as the basis for withholding affirmative approvals permitting medical marihuana use have done so under general regulatory authority, rather than using the zoning power. There is no apparent counterpart to MCL 125.3207 applicable to general regulatory ordinances.

In all events, however, one fact is clear: under state law, the Act is on the books as a viable state authorization. Its validity has not been challenged at this point, and the Justice Department has apparently not threatened or initiated a claim against the Department to cease issuance of, or revoke ID Cards. Nor is there any expectation for the Justice Department to alter this course.[54] Particularly considering that the Act is an initiated law passed by the people, it would not be out of the question for a state court judge to hold that, based on an outstanding law on the State books, patients and caregivers are entitled to proceed as permitted under the Act subject to the right of the federal government to initiate injunction actions or prosecutions, and subject to the successful pursuit of a Supremacy Clause action.

2. Ordinance Provisions

Ordinances of this type simply make reference to federal law, and either prohibit uses that are contrary to federal law, or make it unlawful to engage in an activity that is contrary to federal law.

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[53] *See* footnote 30, above.
[54] See footnote 40, above.

As noted above, aside from being simple, and easily understood by the public, the positive aspect of this type of ordinance is that it avoids the prospect that the community or its officials who are engaged in implementing the ordinance will be charged or implicated by the federal government for violating the federal statutes that prohibit the activities permitted under the Act. On the other hand, litigation is very likely to follow the enactment of an ordinance of this character.

C. Zoning and Regulatory Enactments

1. Legal Basis

The Michigan Zoning Enabling Act[55] is a powerful and well recognized basis of local authority.[56] Communities may use this authority to classify uses, and allocate them to particular use districts, provided that such classification and allocation rationally advance a legitimate government interest.[57]

Likewise, the authority to regulate for the purpose of generally protecting the public health, safety, and general welfare, founded upon statute in townships[58] and upon home rule authority in cities and villages,[59] is well understood and supported by the courts.

Communities regulating on the basis of such zoning and regulatory authority will undoubtedly be challenged to present the legitimate governmental interests being advanced by restricting what challengers will assert to be patient and caregiver rights authorized in the Act.

a. The Preemption Issue

The first argument presented by challengers will be that the Act grants the Department exclusive jurisdiction, and that local regulation restricting activities of patients and caregivers is preempted by the Act. If the claim is that the Department has exclusive jurisdiction, the challengers would have to show "a clear expression of the

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[55] MCL 125.3101, et seq. This act provides enabling authority for cities, villages, townships, and counties.

[56] *See, Kyser v Kasson Township,* 486 Mich 514, 2010 WL 3566907, Mich., July 14, 2010 (NO. 136680). The Majority Opinion declares as follows:

> "To assess the myriad factors that are relevant to land-use planning in hundreds of communities across the state requires a decision-making process for which the judicial branch is the least well-equipped among the branches of government. Such decision-making entails the solicitation of a broad range of disparate views and interests within a community, premised upon widely different visions of that community's future and widely varying attitudes toward 'quality of life' considerations, and then balancing of these views and interests in ways that are not easily susceptible to judicial standards." Slip Opinion, p 22.

[57] *Kirk v Tyrone Township,* 398 Mich. 429, 247 N.W.2d 848 (1976).

[58] MCL 41.181 (general law townships) and MCL 42.15 and 42.17 (charter townships); *See Square Lake Hills Condominium Ass'n v Bloomfield Twp,* 437 Mich 310; 471 NW2d 321 (1991).

[59] *See, e.g.,* MCL 117.3(j), MCL 117.4.j.(3).

Legislature's intent to vest the department with complete jurisdiction" over the subject matter.[60] If the claim is that the Act preempts local regulation, a four-factor test applies, as discussed in *Rental Property Owner's Association of Kent County v City of Grand Rapids.*[61] The *Rental Property Owner's Association* case made it clear, however, that:

> The mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two, and the requirements of the municipal ordinance are not in themselves pernicious, as being unreasonable or discriminatory, both will stand. *The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith unless the statute limits the requirement for all cases to its own prescription.* Thus, where both an ordinance and a statute are prohibitory, and the only difference between them is that the ordinance goes further in its prohibition but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot coexist and be effective. Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not deemed inconsistent because of mere lack of uniformity in detail.[62]

Of course, as local regulations are enacted, enforced, and challenged, the statute will require interpretation, and no outcome can be assured. Yet, there is certainly no clear indication in the Act that a more restrictive ordinance that does not conflict with the Act should not be permitted and could not coexist.

b. The Right to Farm Act Issue

An additional argument reported to have been raised already in various public meetings held to date is that the Michigan Right to Farm Act[63] precludes local regulation of medical marihuana cultivation. This challenge will be resolved based on an interpretation of that act. "Whether a state statute preempts a local ordinance is a question of statutory interpretation-a question of law that this Court reviews de novo."[64]

Because interpretation of a statute turns primarily on intent, it is appropriate to examine the Act on this point. Two particular aspects of the Act are

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[60] Burt Township v Department of Natural Resources, 459 Mich. 659, 663, 593 N.W.2d 534 (1999).
[61] 455 Mich. 246, 257, 566 N.W.2d 514 (1997).
[62] *Id,* at 262. (Emphasis in text of case).
[63] MCL 286.471, *et seq.*
[64] *Charter Township of Shelby v. Papesh,* 267 Mich.App. 92, 704 N.W.2d 92 (2005).

important in this regard: The basic regulatory structure of the Act which places administration into the hands of the Department of Community Health; and the specific mandate that marihuana plants are to be maintained in an "enclosed, locked facility," which means "a closet, room, or other enclosed area." Both of these provisions would appear to suggest the very basic intent to place this subject on a regulatory path distinct from the Right to Farm Act.

A defined term in the Right to Farm Act would also appear to be relevant: The very basic definition of "farm" in MCL 286.472(a):

> "Farm" means the land, plants, animals, buildings, structures, including ponds used for agricultural or aquacultural activities, machinery, equipment, and other appurtenances used in the **commercial production** of farm products. (Emphasis supplied).

It will certainly be argued that this is a very broad definition that clearly encompasses the cultivation of marihuana plants by caregivers for distribution to patients. In spite of its apparent breadth, there are important issues that are presented. First, the "enclosed, locked facility," (which means a "closet, room, or other enclosed area") where marihuana plants are to be kept, will in most cases be situated in an existing structure that was built for a principal use for other purposes, e.g., a single family dwelling. This would be relevant in ascertaining whether the intent of the Act would be to prohibit the application of ordinance codes within the structure.

In addition, it is clear that patients are not engaged in "commercial production," and thus their cultivation activities would not involve a "farm." A caregiver is authorized under the statute to receive "compensation for costs associated with assisting" a patient. It has been held that, for purposes of the Right to Farm Act, "'commercial production' is the act of producing or manufacturing an item intended to be marketed and sold at a profit" and "there is no minimum level of sales that must be reached before the RTFA is applicable."[65] An interpretation that caregiver activity amounts to a commercial farm operation would certainly cast a glaringly different light on the meaning and intent of the Act, which reveals no purpose of creating a new Michigan agri-business for a crop that is subject to felony punishment outside the narrow scope of the Act.[66] Indeed, such an interpretation would contradict the concept of a private and confidential relationship between patient and caregiver, and suggest a relationship with the character of a mere commercial transaction. This, in turn, would raise a significant question of any public interest served in shielding the identity and address of a caregiver. The express language of the Act does not suggest that marihuana plants are to be grown in a "farm operation," but mandates that they are to be kept exclusively in an "enclosed, locked facility." Undoubtedly, the courts will be requested to weigh-in on this issue.

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[65] *Id,* at p 101; and fn 4.
[66] See footnote 11, above.

The Right to Farm Act also appears to be cognizant of the need to comply with federal law. Although not directly addressing the issue concerning whether marihuana cultivation should be considered to be within its purview, the statute provides that:

> (7) A local unit of government may submit to the director a proposed ordinance prescribing standards different from those contained in generally accepted agricultural and management practices if adverse effects on the environment or public health will exist within the local unit of government. A proposed ordinance under this subsection shall not conflict with existing state laws or **federal laws.** . . An ordinance enacted under this subsection shall not be enforced by a local unit of government until approved by the commission of agriculture. (Emphasis supplied).

If an ordinance "shall not conflict with . . . federal law," presumably the Department of Agriculture must consider that if it creates an "accepted agricultural and management practice for cultivating marihuana, it would be implicitly promoting an activity that is a criminal violation under federal law.

The need for judicial interpretation is also found in the current position expressed by the Michigan Department of Agriculture. In an informal telephone inquiry on August 30, 2010, a Department representative in the Right to Farm office indicated that no formal position on this issue had been taken, and the Department intends to await the decision of the courts. While providing little in the way of comfort for either side of the issue, this position does not suggest an immediate interest in, or advocacy for regulation.

c. Would an Ordinance Conflict with the Act

This leads to the question of the extent of local regulation that may be permitted without reaching the point at which it must be concluded that the Act and the ordinance "conflict" in their regulatory effect. For this question, a reference is respectfully suggested to the analysis applied to local ordinance regulation of adult entertainment uses protected by the First Amendment. The relevance of this reference may be demonstrated by making a comparison between the magnitude or legal importance associated with free speech rights in the adult entertainment arena and the individual rights protected by the Act, and then examining this result in light of the remarkably similar "secondary effects" that occur when there are concentrations of adult entertainment establishments and medical marihuana distribution facilities.

There is little need for citation of authority for the proposition that First Amendment free speech rights are among the most closely guarded in the United States. The United States Supreme Court has found that adult entertainment activities such as adult movie theaters and topless dancing facilities fall within this First Amendment protection. On the other hand, the activities protected under the Act, the rights to cultivate, distribute, and use marihuana, have long been classified as criminal acts, only permitted under the Act within a narrow framework. In addition, such activities remain criminal acts under federal law regardless of whether they fall within the protective scope

of the Act. On balance, then, there would appear to be no question that the First Amendment protected free speech rights associated with adult entertainment uses must be deemed of greater magnitude and legal importance than the rights protected under the Act, which were created by a statutory exception to the generally applicable criminal law.

Given this prioritization of rights, it should be fair to conclude that, if adult entertainment activities are subject to regulation on the basis of protecting certain interests of the public, then the rights which are protected by the Act should easily be deemed to be subject to regulation in order to protect the same type of public interests. Thus, this analysis would represent a fair gauge of whether the regulation of rights to cultivate, distribute, and use marihuana should be deemed to be in "conflict" with the terms of the Act. That is, if the regulation of free speech rights associated with adult entertainment does not conflict with the First Amendment, then similar regulation of the cultivation, distribution, and use of marihuana should not be considered a conflict with the rights established under the Act.

Turning to local ordinances that have been permitted to apply to adult entertainment activities, two approaches to regulation have been permitted – even in the face of a challenge that regulation has the effect of limiting free speech and expression protected by the First Amendment. These approaches are represented in *Young v American Mini Theatres, Inc*[67] and *City of Renton v Playtime Theatres, Inc,*[68] and are premised on the point that the **"***predominate* concerns" addressed in the ordinances were with the *secondary effects* of adult theaters, and not with content of speech and expression. In other words, the regulations must be justified without reference to the content of the regulated speech. In *Renton,* the Court referred to the Court's earlier opinion in *American Mini Theatres*:

> Justice Stevens, writing for the plurality, concluded that the city of Detroit was entitled to draw a distinction between adult theaters and other kinds of theaters "without violating the government's paramount obligation of neutrality in its regulation of protected communication," 427 U.S., at 70, 96 S.Ct., at 2452, noting that "[i]t is th [e] secondary effect which these zoning ordinances attempt to avoid, not the dissemination of 'offensive' speech," *id.,* at 71, n. 34, 96 S.Ct., at 2453, n. 34.[69]

Referring again to *American Mini Theatres,* the *Renton* Court noted:

> As a majority of this Court recognized in *American Mini Theatres,* a city's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect." 427 U.S., at 71, 96 S.Ct., at 2453 (plurality opinion); see *id.,* at 80, 96 S.Ct., at 2457 (Powell, J., concurring) ("Nor is there doubt that the interests furthered by this ordinance are both

[67] 427 U.S. 50 (1976).
[68] 475 U.S. 41 (1986).
[69] *Id.* at 49.

> important and substantial"). Exactly the same vital governmental interests are at stake here.

In terms of the "**secondary effects**" that were the focus of the valid regulations applicable to adult entertainment, it was determined by the cities that "**a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime**, effects which are not attributable to theaters showing other types of films."[70] In its recognition that these were legitimate and important objectives to address by ordinance, the Court further pointed out in *Renton* that a community may rely on the experiences of other communities in enacting their ordinances, and that, "[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."[71]

More recently, the Court has confirmed that,

> . . . we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, see *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 50-51, 106 S.Ct. 925, 930-931, 89 L.Ed.2d 29 (1986); *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 584-585, 111 S.Ct. 2456, 2469-2470, 115 L.Ed.2d 504 (1991) (Souter, J., concurring in judgment), or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and "simple common sense," *Burson v. Freeman,* 504 U.S. 191, 211, 112 S.Ct. 1846, 1858, 119 L.Ed.2d 5 (1992).[72]

The two approaches in *American Mini Theatres* and *Renton*, and the deference of the Court to the efforts of the communities, are embraced in the following statement contained in the *Renton* opinion:

> Cities may regulate adult theaters **by dispersing them**, as in Detroit, or by effectively **concentrating them**, as in Renton. "It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas.... [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems."[73] (Emphasis supplied).

In summary, the Court has held that:

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[70] *American Mini Theatres,* p 71. (Emphasis supplied).
[71] *Renton,* pp 51-52.
[72] Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995).
[73] *Renton,* at p 52,

- It is permissible to regulate First Amendment protected adult entertainment activity in order to preserve the quality of urban life, including attempts to address the important and substantial secondary effects in the form of crime and urban deterioration;

- Evidence of the anticipated secondary effects may be drawn from the experiences of other communities rather than conducting new studies; and,

- Because of the significance of the secondary effects, the Court has shown deference to methods devised by communities to preserve their quality of life. Two approved methods of curbing the secondary effects are by concentrating the regulated activities or by dispersing them. These two methods would not appear to represent the entire list of alternatives, allowing communities to fashion methods reasonably related to combating the particular secondary effects.

Returning to a focus on the cultivation, distribution, and use of marihuana permitted under the Act, there is evidence from the experience in California that there are important and substantial secondary effects that result from a concentration of medical marihuana cultivation and distribution activities. As noted above, these secondary effects include significant increases in criminal activity and a general undermining of an area, secondary effects which have a strikingly close resemblance to those at stake in *American Mini Theatres* and *Renton*. Moreover, there are additional secondary effects that result from applying the Act in the absence of local regulation, specifically including adverse influence of children; danger to law enforcement and other members of the public; discouragement and impairment of effective law enforcement with regard to unlawful activity involving the cultivation, distribution, and use of marihuana; the creation of a purportedly lawful commercial enterprise involving the cultivation, distribution, and use of marihuana that is not reasonably susceptible of being distinguished from serious criminal enterprise; and the uninspected installation of unlawful plumbing and electrical facilities that create dangerous health, safety, and fire conditions.

Applying the model approved for the regulation of highly protected First Amendment protected rights, a community should be permitted to enact regulations in order to address the secondary effects caused by a concentration of medical marihuana cultivation and distribution activities, provided that the regulation is primarily intended to focus upon addressing the secondary effects and not on undermining the fundamental intent of the Act: the creation of a *private and confidential patient-caregiver relationship to facilitate the lawful cultivation, distribution, and use of marihuana strictly for medical purposes.* And, just as this type of regulation is not deemed to be in conflict with the First Amendment, regulation of medical marihuana in a manner reasonably aimed at restricting the occurrence of materially adverse secondary effects while allowing the fundamental intent of the Act to be carried out should not be deemed to be in conflict with the authorization contained in the Act.

In order to preserve quality of community life, including attempts to address important and substantial secondary effects such as serious crime and associated activity, and drawing from the experiences in California, communities have a well-substantiated position that they should be permitted to regulate marihuana cultivation, distribution, and use activities.

2. Types of Zoning and Regulatory Ordinances

Any enactment needs to be tailored to a community's particular policies and needs. As noted above, following the model of adult entertainment regulation, local regulations seeking to address the serious secondary effects facilitated by the Act may take various forms. As the Supreme Court noted in *Renton*,

> Cities may regulate adult theaters by **dispersing** them, as in Detroit, or by effectively **concentrating** them, as in Renton. "It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas.... [T]he **city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems**."[74] (Emphasis supplied)

Zoning and regulatory ordinances that authorize medical marihuana activities under specified circumstances come in a variety of forms, including (by way of example): authorizing medical marihuana activities in specified nonresidential districts; authorizing caregiver activities as a home occupation in residential districts with detailed regulations; requiring a caregiver to obtain use approval for a home occupation in the form of a special land use permit; authorizing medical marihuana dispensaries by zoning use permit, with minimum distance requirements from other dispensaries and from churches, schools, and from residential districts; requiring a permit to engage in the business of performing medical marihuana assessments and certifications; requiring a caregiver premises to be used by a single caregiver, establishing minimum distance requirements between a caregiver and a drug free school zone, and prohibiting marihuana consumption in the location where it is cultivated.

Clearly, ordinances that have been enacted to date, and ordinances likely to be enacted in the foreseeable future, are diverse in policy and objective. The two options expressly noted in *Renton* – disbursement and concentration – have been employed most frequently. A strength of these approaches is that they do not entirely exclude medical marihuana use. They do not generally restrict patient cultivation or use, with the exception of minor requirements such as indoor use, and the like. Subject to obtaining permits, most ordinances allow caregiver activity in some location(s) of the community.

a. Disbursement Ordinances

[74] *Renton,* at p 52,

Because the fundamental intent of the Act is to create a *private and confidential patient-caregiver relationship to facilitate the lawful cultivation, distribution, and use of marihuana strictly for medical purposes,* and considering that a concentration of medical marihuana activity has been seen to be the cause of serious secondary effects, ordinances establishing limitations on such concentrations are rationally related to the achievement of legitimate police power objectives. The experience in California would suggest that the concentration issue applies to cultivation (large cultivations are more closely associated with unlawful activity), distribution, as well as use. To the extent that the experiences and reports are transferable to this subject matter, the same concentration/secondary effects model that was approved in the First Amendment adult entertainment cases should be fully applicable.[75] Accordingly, the effort to control crime and maintain quality of life would be supported by regulations seeking to avoid concentrated activities in cultivation, distribution, as well as use.

Along with other regulations, the essence of the disbursement model focuses on the activity being regulated, e.g., caregiver distribution, and prohibits such activity from being located within a minimum distance of one or more other uses.

For example, a zoning ordinance approach, after defining terms, and specifying the manner of review and approval (such as special land use approval), might provide that:

> 1) *No property at which a caregiver distributes marihuana to a patient shall be situated within 1,000 feet of any other property at which a caregiver distributes marihuana to a patient; and,*
>
> 2) *No property at which a caregiver distributes marihuana to a patient shall be situated within 1,000 feet of any of the following uses:*
>
> a) *A church*
>
> b) *A school, public or private, including pre-school through high school.*
>
> c) *A park*

A regulatory ordinance approach, after defining terms, and specifying the manner of review and approval (such as discretionary review and approval based on appropriate standards), might provide that:

> 1) *The location from which a caregiver grows, cultivates or otherwise provides services to a patient shall not be used by another caregiver.*

[75] See subsection 1.c., above.

2) *The location from which a caregiver provides services to a qualifying patient shall not be within 1,000 feet of a drug-free school zone.*

3) *Cultivation or distribution of marihuana shall not occur in connection with or at a location at which any other commodity, product or service is offered for sale.*

A question that may arise in requiring this type of disbursement relates to the legal basis for permitting cultivation and use of marihuana by a *patient* in a residential zoning district, while concurrently restricting cultivation of marihuana by a caregiver to a nonresidential zoning district. One response to this question is based on the rationale for protecting residential neighborhoods recognized in *Village of Euclid v Ambler Realty Co,*[76] and in many cases since.[77] The activity of a patient within his or her home is distinguishable from a land use standpoint from the significantly more intense activity of up to five patients frequenting the home of a caregiver. A person's private activities are distinct from a broader service use involving others, replete with traffic, noise, and the potential for related secondary effects reported in connection with experiences in California.[78]

There have also been anecdotal reports that suggest that, even when caregiver locations are disbursed, and transactions occur on a one-to-one basis between caregiver and patient, there have been instances of violence. One explanation for this might be interpreted from the reports from California and other drug-related circumstances. It is not new that illegal activity involving the distribution of marihuana has been associated with gangs or organized crime.[79] There have long been indications that violence occurs between gangs or criminal enterprises based on competition over the right to distribute drug products within specified markets of users. Particularly considering that the Act mandates that those engaged in lawful cultivation, distribution and use of medical marihuana must remain anonymous, those involved in criminal enterprise are, like law enforcement, unable to distinguish between lawful transactions and those representing competition within the unlawful market. This, in turn, creates the potential for violence: lawful distribution of medical marihuana by individual caregivers may merely represent the basis for a "turf-battle" for those who perceive the caregivers as "competition" in the marketplace. This would seem to be inherent in a system with a parallel classification of activities relating to marihuana, where there are criminal elements acting side-by-side with those under the shield of the Act – particularly considering that the Act mandates that those engaged in lawful cultivation, distribution, and use of medical marihuana must remain anonymous.

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[76] 272 U.S. 365; 47 S.Ct. 114; 71 L.Ed. 303 (1926).

[77] *See, e.g., Greater Bible Way Temple v City of Jackson,* 478 Mich. 373, 403-404, 733 N.W.2d 734 (2007) (the use of zoning to protect a residential neighborhood is considered to be a compelling government interest).

[78] See text accompanying footnotes 12 and 13, above.

[79] See, e.g., Subsection 2) iv. of this report, taken from a California Police Chiefs' White Paper.

b. Concentration Ordinances

A concentration ordinance contemplates the authorization of a targeted activity, e.g., caregiver distribution, in concentrated proportions within a relatively confined area. This regulatory action would theoretically result in a greater degree of serious secondary effects. However, if the regulatory action is combined with the off-setting assignment of more law enforcement personnel and resources to the confined area, the conceptual end-result is a *management* of the secondary effects within the relatively small area by increased patrol.

Ordinances compelling the concentration of marihuana activities may be designed in a variety of ways. One model would expressly permit the respective activity in a particular zoning district, or specified portion of a zoning district based upon performance or related standards. Another model, fashioned after the *Renton* ordinance, would require the targeted marihuana activity to be situated a minimum distance from, say, any dwelling, church, park, or school – and thus indirectly restrict the use to a concentrated area.

Similar to the disbursement model, a concentration ordinance would generally specify various other regulations applicable to the particular use in question, e.g., caregiver distribution, and prohibit such activity from being located within a minimum distance of other specified uses. For comparison to the disbursement zoning ordinance example highlighted above, the concentration model may define terms, and specify the manner of review and approval (such as special land use approval), and provide that:

> *No property at which a caregiver distributes marihuana to a patient shall be situated within 1,000 feet of any of the following uses:*
>
> *a) A church*
>
> *b) A school, public or private, including pre-school through high school.*
>
> *c) A park*
>
> *d) A single family or multi-family zoning district*

Considering that the residential zoning districts of a community generally represent the bulk of the area on the zoning map, adding the minimum distance requirement from residential districts has a significant concentrating effect. The concentration could become more confining by restricting the targeted activity to a single zoning district, e.g., office or commercial; or even more focused by restricting the activity to a particular area within a district, e.g., property on which medical offices would be permitted.

In the use of the concentration approach, some communities have found it to be consistent with their respective policies to authorize a "dispensary" within the targeted area. This and similar terms have been employed in the regulations of other states. For example, in the City of Boulder, Colorado, there is an authorization for "medical marijuana (sic) business," and in Rhode Island there are "compassion centers."[80] The Michigan Act limits caregivers to the service of five patients, and a reading of the statute as a whole paints a picture of a private and confidential relationship between caregiver and patient. There is no authorization for "marihuana stores," "dispensaries," "compassion centers," or "medical marihuana business" that may market to a wide customer base.[81] Thus, it would seem that there is a legitimate question whether ordinances should permit such facilities, particularly in light of the experience in California that strongly points to the conclusion that such facilities lead to serious crime and to the downgrade of areas in which they are situated. Nonetheless, some communities may decide that a "concentration" policy that permits this type of activity would be appropriate.[82]

If and to the extent such terms are employed, it is of great importance to provide definitions of the terms within the ordinance. Moreover, in light of the fact that such terms are used in other states, it would be worthy of consideration to select and define an entirely different term for the intended activity, to apply in those instances where a community desires to authorize or expressly prohibit the activity.

3. Home Occupation Ordinances

Home occupation ordinances can be tailored to apply to the products and services of a caregiver, and prohibit caregiver activities in other zoning districts. In a very real sense, such ordinances recognize the fundamental intent of the

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[80] *Medical marijuana business* means any patient that cultivates, produces, sells, distributes, possesses, transports or makes available marijuana in any form to another patient or to a primary caregiver for medical use, or a primary caregiver that cultivates, produces, sells, distributes, possesses, transports or makes available medical marijuana in any form to more than one patient. Possession of more than six marijuana plants and two ounces of a usable form of marijuana by a patient or primary caregiver shall be considered a medical marijuana business. The term *medical marijuana business* shall include a medical marijuana production facility. The term *medical marijuana business* shall not include the private possession, production, distribution and medical use of marijuana by an individual patient or an individual caregiver for one patient in the residence of the patient or caregiver to the extent permitted by Article XVIII, Section 14 of the Colorado Constitution and any other applicable state law or regulation. Medical Marijuana Local Licensing Authority means the city manager. The city manager shall be the local licensing authority for the purpose of any state law that requires the city to designate a local licensing authority. Also see footnote 21, above.

[81] See footnote 11, above.

[82] See footnote 21, and accompanying text on pages 15-16, above, for additional discussion on this issue. A community could attempt to allow a concentration of caregivers, but restrict them to distributing medical marihuana only to the patients who have formally registered them as their caregiver, recognizing that this would be very challenging to enforce.

Act. That is, by restricting the activity to residential districts, these ordinances implicitly carve out space fit for a *private and confidential patient-caregiver relationship to facilitate the lawful cultivation, distribution, and use of marihuana strictly for medical purposes.*

For a specified purpose unrelated to this report, the Zoning Enabling Act *requires* the authorization of a home occupation in a single family residence.[83] Most communities permit other home occupations for various uses that are not deemed to be inconsistent with the preservation of a residential zoning district. Key among the regulations generally applicable to home occupations would include restrictions on: signage; traffic and parking; visits by customers; amount of space allocated to the use; who may conduct the use (generally, the requirement that the use be accessory to the use of the premises for residential purposes by the owner of the business); and, hours of occupation.

A home occupation for caregiver use may also have provisions for: a minimum distance from specified places frequented by children; restriction upon number of caregivers per residence; restriction upon the number of patients that may be served at the residence; requirement for code inspections.

At least one ordinance requires business licensure in addition to meeting the home occupation requirements of the ordinance, thus permitting a process for suspension and revocation in the event of violation.

4. Sample Licensing and Regulation Ordinance Concept

Licensing and regulation is uniformly permitted in all communities. An important consideration that favors this type of approach relates to the absence of strict nonconforming use rights. Under the Zoning Enabling Act,[84] once improvements are established for a particular use based on a zoning approval, the property owner can claim to have a "vested right" in such use.[85] While the Constitution does not permit a decision under a regulatory ordinance to cause a "taking" of private property rights, the statutory nonconforming use rule does not strictly apply.[86]

The ordinances enacted to date have generally addressed serious issues consistent with local policy. The sample licensing and regulation ordinance set out in Appendix 1 has been prepared with a general disbursement format, together with

[83] MCL 125.3204 provides : "A zoning ordinance adopted under this act shall provide for the use of a single-family residence by an occupant of that residence for a home occupation to give instruction in a craft or fine art within the residence. This section does not prohibit the regulation of noise, advertising, traffic, hours of operation, or other conditions that may accompany the use of a residence under this section."
[84] MCL 125.3208
[85] *Heath Township v Sall,* 442 Mich. 434, 502 N.W.2d 627 (1993).
[86] *Norton Shores v Carr,* 81 Mich.App. 715, 265 N.W.2d 802 (1978).

provisions calculated to afford greater protection, efficiency, and capability for law enforcement by requiring information about sites used for caregiver cultivation and distribution activities, and requiring inspections of facilities used for cultivation. While some communities have focused on these issues, it would appear that further emphasis might be worth considering in order to meet head-on the point that, in the absence of local regulation, law and code enforcement may be unfairly and dangerously restricted under the terms of the Act. There are several deficiencies in this regard, including the following:

a. Law enforcement officers do not have access to information disclosing locations at which lawful cultivation and distribution is occurring. Officers will thus have a more difficult challenge in attempting to distinguish lawful activities permitted under the Act from unlawful ones; this, in turn, may endanger law enforcement officers and members of the public when confrontations occur, and will certainly lead to unnecessary investigatory inefficiencies. Although law enforcement is expressly precluded under the Act from access to names and addresses of patients and caregivers, securing the identification of the *locations* where marihuana cultivation and distribution has been permitted under the Act by caregivers would undoubtedly represent important assistance to law enforcement.

b. The same lack of information will prevent law enforcement from gaining an understanding with regard to the connection between a caregiver and particular patients (without regard to specific name and address), especially if caregivers operate in the same facility or in close proximity. How will the five-patient limit upon a person acting as a caregiver be enforced as a practical matter? Again, securing the identification of the *locations* where marihuana cultivation and distribution is lawful would be helpful in the enforcement of the Act.

c. The same location information would be indispensable in the enforcement of the Act's limits on the number of plants a caregiver may cultivate on behalf of patients.

d. Given the prohibition upon the disclosure of the name and address of caregivers, and the right of these individuals to cultivate up to sixty marihuana plants, discovering, much less preventing, dangerous plumbing and electrical installations which are unlawful under applicable construction codes is not feasible. In the interest of health and safety, it be would be helpful, and consistent with nearly all other situations, to require inspection of a premises at which substantial facilities are installed to facilitate the cultivation of marihuana plants for others, including plumbing and electrical facilities.

A detailed sample concept of a licensing and regulation ordinance is presented for consideration in Appendix 1 of this report. Following is a general outline of the sample ordinance:

1. Intent

2. Definitions

3. Requirement for license

    a. The restrictions in this section are based on the following findings:

    b. Licensure requirements:

4. Restriction on Distribution

    a. The restrictions in this section are based on the following findings:

    b. Restrictions:

5. Inspection of Patient Cultivation

6. Penalty for Violation

7. No Vested Rights

8. Severance Clause

As in all areas of regulation in general, there is no "one size fits all" ordinance. The alternative set forth in attached Appendix 1 may provide ideas that could be considered by communities in their existing or future ordinances, with the caveat that provisions must be fashioned to fit each respective community taking into account such things as administration, existing ordinance format, community priorities, and the like. Moreover, it is not suggested that any of the provisions in this sample should be expected to escape challenge.

D. State Declaratory Judgment Action

Once an ordinance regulating caregivers has been enacted by a community, there will be two alternative scenarios that could unfold: One would be for the community to wait for a legal challenge to be initiated, and defend the suit; the other alternative would be for the community – prior to restricting rights, incurring the inevitable costs of administration, and before the initiation of suit by parties claiming to be aggrieved by the ordinance – to explore whether it would be appropriate to initiate a state court declaratory judgment action.

It has recently been reiterated that,

> The purpose of a declaratory judgment is to enable the parties to obtain adjudication of rights before an actual injury occurs.... The plaintiff in a

> declaratory judgment action bears the burden of establishing the existence of an actual controversy, as well as the burden of showing that ... it has actually been injured or that the threat of imminent injury exists.[87]

Of course, circumstances and stakes will be different among communities. However, particularly if there are several communities that have common issues that could be presented to a court in conformance with the legitimate purposes of the declaratory judgment remedy, a public purpose could be served by an adjudication of rights for the benefit of all concerned. In such circumstances, it is recommended that the availability and propriety of a state declaratory judgment action be investigated.

E. The Enactment of Moratoria

Many communities have enacted, or may enact, moratoria on activities related to the Act. The nature and purpose of a moratorium on specified land use activity within a community has been described as follows:

> As a **legitimate public purpose for police power regulation of the use of land**, courts have held that interim zoning and building moratoria serve to effectuate the purposes of zoning enabling acts by **maintaining the land use status quo within a community pending final adoption** of a proposed zoning plan or zoning change. Interim zoning or building moratoria, by freezing land uses within an area, prevent the "race for diligence" leading to acquisition of "vested rights" and establishment of "nonconforming uses" that might otherwise be inconsistent with land uses permitted under a proposed zoning plan or zoning change. Maintenance of the status quo pending final adoption of a zoning plan or zoning change has been held to support, for example, moratoria on specific land uses that were the subject of pending zoning changes. This same rationale has been relied on by courts to uphold zoning moratoria pending adoption or revision of comprehensive zoning plans.[88]

1. Legal Basis

In Michigan, *Central Advertising Co v St. Joseph Township*[89] includes the following relevant language addressing a deferral in processing approvals within the zoning context:

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[87] *Wolf v. Detroit*, 287 Mich.App. 184, --- N.W.2d ---- (2010).

[88] 1 Rathkopf's The Law of Zoning and Planning § 13:8 (4th ed.) Maintenance of status quo pending decision.

[89] 125 Mich App 548, 554-555 (1983).

> Plaintiff additionally claims that the trial court should have granted an injunction forcing defendant to issue the permit based on a combination of factors. First, the court had invalidated defendant's off-premises sign ordinance. Second, plaintiff had filed an application for a permit. Third, defendant, approximately one week later, adopted a moratorium, which would last until they had adopted a new ordinance with respect to off-premises signs, against the issuance of permits. . . . defendant's failure during this time to issue the sign permit within 30 days after plaintiff had filed an application would ordinarily result in the application's being deemed approved based on defendant's ordinance. However, defendant's adoption of the moratorium would alleviate the problem. Although moratoria are not regarded favorably by the courts, this moratorium was to last only until a new ordinance relating to off-premises signs was adopted and presented to the court. . . . With these considerations in mind, we do not find that the trial court's decision not to issue an injunction mandating that defendant issue the permit was erroneous.

Similarly, a "moratorium on the issuance of building permits in a particular district of a city for a reasonably limited time" was not voided by the court. *Heritage Hill v Grand Rapids*,[90]. Nor did the Court of Appeals find it to be legally offensive for a township to declare a "brief moratorium on all sewer connections..." *BPA II v Harrison Township*.[91]

One of the most important cases on this subject, in which the fundamental lawfulness of a moratorium was challenged head-on, is the United States Supreme Court decision in *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*.[92] In *Tahoe*, two moratoria were established by an intergovernmental Planning Agency, banning most new development in a specified area from 1981 until 1984, in order to adopt environmental standards and incorporate them into the agency's regional development plan. In the face of a challenge by numerous property owners, the Supreme Court held that such action did not amount to a categorical taking of private property interests. The Court cautioned, however, that government entities should not generally assume that such lengthy moratoria (more than two years) would receive the same favorable treatment.

2. Method of Adoption

For the adoption of a moratorium, two alternative enactment vehicles have most frequently been utilized: resolution or ordinance. On which to employ in a given situation, the McQuillin treatise is instructive:

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[90] 48 Mich App 765, 768 (1973).
[91] 73 Mich App 731, 733-734 (1977). Cf. *Cummins v. Robinson Township*, 283 Mich.App. 677, 770 N.W.2d 421 (2009).
[92] 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002).

> A resolution in effect encompasses all actions of the municipal body other than ordinances. Whether the municipal body should do a particular thing by resolution or ordinance depends on the forms to be observed in doing the thing and on the proper construction of the charter. In this connection it may be observed that a resolution deals with matters of a special or temporary character; an ordinance prescribes some permanent rule of conduct or government, to continue in force until the ordinance is repealed. . . . Thus, it may be stated broadly that all acts that are done by a municipal corporation in its ministerial capacity and for a temporary purpose may be put in the form of resolutions, and that matters on which the municipal corporation desires to legislate must be put in the form of ordinances.[93]

Of course, if a municipal charter requires an ordinance to take action in the nature of a moratorium, this rule would govern. However, it is suggested that if a community anticipates the enactment of moratoria on a regular basis, thought should be given to establishing an ordinance procedure for such purpose. On the other hand, if putting a moratorium into place in the present context is expected to be a rarely used exercise, perhaps action by resolution would suffice. If time is available, and if all other things are equal, it is recommended here that the use of an ordinance should be considered.

If an ordinance is utilized, an expected question would be whether there must be compliance with the more rigorous ordinance adoption procedure prescribed in the Zoning Enabling Act. On this question, no authority was found. Generally speaking, however, the character of the action being taken in the establishment of a moratorium relates to the administration and effect of ordinances; the action only *enables* the establishment of land use policy. Therefore, the use of the regulatory ordinance enactment process should suffice.

When a moratorium is established, a property owner may claim, as in the *Tahoe* case, that its effect results in a regulatory taking of private property, that it violates due process, or that it amounts to an abuse of discretion. In order to reduce the likelihood of such an adverse judgment against the community, it is recommended that the enacting ordinance or resolution contain an administrative process permitting a claim, to be considered based upon notice and hearing, describing and substantiating that the moratorium results in the violation being alleged. The administrative process should also include the opportunity on the part of the legislative body to cure the violation and fashion relief under the circumstances in the event it determines that, absent relief, a violation will result.

[93] McQuillin, The Law of Municipal Corporations, §15.2

VII. CONCLUSION

An approved initiative ballot has put into place Michigan's "medical marihuana" law. This law creates a defined medical use exception to the general policy that treats activities involving marihuana as criminal acts.

Clearly the new law is a challenge for local governments. However, each community must determine whether it needs to make a regulatory response to the new Michigan Act. This determination will ultimately be made based on deliberations that take into consideration the community's policies and unique circumstances. As noted above, a federal declaratory judgment action may be considered for the purpose of determining whether the Supremacy Clause of the United States Constitution should apply to invalidate Michigan's authorization. In the legislative forum, it appears that many will encourage the Michigan Legislature to make certain adjustments that would render the Act more workable for local government.

In all events, it must be recognized that the vote to approve the Michigan Act represents an expression of the opinion that the restricted use of medical marihuana should be permitted for the purpose of helping to ease chronic pain being suffered by citizens in this state due to certain debilitating diseases. Based on such recognition, this report has focused on the means of permitting the fundamental intent of the Act to be carried out, while simultaneously examining the task of local government in the protection of the public health, safety, and welfare from the ills that are now very predictable.

The Michigan Act creates a parallel system in which the same conduct – cultivation, distribution, and use of marihuana – is at once lawful and unlawful depending on whether the engaged persons have ID Cards. In creating this parallel system, the Act throws a proverbial curveball to local government by mandating that the identity and address of those having ID Cards not be disclosed – even to law enforcement. Looking to the experiences in California, and to local anecdotal experiences in the short time following approval of the Michigan Act, this report has detailed adverse effects of the parallel system. The challenge presented to local government is determining how to most effectively represent the health, safety, and welfare interests of the public, while permitting the implementation of the fundamental intent of the Act, which is the creation of a private and confidential patient-caregiver relationship to facilitate the lawful cultivation, distribution, and use of marihuana strictly for medical purposes.

Many communities perceive the need to respond with local regulation to address certain provisions and omissions of the Act. This report has described some of these diverse regulatory responses, and has provided a review with regard to several of the foreseeable legal arguments associated with such responses. By early to mid-2011, many communities will have local regulations in place. Some proponents of the Act will resist regulatory interference, and litigation will undoubtedly ensue, and thus widespread litigation appears to be in the making. In addition, as a result of criminal prosecutions anticipated to arise due to the confusion within the statute, the liberty of many is likely to

be jeopardized. We could be in for a long slog. The *Redden* concurrence aptly characterized this as the prospect of piecemeal litigation, "leaving defendants, prosecutors, law enforcement, entrepreneurs, cities, municipalities, townships, and others in a state of confusion for a very, very long time."[94] Moreover, in such litigation, it is unlikely that the judicial system will produce results that might be characterized as "victorious" in any sort of broad sense. With the number of people on each of the respective sides, a "win" in a typical court battle will mean a loss to many – all at great expense. Given this set of circumstances, this report will conclude with a recommendation.

It is unfortunate indeed that, in the current economic climate, significant time and resources will be devoted to emotional court battles that have a low probability of producing a comprehensive and lasting solution, and that many unsuspecting criminal defendants will have been caught in the statute's web of uncertainty. This state of affairs provides a sound basis for the pursuit of negotiated solutions to the gathering legal conflicts. The proponents of medical marihuana could come to the bargaining table with legitimate evidence that a sufficient proportion of the public is in support of a defined use of medical marihuana. Local government could come to the table with equally good evidence that the system devised by the Michigan Act compels local regulation in order to avoid serious problems, including an increase in crime, unnecessary adverse impact on children, and safe and effective law enforcement.

In the interest of the state's population at large, it is suggested that the best solution would be to replace the existing statute, and have all sides work with the State Legislature on a statutory arrangement that permits medical marihuana use on relatively narrow terms that would facilitate assistance to those who are truly suffering, and also provide a more organized method of medical marihuana distribution.

There is simply no legitimate reason why the process of negotiation, with all parties at the table in good faith, could not reach a sufficient consensus to avoid most of the litigation that is now very predictable once ordinances are enacted. While neither party should be of the view that its position lacks support, it would be appropriate to make a good faith effort to pursue lasting negotiated solutions that could ultimately be supported by all. A critical step necessary to even commence discussions would be the identification of the key parties, and the willingness on the part of those parties to come to the table. Considering the public interest and geographic breadth of this problem, the magnitude of resources at stake, and the likely adverse impact upon the lives of so many, once ordinances are in place and litigation begins as anticipated, perhaps the Governor could utilize the "bully pulpit" of that office for the purpose seating the appropriate parties at the table. The creation of an *ad hoc* committee by the leadership in the Legislature, with public and private interests represented, could also provide an appropriate a productive forum.

If good faith negotiations are commenced, an attempt should be made to concurrently establish uniform, fair, and non-prejudicial terms for maintaining the status

[94] Slip opinion, p 4.

quo in order permit a reasonable opportunity for negotiations to take place. If negotiations were successful in building a consensus, even on some of the more important issues, this would provide a reasonable basis for optimism that the State Legislature could muster the three-fourths vote needed to amend the Act in a manner consistent with the agreement of the parties.

Respectfully submitted,

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APPENDIX 1

SAMPLE CONCEPT OF LICENSING AND REGULATION ORDINANCE FOR CONSIDERATION

STATE OF MICHIGAN

CITY / VILLAGE / TOWNSHIP OF _____

ORDINANCE TO REGULATE AND LICENSE CERTAIN ASPECTS OF MEDICAL MARIHUANA CULTIVATION, USE AND DISTRIBUTION

1. Intent

It is the intent of this ordinance to give effect to the intent of Initiated Act 1 of 2008, MCL 333.26421, *et seq*, (the Act) as approved by the electors, and not to determine and establish an altered policy with regard to marihuana. The act authorizes a narrow exception to the general rule and state policy that the cultivation, distribution, and use of marihuana amount to criminal acts. It is the further intent of this ordinance to protect the public health, safety, and general welfare of persons and property, and to license certain locations as specified below. It is the further intent of this ordinance to comply with the Act while concurrently attempting to protect the health, safety, and welfare of law enforcement officers and other persons in the community, and also to address and minimize reasonably anticipated secondary effects upon children, other members of the public, and upon significant areas of the community, that would be reasonably expected to occur in the absence of the provisions of this ordinance. This ordinance is designed to recognize the fundamental intent of the Act to allow the creation and maintenance of a private and confidential patient-caregiver relationship to facilitate the statutory authorization for the limited cultivation, distribution, and use of marihuana for medical purposes; and to regulate around this fundamental intent in a manner that does not conflict with the Act so as to address issues that would otherwise expose the community and its residents to significant adverse conditions, including the following: adverse and long-term influence on children; substantial serious criminal activity; danger to law enforcement and other members of the public; discouragement and impairment of effective law enforcement with regard to unlawful activity involving the cultivation, distribution, and use of marihuana; the creation of a purportedly lawful commercial enterprise involving the cultivation, distribution, and use of marihuana that is not reasonably susceptible of being distinguished from serious criminal enterprise; and, the uninspected installation of unlawful plumbing and electrical facilities that create dangerous health, safety, and fire conditions.

This ordinance permits authorizations for activity based on the Act. Nothing in this ordinance shall be construed as allowing persons to engage in conduct that endangers others or causes a public nuisance, or to allow use, cultivation, growth, possession or control of marihuana not in strict accordance with the express

authorizations of the Act and this ordinance; and, nothing in this ordinance shall be construed to undermine or provide immunity from federal law as it may be enforced by the federal or state government relative to the cultivation, distribution, or use of marihuana. Thus, the authorization of activity, and the approval of a license under this ordinance shall not have the effect of superseding or nullifying federal law applicable to the cultivation, use, and possession of marihuana, and all applicants and grantees of licenses are on notice that they may be subject to prosecution and civil penalty, including forfeiture of property.

2. Definitions

- *Act* means Initiated Law of 2008, MCL 333.26421, *et seq.,* and Michigan Administrative Rules, R 333.101, *et seq.*
- *Department* means the State of Michigan Department of Community Health
- *Qualifying patient* or *patient* means a person as defined under MCL 333.26423(h) of the Act.
- *Primary caregiver* or *caregiver* means a person as defined under MCL 333. 26423(g) of the Act, and who has been issued and possesses a Registry Identification Card under the Act.
- *Registry Identification Card* means the document defined under MCL 333.26423(i) of the Act.
- *Distribution* means the physical transfer of any amount of marihuana in any form by one person to any other person or persons, whether or not any consideration is paid or received.
- *Distributor* means any person, including but not limited to a caregiver, patient or any other person, who engages in any one or more acts of Distribution.
- *Facility* or *Premises* means one commercial business premises having a separate or independent postal address, one private office premises having a separate or independent postal address, one single family residence having a separate or independent postal address, one apartment unit having a separate or independent postal address, one condominium unit having a separate or independent postal address, or one free-standing industrial building having a separate or independent postal address.
- *Marihuana* means the substance or material defined in section 7106 of the public health code, 1976 PA 368, MCL 333.7106.
- *Principal residence* means the place where a person resides more than half of the calendar year.

3. Requirement for license

c. The restrictions in this section are based on the following findings:

1) Law enforcement officers are required to investigate and pursue prosecution with regard to the *unlawful* cultivation, distribution or consumption of marihuana. Yet, the Act concurrently authorizes as lawful undertakings the same actions by those who meet the terms of the Act Although this places a burden on law enforcement to make a distinction relating to very similar conduct, the Act expressly denies law enforcement officials advanced

access to the identity and location of those authorized to lawfully engage in the cultivation, distribution or consumption of marihuana – critical information needed to distinguish unlawful undertakings from lawful ones, particularly at critical investigatory stages. The experience of law enforcement dictates that the presence of significant quantities of unlawful controlled substances are often accompanied by large quantities of cash, and by weapons used to protect the controlled substances and cash. Thus, confrontations between law enforcement and persons engaged in unlawful drug enterprises can be extremely dangerous, and there is a need to use the element of surprise in order to protect the lives of officers and members of the public. Under the Act, before the occurrence of a direct confrontation between law enforcement and persons engaged in cultivation and distribution of marihuana, law enforcement officers are prevented from securing the information necessary to determine whether such activities are being conducted by persons authorized under the Act or by persons engaged in criminal enterprise. This in turn leads to the condition that, if there is a suspicion that an unlawful enterprise is being perpetrated, officers may need to seek a voluntary entry into premises, and may be met by a weapons-based confrontation without being permitted to utilize the element of surprise. Moreover, if an unlawful enterprise is not involved, substantial resources can easily be expended by law enforcement on a baseless investigation. Accordingly, the licensure of a particular Facility as the site of cultivation and distribution, which need not undermine the privacy and confidentiality of the patient-caregiver relationship, could be critical to law enforcement in order to identify and distinguish sites of lawful activity from sites of unlawful activity.

2) The experience in the State of California, a state that approved the medical use of marihuana more than a decade ago, is that concentrations of marihuana distribution activity lead to the following significant and serious secondary effects:

i. California law enforcement reported in 2009 (White Paper),[95] that nonresidents in pursuit of marihuana, and out of area criminals in search of prey, are commonly encountered just outside marihuana dispensaries, as well as drug-related offenses in the vicinity—like resales of products just obtained inside—since these marihuana centers regularly attract marihuana growers, drug users, and drug traffickers. Sharing just purchased marihuana outside dispensaries also regularly takes place. There

[95] See:
http://www.californiapolicechiefs.org/nav_files/marijuana_files/files/MarijuanaDispensariesWhitePaper_042209.pdf

have been increased incidents of crime including murder and armed robbery.

ii. In a 2009 California law enforcement presentation (Power Point),[96] referring again to the existence of a concentration of distribution activities, the Los Angeles Police Department reported:
(1) 200% increase in robberies,
(6) 52.2% increase in burglaries,
(7) 57.1% rise in aggravated assaults,
(8) 130.8% rise in burglaries from autos near cannabis clubs in Los Angeles.
(9) Use of armed gang members as armed "security guards"

iii. California law enforcement reported in 2009 (White Paper) that the dispensaries or "pot clubs" are often used as a front by organized crime gangs to traffic in drugs and launder money.

iv. California law enforcement reported in 2009 (White Paper) that besides fueling marihuana dispensaries, some monetary proceeds from the sale of harvested marihuana derived from plants grown inside houses are being used by organized crime syndicates to fund other legitimate businesses for profit and the laundering of money, and to conduct illegal business operations like prostitution, extortion, and drug trafficking.

v. California law enforcement reported in 2009 (White Paper) that other adverse secondary impacts from the operation of marihuana dispensaries include street dealers lurking about dispensaries to offer a lower price for marihuana to arriving patrons; marihuana smoking in public and in front of children in the vicinity of dispensaries; loitering and nuisances; acquiring marihuana and/or money by means of robbery of patrons going to or leaving dispensaries; an increase in burglaries at or near dispensaries; a loss of trade for other commercial businesses located near dispensaries.

3) Secondary effects with regard to children: Presumably it is agreed that children should not be encouraged by example to undertake uses and activities which are unlawful. However, considering that marihuana possession and use is a generally prohibited criminal activity, but the Act authorizes an undisclosed group of individuals to possess and use marihuana, and because children are not

[96] See:
http://www.californiapolicechiefs.org/nav_files/marijuana_files/files/DispensarySummitPresentation.ppt

capable of making distinctions between lawful and unlawful use and possession by individuals based upon the intricacies of the Act, there is a need to insulate children from the narrowly permitted use and possession activity permitted under the Act. California law enforcement reported in 2009 (White Paper) that minors exposed to marihuana at dispensaries or residences where marihuana plants are grown may be subtly influenced to regard it as a generally legal drug, and inclined to sample it.

4) The Act requires that information concerning identity and location of caregivers is to be confidential, and that caregivers authorized under the Act are not to be punished. However, the Act does not expressly or implicitly specify an intent to pre-empt all local enforcement efforts. Analogously, persons performing in adult entertainment have been held to be engaged in activity involving free expression, protected under the First Amendment, and thus direct local regulation that restricts such activity has been deemed to be prohibited content restriction of free speech. Nonetheless, where it can be shown that there are adverse secondary effects that result from the concentration of adult entertainment establishments (and other related adult uses), including criminal activity closely associated with that reported above in connection with concentrations of medical marihuana Distribution, reasonable regulation, and requirements for the disbursement of locations of adult entertainment uses have been permitted under the First Amendment, and have been authorized in order to mitigate against the secondary effects.

5) Considering the reports from California, and based upon the limited experience already reported in Michigan, it is found that there is a rational basis for concern that a concentration of Distribution activities, conduct that would be criminal outside the narrow exception provided in the Act, will have adverse secondary effects, particularly where law enforcement personnel have no information-base to distinguish lawful from unlawful activities at the scene of such activities. Therefore, it is the intent of this ordinance to regulate and disburse Distribution activities in order to mitigate the reasonably anticipated adverse secondary effects.

6) Local regulation of Distribution activities is implicitly contemplated under the Act in view of the glaring gaps opened by the terms of the Act which would, absent local regulation, render it impossible for law enforcement to investigate and pursue criminal activity not protected by the Act. By way of example:

   i. While the Act limits a caregiver from distributing marihuana to more than five patients, because the Act withholds direct advanced information that would allow a connection to be made by law enforcement between a caregiver and particular patients (without regard to specific name and address), especially if caregivers operate in the same

facility or in close proximity, the five-patient limit upon a person acting as a caregiver would be practically impossible to investigate or enforce.

ii. While the Act limits the number of plants a caregiver may cultivate on behalf of patients, because the Act withholds direct advanced information that would allow a connection to be made by law enforcement between a caregiver and particular grow locations, the limitation on the number of plants cultivated at multiple sites would be practically impossible to investigate and enforce.

7) The inability of law enforcement officials to access relevant and often critical information concerning those cultivating, distributing and consuming marihuana amounts to a material barrier to the effective investigation/enforcement model. Without critical information to distinguish those operating under the Act from those engaged in illegal trafficking, law enforcement is impeded in the effort of undertaking adequate operational planning, and this, in turn, exposes law enforcement, and innocent third parties, to substantial and unnecessary risks.

8) Absent the requirement for an application and inspection of a premises at which substantial facilities have been installed to facilitate the cultivation of marihuana plants, including plumbing and electrical inspections, there have been reports that unauthorized installations relating to the cultivation of marihuana plants have been made, including unauthorized power lines that by-pass meters. These installations create a threat to public safety, and result in a fire risk.

9) The fundamental intent of the Act is the creation of a *private and confidential patient-caregiver relationship to facilitate the lawful cultivation, distribution, and use of marihuana strictly for medical purposes.*

10) It is the intent of this ordinance that the requirements for licensure shall be administered by law enforcement, and that the information acquired by law enforcement shall be deemed *per se* confidential, and not subject to public disclosure by law enforcement, by FOIA or otherwise.

(11) The requirement to identify sites at which marihuana is cultivated for and distributed to others, while not requiring idenification of names and addresses of caregivers, is not in conflict with the terms of the act, and is deemed to be the minimum requirement necessary in order to protect the public and permit safe and effective enforcement of the act and the general laws relating to marihuana. To the extent that such identification impacts upon confidentiality, such confidentiality must be strictly construed as an exception to the general criminality of marihuana cultivation,

distribution, and use, and must be weighed in relation to impacts upon the health, safety, and welfare of the general public at large and the feasibility of enforcing applicable law in the absence of site identification. It is found that the adverse effects of identifying and disclosing such sites to law enforcement officials is minimal in relation to the severe and certain adverse effects upon a significantly greater number of people and the rule of law if such site identification and disclosure to law enforcement were not required.

b. Licensure requirements:

1) The cultivation of marihuana by a caregiver or any other person permitted under the Act, and the provision of caregiver services relating to medical marihuana use, shall be permitted in accordance with the Act. No cultivation, distribution, and other assistance to patients shall be lawful in this community at a location unless and until such location for such cultivation, distribution, and assistance shall have been licensed under this ordinance. Licensure shall be subject to and in accordance with the following:

a) The location of a Facility used for the cultivation of marihuana by caregivers or by other persons permitted under the Act;

b) The location of a Facility used for distribution;

c) The location of a Facility used to provide any other assistance to patients by caregivers or any other person permitted under the Act relating to medical marihuana;

d) By way of exception, it is not the intent of this ordinance to require a license for the principal residence of a patient where marihuana is cultivated or used exclusively for such patient's personal consumption, however, a location other than a patient's principal residence where a patient cultivates or uses marihuana shall be subject to the licensure requirements of this ordinance.

2) Application for license

a) The requirement of this ordinance is to license a location, and not to license persons. A confidential application for a license under this section shall be submitted to the person designated as the medical marihuana officer of the city/village/township/county police department, and shall conform to the following specifications. An application shall:

i. Not require the name, home address, or date of birth of a patient or caregiver.

ii. Include the address and legal description of the precise premises, other than a patient's principal residence, at which there shall be possession, cultivation, distribution or other assistance in the use of marihuana. The fact that a caregiver or other person providing assistance to patients also has an ID Card as a patient shall not relieve the obligation to provide this information.

iii. Specify the name and address of the place where all unused portions of marihuana plants cultivated in connection with the use of marihuana or caregiver activity at the premises shall be disposed.

iv. Describe the enclosed, locked facility in which any and all cultivation of marihuana is proposed to occur, or where marihuana is stored, with such description including: location in building; precise measurements in feet, of the floor dimensions and height; the security device for the facility.

v. Describe all locations in the premises where a caregiver or other person authorized under the Act shall render assistance to a qualifying patient.

vi. Specify the number of patients to be assisted, including the number of patients for whom marihuana is proposed to be cultivated, and the number of patients to be otherwise assisted on the premises, and the maximum number of plants to be grown or cultivated at any one time. If the location at which patients will be assisted is different from the licensed premises, the application shall provide the address of all such other locations (other than the address of a patient being assisted).

vii. For safety and other code inspection purposes, it shall describe and provide detailed specifications of all lights, equipment, and all other electrical, plumbing, and other means proposed to be used to facilitate the cultivation of marihuana plants as such specifications relate to the need for the installation of facilities.

b) Requirements and standards for approval of licensure and for the activity permitted

i. Locations used for the cultivation of marihuana by caregivers and any other person permitted under the Act, and the location used for the provision of assistance to patients by caregivers or any other person authorized under the Act relating to medical marihuana use, including distribution or other assistance, but in all events not including a patient's principal residence which is not used to cultivate marihuana or assist in the use of medical marihuana for persons other than the patient at such residence, shall be prohibited:

- Within 1,000 feet from sites where children are regularly present, and specifically: a daycare facility, a church, synagogue, mosque, or other religious temple, and from a recreational park and a public community center, a public or private pre-school, elementary school, middle school, high school, community college, and all other schools that have different name references but serve students of the same age.[97]
- Within 1,000 feet of an adult use, as defined in this [or the zoning] ordinance [*if applicable*]. (*attach appendix if not stated or incorporated*).
- Within1,000 feet from the site at which any other caregiver or any other person cultivates marihuana, or assists in the use of marihuana, not including a patient's principal residence which is not used to cultivate marihuana or assist in the use of medical marihuana for persons other than the patient at such residence.

Measurements for purposes of this sub-section shall be made from property boundary to property boundary.

ii. The location of the Facility at which a caregiver or any other person permitted under the Act cultivates marihuana, or assists a patient in the use of

[97] *Compare*., MCL 333.7410(2), which provides: (2) An individual 18 years of age or over who violates section 7401(2)(a)(*iv*) by delivering a controlled substance described in schedule 1 or 2 that is either a narcotic drug or described in section 7214(a)(*iv*) to another person on or within 1,000 feet of school property or a library shall be punished, subject to subsection (5), by a term of imprisonment of not less than 2 years or more than 3 times that authorized by section 7401(2)(a)(*iv*) and, in addition, may be punished by a fine of not more than 3 times that authorized by section 7401(2)(a)(*iv*).

marihuana shall not be the same Facility at which any other caregiver or person cultivates marihuana, or assists a patient in the use of marihuana. [98] Accordingly, at a patient's principal residence used by such patient to cultivate marihuana for his or her personal use as permitted under the Act, there shall be not more than twelve marihuana plants being cultivated at any one time; only at a licensed Facility may there be more than twelve marihuana plants being cultivated at any one time; and, at a Facility at which a caregiver or any other person permitted under the Act cultivates marihuana for use by patients, there shall not be more than twelve marihuana plants being cultivated at any one time per patient, and in no event more than sixty marihuana plants being cultivated at any one time (which assumes cultivation for five patients, plus an additional twelve plants if the caregiver is also a patient that has not designated a caregiver to assist in providing medical marihuana).

iii. In order to insulate children and other vulnerable individuals from such actions, all medical marihuana cultivation, and all assistance of a patient in the use of medical marihuana by a caregiver, shall occur within the confines of a building licensed under this section, and such activities shall occur only in locations not visible to the public and adjoining uses, provided, this subsection shall not prohibit a caregiver from assisting a patient at the patient's principal residence or at a hospital.

iv. The electrical and plumbing inspectors (and other inspector(s) within whose expertise an inspection is needed) must, after inspection, provide a report confirming that all lights, plumbing, equipment, and all other means proposed to be used to facilitate the growth or cultivation of marihuana plants is in accordance with applicable code.

v. Considering that the distribution of marihuana is generally unlawful, and that the Act authorizes "caregivers," and does not authorize any activity such as a "dispensary" (authorized by statutes in

[98] Although expressly authorized in certain other states that permit medical marihuana use, the Act does not expressly define or authorize "marihuana stores," "dispensaries," "compassion centers," or "medical marihuana business." While some may argue that the absence of authorization does not, as a matter of law, mean that the use may not be permitted, this sample ordinance is intended to fill any ambiguity in the Act by clarifying that such activity is not permitted.

other states), and reading the Act as a whole, the activities of caregivers are interpreted as being limited to private and confidential endeavors. Moreover, the location and identity of a caregiver is known to patients. Accordingly:

- There shall be no signage identifying a caregiver use or a place at which medical marihuana is distributed.[99]
- Unless conducted as part of a related licensed professional medical or pharmaceutical practice, caregiver activity shall not be advertised as a "clinic," "hospital," "dispensary," or other name customary ascribed to a multi-patient professional practice.[100]

3) An approval of licensure may include reasonable conditions requested in writing by the applicant during the application and review process.

4) Use of land in accordance with approved application

If approved, all use of property shall be in accordance with an approved application, including all information and specifications submitted by the applicant in reliance on which the application shall be deemed to have been approved.

5) A Facility that exists on the effective date of this ordinance must make application for and receive approval to continue to operate; provided, an application shall be filed within fifteen days following the effective date of this ordinance. If an application for licensure under this ordinance is denied due to the minimum distance requirement standards, and a timely application has been filed seeking licensure under this ordinance, such Facility shall have sixty days from the date of application denial to cease operating at the denied site.

4. Restriction on Distribution

a. The restrictions in this section are based on the following findings:

1) The Act was passed by the initiative process. The ballot containing the proposal did not include, and as a practical matter could not have included, the full statute. Thus, electors approved the initiative proposal based upon a reading of a mere summary of

[99] This provision is offered with the caution that it may be confronted by a First Amendment challenge.
[100] This provision is also offered with the caution that it may be confronted by a First Amendment challenge.

the Act. Both the summary and the Act as a whole reflect the intent to a *private and confidential patient-caregiver relationship to facilitate the lawful cultivation, distribution, and use of marihuana strictly for medical purposes, that is,* an authorization for confidential and private use of marihuana by patients, and for confidential and private assistance in such use by caregivers with whom individual patients are connected through the Department's registration process. That is, the Act does not authorize the broad legalization of the cultivation, distribution, or use of marihuana, and a reading that permits such broad legalization is inconsistent with the fundamental intent of the Act read as a whole in context with generally applicable Michigan law. Thus, it would be reasonable to expect and require that all undertakings of caregivers and other persons in assisting a patient are intended to occur on a confidential and private one-to-one basis.

2) The Act does not reflect the intent for distributions of marihuana by more than one caregiver or other person to one patient, or by one or more caregivers or other persons to more than one patient at any given time and place.

3) The confidentiality provisions of the Act reflect the intent for all caregivers and patients to remain anonymous in terms of their name and address, thus further reflecting the private and confidential nature of the activities contemplated between a caregiver and the patient he or she is assisting.

4) In view of the fact that the Act effectively requires law enforcement officers to seek to prevent unlawful cultivation, distribution or consumption of marihuana, while concurrently permitting substantially the same actions by those who meet the terms of the Act, and considering that law enforcement officials are prohibited from having access to important information that could be used to distinguish unlawful and lawful actors, it is deemed necessary by the legislative body of the community to maintain by licensure and restriction an environment that seeks to promote the protection, efficiency, and effectiveness of law enforcement officers and their work performed in connection with the cultivation, distribution or consumption of marihuana.

5) All of the findings stated in subsection 3.a, above, in support of the requirement for licensure are incorporated by reference to this subsection of the ordinance.

b. Restrictions:

1) A caregiver and any other person authorized under the Act to assist patients, if any, shall distribute medical marihuana only on a confidential, one-to-one, basis with no other caregiver being present at the same Facility at the same time, and no other patient or other person being present at the same Facility at the same

time, provided, that a patient's immediate family members or guardian may be present within the patient's private residence, and one family member or guardian may be present in any Facility other than the patient's private residence. For purposes of this subsection, the phrase "same time" shall mean and include concurrently as well as within a time interval of one hour.

2) Considering the health issues presented, no food shall be sold from the facility used for the distribution of medical marihuana.

5. Inspection of Patient Cultivation

Upon the request of a patient who is cultivating medical marihuana, the medical marihuana officer of the community shall confidentially coordinate electrical and plumbing inspectors (and other inspector(s) within whose expertise an inspection is needed) with regard to site of such cultivation for the purpose of determining whether all lights, plumbing, equipment, and all other means used to facilitate the cultivation of marihuana plants is in accordance with applicable code. In carrying out the provisions of this subsection, community officials shall not require the name and address of the patient. Rather, the intent of this subsection is to focus on the premises, and to insure fire, electrical, plumbing, and other safety for the benefit of the resident of the premises and others who may be affected by one or more code violations.

6. Penalty for Violation

Civil Infraction, with penalty of $1,000 (or the maximum permitted by law if less than $1,000) for each violation

In the event of two or more violations, increased civil penalty (if permitted by law), and grounds for revocation, following hearing.

7. No Vested Rights

A property owner shall not have vested rights or nonconforming use rights that would serve as a basis for failing to comply with this ordinance or any amendment of this ordinance.

8. Severance Clause