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Township Law *E-Letter*

PERMISSIBLE LOCAL REGULATION OF RECREATIONAL MARIHUANA IN MICHIGAN

*Initiated Law 1 of 2018, the Michigan Regulation and Taxation of Marihuana Act (“MRTMA”) legalizes the cultivation, possession, and use of marihuana by adults over the age of 21. Essentially, recreational use of marihuana is legalized under state law. Michigan is the first state in the Midwest to legalize recreational use. Unfortunately, the language in the initiated law left several questions unanswered and also contains ambiguous or vague language. The Act specifically empowers LARA to issue rules, but developing those will take some time. Additionally, it provides for a new type of marihuana establishment and even permits LARA to create more rules via the rulemaking process. Whether townships will have expansive or limited regulatory authority is unclear. This **E-Letter** examines the provisions and structure of the MRTMA, differences between the MRTMA and MMFLA, and the potential impact and limits to local regulatory authority.*

THE HAZY MARIHUANA LEGAL LANDSCAPE

Although marihuana remains a Schedule I controlled substance under federal law, the State of Michigan has recognized medical applications of marihuana for nearly a decade and is now the first state in the Midwest to approve recreational use of marihuana. The shift in regulatory treatment of marihuana in Michigan began in 2008, when voter-initiated legislation, entitled the Michigan Medical Marihuana Act (“MMMA”), permitted the use of marihuana for medical purposes. The MMMA allowed registered “patients” with state-approved ID cards to grow and use marihuana or use marihuana supplied by registered “primary caregivers” for medical purposes.

In September 2016, Michigan’s Legislature enacted the Medical Marihuana Facilities Licensing Act (“MMFLA”), scaling medical marihuana to a commercial market. Now, in November 2018, Michigan voters approved the Michigan Regulation and Taxation of Marihuana Act (“MRTMA”), which legalizes the recreational use and possession of marihuana for persons 21 years of age or older. The MRTMA also authorizes the creation of six commercial recreational establishments, expanding the current medical marihuana commercial industry to include recreational marihuana.

The MRTMA poses many challenges for local municipalities. The language and terms used within the MRTMA leave open questions as to how law enforcement will identify individuals over the age of 21 acting outside of the conduct condoned under the Act as well as enforcement and prosecution of such activities. Certain language, including terms and phrases including the Act, do not precisely clarify at this time issues regarding consumption, use, smoking, and the transfer of recreational marihuana. Setting those issues aside, the MRTMA also creates ambiguity in how local municipalities regulate the commercial licenses created under the Act. The MRTMA allows for local municipalities to adopt ordinances regulating such license types, but restrictions stated elsewhere in the Act raise red flags as to what is intended by the

plain language in the Act. The MRTMA also works as an extension of the 2016 MMFLA. For those local municipalities that have opted-in to allowing commercial medical marihuana facilities, the limitations they may place on local recreational marihuana regulation raises further red flags. Many of these issues will not be solved for years as cases trickle through the court system, but local municipalities should at least start considering potential issues.

THE 2018 MRTMA

The voter-initiated MRTMA is designed “to allow under state law the personal possession and use of marihuana by persons 21 years of age or older.” Unlike the MMMA and MMFLA, which defined the term “marihuana” consistent with the public health code, the MRTMA adopted its own, broader definition. Where the public health code referenced only “the plant *Cannabis sativa* L.” the MRTMA broadly included “all parts of the plant of the genus *cannabis*.” Each is broadly defined to include seeds, derivatives, mixtures, and resin. The MRTMA also includes (and thus legally permits the use and possession of) “marihuana concentrate and marihuana-infused products.” Both exclude from their definition mature plant stalks and fiber as well as industrial hemp. The MRTMA additionally excludes “any other ingredient combined with marihuana to prepare topical or oral administrations, food, drink, or other products.” Thus, only the “marihuana” in a “marihuana-infused product” counts as “marihuana” under the MRTMA.

Section 5(2) of the MRTMA provides that the following acts are not unlawful for a person 21 years or older:

- Possessing, using or consuming, purchasing, transporting, or processing 2.5 ounces of marihuana, except that not more than 15 grams may be in the form of marihuana concentrate.
- Storing not more than 10 ounces of marihuana in a person’s residence.
- Storing and cultivating not more than 12 marihuana plants on a person’s premises.
- Giving away up to 2.5 ounces of marihuana to a person 21 years of age or older, provided that the transfer is not publicly advertised.

These activities may not be prohibited or punished within a local jurisdiction. This list of activities is the heart of the MRTMA’s approval to allow recreational use of marihuana for individuals over the age of 21.

a. LARA Has the Obligation to Promulgate Rules Which May Clarify Some of the Ambiguity, But Rules Will Not Be Available for Some Time

As with the MMFLA, the MRTMA leaves much of the responsibility for implementing the new law in the hands of LARA. Section 7 of the MRTMA gives LARA the “powers and duties necessary to control the commercial production and distribution of marihuana.” This includes promulgating the rules necessary to implement, administer and enforce the MRTMA, including:

- Procedures for issuing, renewing, suspending and revoking a state license.
- A schedule of fees to pay the implementation, administration and enforcement costs of the act.
- Qualifications for licensure.
- Requirements and standards for safely cultivating, processing, and distributing marihuana.
- Testing, packing and labeling standards.

- Security requirements for establishments.
- Record keeping requirements.
- Requirements for operating secure transporters.
- Reasonable restrictions on advertising, marketing and displaying marihuana.
- A plan to promote and encourage participation in the marihuana industry by communities that have been disproportionately impacted by marihuana prohibition and enforcement.
- Penalties for failing to comply with the rules established by LARA and the MRTMA.

LARA is also authorized to regulate the cultivation, processing, distribution and sale of industrial hemp.

b. Types of Establishments Under the MRTMA

As far as types of licenses are concerned, the MRTMA provides for six types of “marihuana establishments,” which generally mirror the classifications of marihuana facilities under the MMFLA, with a few key differences.

1. Growers: Like the MMFLA, the MRTMA defines a “grower” as a person licensed to cultivate marihuana and sell or otherwise transfer marihuana to other marihuana establishments. The MRTMA also has classes of growers classified by the number of marihuana plants permitted, but the maximum number of plants varies from the classes established by the MMFLA.

- Class A – Up to 100 plants (Class A growers can have up to 500 plants under the MMFLA).
- Class B – Up to 500 plants (Class B growers can have up to 1,000 plants under the MMFLA).
- Class C – Up to 2,000 plants (Class C growers can have up to 1,500 plants under the MMFLA).

It is unclear what reason underlies this departure from the MMFLA’s classification system, but care should be taken in distinguishing between the similar types of licenses under both acts.

2. Processors: Defined as a person licensed to obtain marihuana from marihuana establishments; process and package marihuana; and sell or otherwise transfer marihuana to marihuana establishments. This license type functions effectively the same as a “processor facility” would under the MMFLA.

3. Secure Transporters: A person licensed to obtain marihuana from marihuana establishments in order to transport marihuana to marihuana establishments. Again, essentially the same as the MMFLA.

4. Retailer: A person licensed to obtain marihuana from marihuana grower establishments and to sell or otherwise transfer marihuana to marihuana establishments and to individuals who are 21 years of age or older. These establishments function similarly to provisioning center facilities under the MMFLA, but where the MMFLA only authorizes sales to registered qualifying patients or primary caregivers, a marihuana retailer establishment operating under the MRTMA may sell to *any* person 21 or older.

5. Safety Compliance Establishment: A person licensed to test marihuana, including certification for potency and the presence of contaminants. This establishment functions in a similar manner as a safety compliance facility under the MMFLA.

6. Microbusiness: A person licensed to cultivate not more than 150 marihuana plants; process and package marihuana; and sell or otherwise transfer marihuana to individuals who are 21 years of age or

older or to a marihuana safety compliance facility, but not to other marihuana establishments. This type of establishment has no equivalent under the MMFLA; it is an entirely new type of license. These microbusinesses will function similarly to a micro-brewery, where the product is grown, processed and sold on-site.

LARA is also authorized to devise additional types or classes of licenses for marihuana-related businesses, so the list of establishments above may be subject to change in the future.

c. Local Municipal Regulation Under the MRTMA

Unlike the MMFLA's opt-in procedure, the MRTMA requires an affirmative act by a municipality to prohibit recreational marihuana establishments. Section 6(1) of the MRTMA establishes that a municipality may completely prohibit or limit the number of establishments within its boundaries.

Section 6(2) of the MRTMA provides that, in addition to prohibiting or limiting the number of establishments within its boundaries, a municipality may also adopt "any other ordinance" addressing recreational marihuana establishments, provided that the ordinance is not "unreasonably impractical" and does not conflict with the MRTMA or any rules promulgated thereunder. The MRTMA defines "Unreasonably impracticable" to mean that "the measures necessary to comply with the rules or ordinances adopted pursuant to this act subject licensees to unreasonable risk or require such a high investment of money, time, or any other resource or asset that a reasonably prudent businessperson would not operate the marihuana establishment." Section 1(u). This definition does not impose any bright line rules, so it is difficult to say at this time whether a given restriction would qualify as "unreasonably impractical."

The MRTMA does not give specific direction as to the provisions to include in a local ordinance, but it does set forth general guidelines for municipal ordinances, providing that such ordinances may:

- "Establish reasonable restrictions on public signs related to marihuana establishments." Section 6(2)(a). It is unclear whether this will enable a municipality to regulate the content of signs; even if authorized under the MRTMA such regulation may nevertheless be unconstitutional.
- "Regulate the time, place, and manner of operation of marihuana establishments and of the production, manufacture, sale, or display of marihuana accessories." Section 6(2)(b). This language is somewhat confusing, as "time, place, and manner" restrictions are typically discussed only in the context of First Amendment issues.
- "Authorize the sale of marihuana for consumption in designated areas that are not accessible to persons under 21 years of age, or at special events in limited areas and for a limited time." Section 6(2)(c). Municipalities could allow for something akin to a "marihuana bar," where participants could consume marihuana on-site.
- "Designate a violation of the ordinance and provide for a penalty for that violation by a marihuana establishment, provided that such violation is a civil infraction and such penalty is a civil fine of not more than \$500." Section 6(2)(d).
- Require marihuana establishments with a physical location within the municipality to obtain a municipal license. Section 6(3).
- Impose an annual fee of not more than \$5,000 to defray application, administrative and enforcement costs within the municipality. Section 6(4).

Notably, municipalities may **not** adopt an ordinance that “restricts the transportation of marihuana through the municipality or **prohibits a marihuana grower, a marihuana processor, and a marihuana retailer** from operating within a single facility or **from operating at a location shared with a marihuana facility operating pursuant to the [MMFLA]**.” Section 6(5) (emphasis added).

If a municipality elects to so limit the number of recreational marihuana establishments, the MRTMA endorses a competitive review process. Section 9(4) states that: “If a municipality limits the number of marihuana establishments that may be licensed in the municipality . . . and that limit prevents the department from issuing a state license to all applicants . . . the municipality shall decide among competing applications by a competitive process intended to select applicants who are best suited to operate in compliance with this act within the municipality.” As with other provisions, there is no guidance as to the scope of the review process, nor what criteria is authorized. On the state level, license ownership is restricted in favor of residents and currently licensed MMFLA operators. Section 9(6). However, there is no requirement that municipalities must favor applicants in this manner.

The MRTMA further provides significant leverage to local residents, however, that has not been previously provided in the context of marihuana regulation. There is a right to petition for adoption of an ordinance either providing for the number of marihuana establishments allowed or completely prohibiting them within the municipality. Section 6(1). This petition must be signed by 5% of the votes cast for governor. If such a petition is successfully made, **an ordinance will be submitted to the voters** at the next regular election. The language in the MRTMA is not clear. Marihuana advocates may argue that this right exists regardless of what action the municipality takes on its own initiative. This may play out in several different ways:

- Where a municipality completely prohibits establishments, individuals may initiate an ordinance that would provide for the number of establishments;
- Where a municipality allows marihuana establishments, individuals may initiate an ordinance to prohibit them entirely;
- Where a municipality allows marihuana establishments, it may be possible for individuals to initiate an ordinance to modify the number of establishments allowed within the municipality.

While it is unsurprising that a voter-initiated law itself provides local residents the ability to implement direct change in their respective jurisdictions, it will create complications for municipalities. The breadth of possible petition options creates continuing uncertainty. With many aspects of recreational establishments under development, a cautious approach is not unwarranted even in friendly environments.

d. Local Municipalities Must Brace for a Significant Change in Excise Tax Distributions

The MRTMA departs again from the MMFLA on the issue of taxation. Section 13(1) provides that an excise tax of 10% will be imposed on marihuana sold by retailers or microbusinesses, replacing the 3% excise tax of the MMFLA. There is also a new process for allocating these funds. Pursuant to Section 14(3), all monies collected under the MRTMA will be distributed as follows:

- Until 2022 or at least the next 2 years, the first \$20 million collected will be used for clinical trials.
- 15% to municipalities with retail or microbusiness establishments, allocated in proportion to the number of retail or microbusiness establishments.
- 15% to counties with retail or microbusiness establishments, allocated in proportion to the number of retail or microbusiness establishments.

- 35% to the school aid fund for K through 12 schools.
- 35% to the State of Michigan for the repair and maintenance of roads and bridges.

Under the MMFLA, the distribution of tax funds was based only on the number of facilities within the municipality, with no consideration to the type of facility. The MRTMA's method of distribution is based solely on retail and microbusinesses. This change is an attempt to have those municipalities that want to share in the revenue to also allow for retail sales facilities. This will require those municipalities that have opted-in and have no retail sales facilities to reconsider approved facilities.

CONCLUSIONS

The MMMA, the MMFLA and the MRTMA create a regulatory framework for the cultivation, testing and distribution of both medical marijuana and recreational marijuana. The passage of the MRTMA creates significant issues for local municipalities. Setting aside the issue of expanding to a recreational market, the issues stem from unclarity in the authority provided to local municipalities to adopt ordinances and the interplay of authorized commercial medical marijuana facilities and the newly created recreational marijuana facilities. The issues create a large amount of ambiguity for local policy makers trying to make the correct decisions.

Many municipalities may choose to take a cautious approach, but that will be further complicated by those municipalities in jurisdictions where the majority approved the MRTMA. The petition right provided to local residents has the potential to create quite the stir as well as trigger litigation as the scope of the right and the scope of an ordinance initiated under that right is clarified through either legislative amendments or court cases. Currently, local municipalities need to be aware of the MRTMA's provisions and its potential impacts. For those local municipalities that have already opted-in to commercial medical marijuana, considerations should be made on how to effectively regulate recreational marijuana or take certain steps to potentially limit expansion. And for those municipalities interested in expanding current commercial licensed facilities to include recreational facilities or to adopt marijuana regulations for the first time, they should consider an appropriate licensing ordinance and zoning ordinance (if the local municipality is a zoned community) that will use all the power permitted by the MRTMA.

-- Christopher Patterson & Matthew Kuschel

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