STATE OF MICHIGAN
MICHIGAN SUPREME COURT
(Appeal from the Michigan Court of Appeals)

JOHN TER BEEK,

Plaintiff/Appellee,

v

CITY OF WYOMING,

Defendant/Appellant

File No. 145816

Court of Appeals File No. 306240
Lower Court File No. 10-11515-CZ

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**MICHIGAN MUNICIPAL LEAGUE**

***AMICUS CURIAE* BRIEF**

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Dated: August 19, 2013

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## STATEMENT OF APPELLATE JURISDICTION

Michigan Municipal League accepts and adopts by reference the City of Wyoming's statement of Appellate Jurisdiction. The Michigan Municipal League states further that this amicus curiae brief is submitted pursuant to MCR 7.306(D)(1) to the extent requested leave may be necessary and is granted and further pursuant to MCR 7.306(D)(2) to the extent the Michigan Municipal League is exempt from seeking leave as an "association representing a political subdivision".

## STATEMENT OF PROCEEDINGS AND FACTS

Michigan Municipal League accepts and adopts by reference the City of Wyoming's statement of material proceedings and facts.

## STATEMENT OF QUESTION

I. **Whether the City of Wyoming's zoning code ordinance, which prohibits any use that is contrary to federal law, state law, or local ordinance, is subject to state preemption by the Michigan Medical Marihuana Act (MMMA), MCL 222.26421 *et seq*.**

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|---|---|
| The Trial Court Answers: | "Not Answered" (decided on other grounds) |
| The Court of Appeals Answers: | "Yes" |
| The Appellant Answers: | "Yes" |
| The Appellee Answers: | "No" |
| The MML as Amicus Curiae Answers: | "No" |

## INTRODUCTION

The Michigan Court of Appeals has determined that the City of Wyoming's Zoning Code, which prohibits unlawful land uses, is "void and unenforceable to the extent that it prohibits the medical use of marijuana in accordance with the MMMA because it is preempted by MCL 333.26424(a)." *Ter Beek v. City of Wyoming*, 297 Mich. App. 446, 457, 823 N.W.2d 864, 870 (2012) *appeal granted*, 493 Mich. 957, 828 N.W.2d 381 (2013). In the same breath, however, the Court of Appeals observed that "**this is not a case in which zoning laws are enacted to regulate in which areas of the city the medical use of marijuana as permitted by the MMMA may be carried out.**" *Id.* at FN 4.

The Court of Appeals cannot have it both ways, municipalities are either preempted from regulating medical marijuana use activities based on the protections afforded under the MMMA or they are not. By its finding that the challenged City of Wyoming Zoning Ordinance *was preempted* by state law, the Court of Appeals' decision in this case fails to leave to any room for local units of government to "carr[y] out" the regulatory control reserved to local units of government. *Id.* The decision by the Court of Appeals is not only internally inconsistent, it is also unsupported by existing statutory authority preserving to local units of government regulatory control of land use within their jurisdictions. The holding in *Ter Beek* has state wide significance to the rights of local communities to regulate land uses under the Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq.* For these and additional reasons more fully explained below, the Michigan Municipal League[1] urges reversal of this decision.

[1] The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 521 Michigan local governments of which 450 are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is

## ARGUMENT

### Standard of Review

The Supreme Court reviews *de novo* whether a trial court properly grants a motion for summary disposition. *First Pub. Corp. v. Parfet*, 468 Mich. 101, 104, 658 N.W.2d 477, 479 (2003). This Court has further observed, "In resolving an issue of statutory interpretation, our primary aim is to effect the intent of the Legislature. We first examine the language of the statute and if it 'is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written.'" *Martin v. Beldean*, 469 Mich. 541, 546, 677 N.W.2d 312, 316 (2004).

### I. The Court of Appeals erred when determining that the City of Wyoming's zoning ordinance prohibiting all illegal land uses was unenforceable against Mr. Terbeek, a qualified medical-marijuana patient who resides within the City of Wyoming, because the city's ordinance is authorized by the Michigan Zoning Enabling Act and is not otherwise preempted by the Michigan Medical Marihuana Act.

In granting the City of Wyoming's application for leave to appeal, this Court requested among the issues to be briefed to include: "whether the defendant city's zoning code ordinance, which prohibits any use that is contrary to federal law, state law, or local ordinance, is subject to state preemption by the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.*"

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to represent the member local governments in litigation of statewide significance. The brief amicus curiae is authorized by the Legal Defense fund's Board of Directors whose membership includes: the president and executive director of the Michigan Municipal League, and the officers and directors of the Michigan Association of Municipal Attorneys: Randall L. Brown, City Attorney, Portage; Lori Grigg Bluhm, City Attorney, Troy; Stephen K. Postema, City Attorney, Ann Arbor; Eric D. Williams, City Attorney, Big Rapids; Clyde J. Robinson, City Attorney, Kalamazoo; James O. Branson, III, City Attorney, Midland; James J. Murray, City Attorney, City of Boyne City and Petoskey; Robert J. Jamo, City Attorney, Menominee, John C. Schrier, City Attorney, Muskegon, Thomas R. Schultz, City Attorney, Farmington and Novi; and William C. Mathewson, General Counsel, Michigan Municipal League.

*Ter Beek v. City of Wyoming*, 493 Mich. 957, 828 N.W.2d 381 (2013). The arguments offered by the Michigan Municipal League will center solely on this question presented.

In this action, Mr. Terbeek, a qualified medical marijuana patient pursuant to MCL 333.26424(a) of the Michigan Medical Marijuana Act, MCL §333.26421, *et seq.* (MMMA), filed a complaint for injunctive relief in the Kent County Circuit Court. In his claim, Mr. Ter Beek sought a court declaration that the City of Wyoming Zoning Ordinance Sec. 90-66 prohibiting *land uses* which are "contrary to federal law, state law or local ordinance" is preempted by the MMMA and is unenforceable as to his activites relating to medical marijuana use. The Court of Appeals determined that the City of Wyoming's zoning regulation, which prohibits illegal land uses, is unenforceable against Mr. John Terbeek because Mr. Terbeek, a City of Wyoming resident, has obtained immunity from what would otherwise be unlawful activity associated with his use and possession of a Schedule I controlled substance, marijuana.

The Court of Appeals determined that a City of Wyoming zoning provision which prohibits, generally, all land uses which are otherwise contrary to law, was in direct conflict with the immunity protections available under Michigan Medical Marijuana Act, MCL 333.26421, *et seq.* (MMMA). *Ter Beek v. City of Wyoming*, 297 Mich. App. 446 (2012) *appeal granted*, 493 Mich. 957, 828 N.W.2d 381 (2013). The Court of Appeals concluded that the City of Wyoming's zoning provision could not be enforced against persons properly registered as patients and caregivers and who are otherwise conducting themselves in compliance with provisions of the MMMA.

The Court of Appeals correctly stated but improperly applied the test for determining whether a local ordinance is in conflict with State law, and as such preempted:

> A city ordinance that purports to prohibit what a state statute permits is void. *Walsh v. City of River Rouge,* 385 Mich. 623, 636, 189 N.W.2d 318

> (1971). "A state statute preempts regulation by an inferior government when the local regulation directly conflicts with the statute or when the statute completely occupies the regulatory field." *USA Cash # 1, Inc. v. City of Saginaw,* 285 Mich.App. 262, 267, 776 N.W.2d 346 (2009). A direct conflict exists between a local regulation and state statute when the local regulation prohibits what the statute permits. *Id.*

*Ter Beek v. City of Wyoming*, 297 Mich. App. at 453, 823 N.W.2d at 868. The Court of Appeals did not go far enough to consider the stated purposes of the Michigan Zoning Enabling Act (MZEA).

1. Public Policy dictates that the MMMA, an Initiated Law passed by the electors of the State of Michigan, be limited to its express terms and not be read to supersede the authority of municipalities to enact and enforce lawful zoning regulations established under the MZEA.

Michigan law provides local units of government broad authority governing the land use. As stated in the Michigan Zoning Enabling Act:

> (1) A local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of 1 or more districts within its zoning jurisdiction which regulate the use of land and structures to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land, to ensure that use of the land is situated in appropriate locations and relationships, to limit the inappropriate overcrowding of land and congestion of population, transportation systems, and other public facilities, to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility requirements, and to promote public health, safety, and welfare.

MCL 125.3201(1)(emphasis added).

The Michigan Constitution requires liberal construction of laws as relating to powers conferred on local units of government,

> **§ 34 Construction of constitution and law concerning counties, townships, cities, villages.**
>
> The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution.

Mich. Const. Art. VII, §34.

Moreover, local units of government clearly have constitutional mandated power to enact laws affecting local concerns:

> **§ 22 Charters, resolutions, ordinances; enumeration of powers.**
>
> Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.

Mich. Const. Art. VII, 22 (emphasis added).

The State Constitution further provides protection to local units of government in the enactment of state laws affecting local concerns by prohibiting the State Legislature, at least without a vote by "two-thirds of the members elected to and serving in each house," from enacting a "local or special act." *Mich. Const. Art. IV, §29*; see also, *Monroe v. Burleson*, 311 Mich. 76, 82, 18 N.W.2d 371, 373 (1945)(finding unconstitutional a state law which granted a right to appeal a criminal conviction entered in a police court "in a city having a population of more than 200,000 . . . but not in a city with a population between 100,000 and 200,000.").

As has been repeatedly observed by this court, municipalities have broad discretion to enact regulations so long as those regulations are not contrary to law or in contravention of sound public policy. *Veldman v. City of Grand Rapids*, 275 Mich. 100, 111, 265 N.W. 790, 794 (1936) ("The judiciary is not charged with supervisory control over the exercise of governmental functions by the city . . ."). Also, as pointedly observed by this Court,

> * * * we deem it expedient to point out again, in terms not susceptible of misconstruction, a fundamental principle: this Court does not sit as a super-zoning commission. Our laws have wisely committed to the people of a community themselves the determination of their municipal destiny, the degree to which the industrial may have precedence over the residential, and the areas carved out of each to be devoted to commercial pursuits. With the wisdom or lack of wisdom of the determination we are not concerned. The people of the community, through their appropriate legislative body, and not the courts, govern its growth and its life. Let us state the proposition as clearly as may be: It is not our function to approve the ordinance before us as to wisdom or desirability. For alleged abuses involving such factors the remedy is the ballot box, not the courts. We do not substitute our judgment for that of the legislative body charged with the duty and responsibility in the premises.

*Robinson v. City of Bloomfield Hills*, 350 Mich. 425, 430-31, 86 N.W.2d 166, 169 (1957) (emphasis added). Michigan is a state within which a multitude of local governing units exist for the protection of "community growth and life." *Id.* It is in this context that any new state law purporting to limit or otherwise preempt such clearly reserved powers must be considered.

The purpose and intent of MMMA is clearly spelled out in its "findings and declarations" as follows:

> Sec. 2. The people of the State of Michigan find and declare that:
>
> (a) Modern medical research, including as found by the National Academy of Sciences' Institute of Medicine in a March 1999 report, has discovered beneficial uses for marihuana in treating or alleviating the pain, nausea, and other symptoms associated with a variety of debilitating medical conditions.

> (b) Data from the Federal Bureau of Investigation Uniform Crime Reports and the Compendium of Federal Justice Statistics show that approximately 99 out of every 100 marihuana arrests in the United States are made under state law, rather than under federal law. Consequently, changing state law will have the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marihuana.
>
> (c) Although federal law currently prohibits any use of marihuana except under very limited circumstances, states are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law. The laws of Alaska, California, Colorado, Hawaii, Maine, Montana, Nevada, New Mexico, Oregon, Vermont, Rhode Island, and Washington do not penalize the medical use and cultivation of marihuana. Michigan joins in this effort for the health and welfare of its citizens.

MCL 333.26422(emphasis). The stated findings and declarations supporting why the MMMA was advanced and ultimately passed by Michigan's voters declare nothing whatsoever regarding land use and the ability of municipalities to control land use through zoning.

As observed in the concurring opinion of Court of Appeals Judge O'Connell, in *People v. Redden*, 290 Mich. App. 65, 98, 799 N.W.2d 184, 202 (2010),

> The MMMA is based on model legislation provided by the Marijuana Policy Project (MPP), a lobbying group based in Washington, D. C, and organized to decriminalize both the medical *and* recreational uses of marijuana. The statutory language of the MMMA was drafted by Karen O'Keefe, the director of state policies at the MPP in Washington, D.C.

*People v. Redden*, 290 Mich. App. 65, 98, 799 N.W.2d 184, 202 (2010)(J. O'Connell, concurring). Considering its genesis, it is not surprising that this initiated law failed to contemplate other provisions of Michigan law, including Michigan's Zoning Enabling Act. As further observed by Judge O'Connell,

> Most legislation either grants rights and privileges to citizens by stating that a person may do a certain activity or it makes certain activity illegal. In either circumstance, the statute affirmatively indicates what an individual may or may not do. The MMMA does the opposite; instead of granting a right or implementing a prohibition, the statute leaves the underlying prohibition of the manufacture, possession, or use of marijuana

> intact and states that individuals meeting certain criteria "shall not be subject to arrest, prosecution, or penalty" for using, possessing, or growing marijuana under specified circumstances. As a result, this state finds itself in the unusual position of having a statute that precludes enforcement, in certain circumstances, of another statute that makes certain activity illegal. Needless to say, this decision to use one statute to undercut the enforceability of another statute, instead of simply redefining the circumstances under which marijuana use and possession are legal in this state, greatly adds to the confusion that surrounds this act.

*People v. Redden*, 290 Mich. App. 65, 136, 799 N.W.2d 184, 224, FN 11 (J. O'Connell concurring). Undeterred by the MMMA's failure to affirmatively establish circumstances under which possession or use of marijuana is permitted, advocates for the expansion of the impact of the MMMA continue to advance new theories by which the MMMA is supposed to infiltrate long standing legal relationships, no matter how well grounded in existing law. See, e.g., *State v. McQueen*, 493 Mich. 135, 141, 828 N.W.2d 644, 647 (2013) (the MMMA "does not authorize a registered qualifying patient to transfer marijuana to another registered qualifying patient.")

In *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428, 437 (6th Cir. 2012), the 6th Circuit Court of Appeals was faced with this very question. Therein, a former employee sued his former company claiming he was wrongfully discharged after he tested positive for marijuana, despite being a registered medical marijuana patient. Concluding that "the MMMA does not impose restrictions on private employers, such as Wal–Mart," the 6th Circuit Court of Appeals further observed:

> We agree with the district court that accepting Plaintiff's public policy interpretation could potentially prohibit any Michigan business from issuing any disciplinary action against a qualifying patient who uses marijuana in accordance with the Act. Such a broad extension of Michigan law would be at odds with the reasonable expectation that such a far-reaching revision of Michigan law would be expressly enacted. Such a broad extension would also run counter to other Michigan statutes that clearly and expressly impose duties on private employers when the duties imposed fundamentally affect the employment relationship. *See, e.g.*, Michigan Elliott–Civil Rights Act of 1976, Mich. Comp. Laws §

> 37.2202(1) ("An employers shall not ... discriminate against an individual with respect to employment ..."); Persons With Disabilities Civil Rights Act of 1976, Mich. Comp. Laws 37.1102(1) ("[A]n employer shall not ... discharge or otherwise discriminate against an individual ... because of a disability ..."); and Michigan's Occupational Safety and Health Act, Mich. Comp. Laws § 4008.1002 ("This act shall apply to all places of employment in the state...."). The MMMA does not include any such language nor does it confer this responsibility upon private employers. We therefore reject Plaintiff's policy argument.

*Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428, 437 (6th Cir. 2012). The *Casias* court observed further,

> * * * that Michigan voters could not have intended such consequences and that accepting Plaintiff's argument would create a new category of protected employees, which would "mark a radical departure from the general rule of at-will employment in Michigan." *Casias,* 764 F.Supp.2d at 922.

*Casias v. Wal-Mart Stores, Inc.*, 695 F.3d at 435. (emphasis added).

Similarly here, when enacting this Initiated law, Michigan voters could not have intended to have made "a radical departure" from the State's express statutory framework reserving to municipalities to ability to zone for all land uses, even land uses which may in one form or another be visited with medical marijuana activities. Moreover, the MMMA, though an Initiated Law, enjoys no superior standing relative to any other law enacted by the legislature because "laws proposed by initiatives are on an equal footing with acts of the Legislature not proposed by the people." *Frey v. Dir. of Dep't of Soc. Servs.*, 162 Mich. App. 586, 600, 413 N.W.2d 54, 61 *aff'd sub nom. Frey v. Dep't of Mgmt. & Budget,* 429 Mich. 315, 414 N.W.2d 873 (1987).

The strong public policy in favor of reserving to local units of government the power to regulate land use was a central consideration in the recent decision by the California Supreme Court. *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 56 Cal. 4th 729, 738, 300 P.3d 494, 496 (2013). In *City of Riverside*, at issue was the voter initiated legislation known as the Compassionate Use Act of 1996, (CUA); Cal. Health & Saf. Code, § 11362.5 and

the Medical Marijuana Program (MMP); Cal. Health & Saf. Code, 11362.7 *et seq.*, which together "adopted limited exceptions to the sanctions of this state's criminal and nuisance laws in cases where marijuana is possessed, cultivated, distributed, and transported for medical purposes." *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 56 Cal. 4th 729, 739, 300 P.3d 494, 497.

In reviewing whether the municipality's zoning enactment, which banned as nuisance land use medical marijuana dispensaries within the city, was preempted by these two California statutes, the California Supreme Court held as follows:

> Nothing in the CUA or the MMP expressly or impliedly limits the inherent authority of a local jurisdiction, by its own ordinances, to regulate the use of its land, including the authority to provide that facilities for the distribution of medical marijuana will not be permitted to operate within its borders. We must therefore reject defendants' preemption argument, and must affirm the judgment of the Court of Appeal.

*City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 56 Cal. 4th 729, 738, 300 P.3d 494, 496. The California Supreme Court observed that,

> "[w]e have been particularly 'reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another.' " (*Big Creek Lumber Co., supra,* 38 Cal.4th 1139, 1149, 45 Cal.Rptr.3d 21, 136 P.3d 821, quoting *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 707, 209 Cal.Rptr. 682, 693 P.2d 261.) " 'The common thread of the cases is that if there is a significant local interest to be served which may differ from one locality to another then the presumption favors the validity of the local ordinance against an attack of state preemption.' " (*Big Creek Lumber Co., supra,* at p. 1149, 45 Cal.Rptr.3d 21, 136 P.3d 821, quoting *Gluck v. County of Los Angeles* (1979) 93 Cal.App.3d 121, 133, 155 Cal.Rptr. 435.)

*City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 56 Cal. 4th 729, 744, 300 P.3d 494, 500. Moreover, the strong public policy in favor of local control over local land use was emphasized repeatedly in *City of Riverside.*

> More fundamentally, we have made clear that a state law does not "authorize" activities, to the exclusion of local bans, simply by exempting those activities from otherwise applicable state prohibitions.

*City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 56 Cal. 4th 729, 758, 300 P.3d 494, 510.

> * * * the MMP merely exempts the cooperative or collective cultivation and distribution of medical marijuana by and to qualified patients and their designated caregivers from prohibitions that would otherwise apply under state law. The state statute does not thereby *mandate* that local governments authorize, allow, or accommodate the existence of such facilities.

*City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 56 Cal. 4th 729, 759, 300 P.3d 494, 510 (emphasis added).

Similarly, Michigan's exemption of qualified medical marijuana patients from prosecution or suffering other penalties based on their "medical use" of marijuana does not "mandate that local governments authorize, allow, or accommodate the existence of such" use activities. *Id. City of Riverside* concluded with the following pointed observation which can equally apply to Michigan's struggle in interpreting the scope of the MMMA:

> * * * the CUA and the MMP are careful and limited forays into the subject of medical marijuana, aimed at striking a delicate balance in an area that remains controversial, and involves sensitivity in federal-state relations. We must take these laws as we find them, and their purposes and provisions are modest. They remove state-level criminal and civil sanctions from specified medical marijuana activities, but they do not establish a comprehensive state system of legalized medical marijuana; or grant a "right" of convenient access to marijuana for medicinal use; or override the zoning, licensing, and police powers of local jurisdictions; or mandate local accommodation of medical marijuana cooperatives, collectives, or dispensaries.

*City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 56 Cal. 4th 729, 762-63, 300 P.3d 494, 513 (emphasis added).

While the *City of Riverside* case is not controlling authority, it is nonetheless captures relevant public policy considerations that simply cannot be ignored by this court when local land use rules are challenged by persons whose personal conduct, though immune from penalty, may need to be accounted for by municipal planners in providing for comprehensive zoning regulations designed to protect the health, safety and welfare of an entire community. *Kyser v. Twp.*, 486 Mich. 514, 541-42, 786 N.W.2d 543, 559.

As recently observed by the Michigan Court of Appeals,

> The MMMA did not legalize the possession, use, or delivery of marijuana. *People v. King,* 291 Mich.App. 503, 508–509, 804 N.W.2d 911 (2011); see also *Redden,* 290 Mich.App. at 92, 799 N.W.2d 184 (O'Connell, P.J., concurring) ("The MMMA does not repeal any drug laws contained in the Public Health Code, and all persons under this state's jurisdiction remain subject to them."). Rather, the MMMA sets forth very limited circumstances in which persons involved with the use of marijuana, and who are thereby violating the PHC, may avoid criminal liability. *King,* 291 Mich.App. at 509, 804 N.W.2d 911; see also *People v. Anderson,* 293 Mich.App. 33, 48–57, 809 N.W.2d 176 (2011) (M.J. Kelly, J.,, concurring).

*State v. McQueen*, 293 Mich. App. 644, 658-59, 811 N.W.2d 513, 522 (2011) *appeal granted*, 491 Mich. 890, 810 N.W.2d 32 (2012) and *aff'd on other grounds*, 493 Mich. 135, 828 N.W.2d 644 (2013)(emphasis added). The "very limited circumstances" exempting one from prosecution or penalty as related to one's medical use of marijuana as defined by the MMMA simply do not include how one may make a principal use of land. To the extent the Court of Appeals holding determines otherwise and preempts from local control land use regulations as may be necessary for a given municipality, the Court of Appeals decision must be reversed.

2. The MMMA contains no express limitation to the power of local governments to regulate land use.

It is undisputed that no provision of the MMMA expressly references the MZEA or otherwise can be read to expressly permit "a use of land" that is otherwise expressly reserved for local units of government to regulate. See, MCL 333.26421 *et seq.* and MCL 125.3407. This is in stark contrast to other provisions of Michigan law which do *expressly* grant exemptions from the force of local unit of government zoning regulations. This principle was also squarely addressed by this Court in *Kyser v. Twp.*, 486 Mich. 514, 542, 786 N.W.2d 543, 559-60 (2010), where it was observed as follows:

> The ZEA also imposes other limitations. For example, there is a provision that limits the regulation of adult foster care facilities and family or group child-care homes. MCL 125.3206. Another provision sets forth a detailed approach to protect and preserve open spaces. MCL 125.3506. There is also a provision that protects agricultural land by allowing for the creation of a development rights ordinance. MCL 125.3507 *et seq.* Notably, **the ZEA specifically excludes areas that the Legislature intended to regulate through other means.** MCL 125.3205(1), for example, explicitly makes local zoning subject to the Electric Transmission Line Certification Act, MCL 460.561 *et seq.* That same provision specifically limits a county or township from regulating or controlling "the drilling, completion, or operation of oil or gas wells or other wells drilled for oil or gas exploration purposes," and also limits them from exercising jurisdiction over "the issuance of permits for the location, drilling, completion, operation, or abandonment of such wells." MCL 125.3205(2). Notably, there are no similar provisions that limit or exempt the exercise of local zoning power over other natural resources, such as gravel.

*Kyser v. Twp.*, 486 Mich. at 542, 786 N.W.2d 543, 559-60 (2010)(emphasis added).

When assessing a local unit of government's general authorization to control for certain land uses "in the context of the whole ZEA," is clear that the legislature provided for exemptions from local zoning in very clear and "explicit" language. *Kyser v. Twp.*, 486 Mich. at 540 and 542, 786 N.W.2d at 559 and 560.

As noted above, adult foster care facilities and group or child-care homes are expressly exempted from general zoning rules as follows:

> (1) Except as otherwise provided in subsection (2), a state licensed residential facility shall be considered a residential use of property for the purposes of zoning and a permitted use in all residential zones and is not subject to a special use or conditional use permit or procedure different from those required for other dwellings of similar density in the same zone.

MCL 125.3206.

The ability of a local unit of government to regulate and provide for "Open space preservation" is expressly curtailed as follows:

> (1) Subject to subsection (4) and section 402, a qualified local unit of government shall provide in its zoning ordinance that land zoned for residential development may be developed, at the option of the landowner, with the same number of dwelling units on a smaller portion of the land than specified in the zoning ordinance, but not more than 50% for a county or township or 80% for a city or village, that could otherwise be developed, as determined by the local unit of government under existing ordinances, laws, and rules on the entire land area, if all of the following apply:
>
> (a) The land is zoned at a density equivalent to 2 or fewer dwelling units per acre or, if the land is served by a public sewer system, 3 or fewer dwelling units per acre.
>
> (b) A percentage of the land area specified in the zoning ordinance, but not less than 50% for a county or township or 20% for a city or village, will remain perpetually in an undeveloped state by means of a conservation easement, plat dedication, restrictive covenant, or other legal means that runs with the land, as prescribed by the zoning ordinance.
>
> (c) The development does not depend upon the extension of a public sewer or public water supply system, unless development of the land without the exercise of the option provided by this subsection would also depend upon the extension.
>
> (d) The option provided under this subsection has not previously been exercised with respect to that land.

MCL 125.3506(1).

In addition, the MZEA affords special protection for agricultural use of land by creating a procedure for local governments to purchase development rights under certain enumerated conditions. MCL 125.3507; 3508 and 3509.

A local unit of government, though granted broad zoning powers, is also expressly limited in planning for land use where "an airport layout plan or airport approach plan has been filed with the local unit of government." MCL 125.3203(2). The local unit of government must give "reasonable consideration" of the "environs of any airport within a district" and "comments received at or before a public hearing . . . from the airport manager." MCL 125.3203(2) and (3).

Similarly, MCL §125.3205(2) expressly prohibits a local unit of government from "regulat[ing] or control[ing] the drilling, completion, or operation of oil or gas wells or other wells drilled for oil or gas exploration purposes and shall not have jurisdiction with reference to the issuance of permits for the location, drilling, completion, operation, or abandonment of such wells."

Further, express limitations to local zoning are recognized in MCL 125.3205 which provides:

> (1) A zoning ordinance is subject to all of the following:
>
> (a) The electric transmission line certification act, 1995 PA 30, MCL 460.561 to 460.575.
>
> (b) The regional transit authority act. [MCL 124.541 *et seq.*]

Additional express exemptions to a local unit of government's ability to zone for particular land uses has also been expressly limited by Michigan's Right to Farm Act.

> Except as otherwise provided in this section, a local unit of government shall not enact, maintain, or enforce an ordinance, regulation, or resolution that conflicts in any manner with this act or generally accepted agricultural and management practices developed under this act.

MCL 286.474.

As observed by the Court of Appeals,

> MCL 286.474(6) expressly provides that "a local unit of government *shall not ... enforce* an ordinance that conflicts in any manner with this act...." (Emphasis added). We cannot imagine any clearer expression of legislative intent. The plain language of the RTFA precludes enforcement of an ordinance that conflicts with the RTFA.

*Charter Twp. of Shelby v. Papesh*, 267 Mich. App. 92, 107, 704 N.W.2d 92, 102 (2005).

Obviously, our state legislature has provided for express exemptions or limitations to the local zoning authority as may be applicable to a variety of land uses. Land uses which are expressly exempt or otherwise limited by the MZEA are clear. Moreover, it is equally apparent that no similar exemption exists for qualified medical marijuana patients to use land in violation of express zoning code provisions, simply because such patients may have been granted immunity from Michigan's other penalty statutes.

This Court has previously come to a similar conclusion in the context of obscenity regulation by municipalities. In *People v. Llewellyn*, 401 Mich. 314, 257 N.W.2d 902 (1977), this Court did conclude that efforts by municipalities to define obscenity and enforce laws based on each municipalities' definition of obscenity was preempted by state law. This Court held, "where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is preempted." *People v. Llewellyn*, 401 Mich. at 323, 257 N.W.2d at 905. However, this Court was also quick to observe that its finding of preemption did not preclude local units from exercising zoning powers:

> Moreover, we do not mean to suggest in this opinion that a municipality is preempted from enacting ordinances outside the field of regulation occupied by the state statutory scheme governing criminal obscenity. For example, there is not the slightest indication that the state Legislature acted in M.C.L.A. s 750.343a *et seq.*; M.S.A. s 28.575(1) *et seq.* to preclude local zoning ordinances governing the location of establishments

> featuring "adult entertainment" such as that recently approved by the United States Supreme Court in *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976).

*People v. Llewellyn*, 401 Mich. at 330-31, 257 N.W.2d at 908 (emphasis added). Accordingly, not unlike *People v Llewellyn*, where there existed "not the slightest indication that the state Legislature" intended to preempt local zoning authority, the City of Wyoming zoning ordinance, as a land use regulation, cannot be invalidated under silent or non-existent provisions of the MMMA applicable to local zoning. *Id.*

It must also be remembered that the MMMA was an Initiated Law enacted on December 4, 2008. See, Michigan Initiated Law 1 of 2008. Initiated laws are expressly authorized by the Michigan Constitution, Article II,§ 9 which provides, in relevant part, as follows:

> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, * * * The power of initiative extends only to laws which the legislature may enact under this constitution. * * * To invoke the initiative or referendum, petitions signed by a number of registered electors, not less than eight percent for initiative and five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required.
>
> * * *
>
> Any law proposed by initiative petition shall be either enacted or rejected by the legislature without change or amendment within 40 session days from the time such petition is received by the legislature. * * *
>
> If the law so proposed is not enacted by the legislature within the 40 days, the state officer authorized by law shall submit such proposed law to the people for approval or rejection at the next general election. The legislature may reject any measure so proposed by initiative petition and propose a different measure upon the same subject by a yea and nay vote upon separate roll calls, and in such event both measures shall be submitted by such state officer to the electors for approval or rejection at the next general election.

Mich. Const. Art. II, §9. (emphasis added). As outlined above, while Initiated laws may certainly be originated by the people of the State of Michigan, the state constitution also provides that the Michigan Legislature may reject or propose different measures upon the same subject matter proposed by any Initiated Law petition.

Here, the Michigan Legislature clearly had the ability to reject or "propose a different measure upon the same subject" as was at issue in Initiated Law 1 of 2008. *Id.* It is "a general rule of statutory construction is that the Legislature is "presumed to know of and legislate in harmony with existing laws". *People v. Cash*, 419 Mich. 230, 241, 351 N.W.2d 822, 826 (1984). Accordingly, notwithstanding the MZEA's clear authority reserved to "localities to plan for, and regulate, a broad array of land uses, taking into consideration the full range of planning concerns that affect the public health, safety, and welfare of the community," the State Legislature chose to offer no "different measure" to exempt or otherwise limit local units of government's zoning authority. *Kyser v. Twp.*, 486 Mich. 514, 541-42, 786 N.W.2d 543, 559 (2010); and Mich. Const. Art. II, § 9. Moreover, since the enactment of the MMMA, nearly 5 years ago, no exemptions have been adopted by the State Legislature within the MZEA to limit its general applicability to regulate land use.[2] Clearly, had the state legislature deemed it necessary to exempt from a municipalities' zoning authority any land use regulations that may touch upon medical use of marijuana, it could have most certainly provided for the same as it has done for a variety of other specially protected land uses.

[2] One amendment of the MMMA was enacted by Public Act 512 of 2012, effective April 1, 2013, which clarified, in part, the "privilege from arrest" as being available to qualifying patients who present a registry card and valid driver's license or government identification. Nothing in this recent Public Act, however, can be read to exempt from local land use regulations persons engaged in medical use of marijuana.

The MMMA does attempt to insulate itself from the impact of other state statutes with the following provision:

> All other acts and parts of acts inconsistent with this act do not apply to the medical use of marihuana as provided for by this act.

MCL 333.26427(e)(emphasis added).

However, "medical use" of marihuana is a limited defined term in the MMMA and no part of the definition set forth in the MMMA can be read to equate medical use[3] with *land use.* MCL 333.26423(f). Accordingly, unlike the enforcement of "Michigan Vehicle Code's zero-tolerance provision, MCL 257.625(8)," found by the Court to be "inconsistent with the MMMA," and therefore superseded by the express terms of the MMMA which protected registered patients' "internal possession" of medical marijuana, there is nothing in the definition of medical use of marijuana which insulates patients from lawfully enacted zoning rules. *People v. Koon*, 494 Mich. 1, 7-9, 832 N.W.2d 724 (2013). The Court of Appeals further appeared to concede this very point when observing in footnote 4 of its opinion: "**this is not a case in which zoning laws are enacted to regulate in which areas of the city the medical use of marijuana as permitted by the MMMA may be carried out.**" *Ter Beek v. City of Wyoming*, 297 Mich. App. at 457, 823 N.W.2d at 870, FN 4. Preemption, however, is not a half-a-loaf proposition. Either a municipality is preempted from regulating within the field occupied by the State or it is not. *People v. Llewellyn*, 401 Mich. 314, 257 N.W.2d 902 (1977). The decision by the Court of Appeals confuses this important distinction and if left unaddressed by this Court threatens all municipalities in Michigan in the exercise of their constitutionally and statutorily reserved

[3] "Medical use" means the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition. MCL 333.26423(f).

powers. The plain language of the MMMA must be afforded no more than "equal footing" to the MZEA's clear empowerment of municipalities to control for local land uses. *Frey v. Dir. of Dep't of Soc. Servs.*, 162 Mich. App. at 600, 413 N.W.2d at 61.

3. The Court of Appeals erred in failing to employ the proper analysis when a city zoning rule is challenged as a prohibited exclusionary zoning rule.

The Court of Appeals observed that MCL 125.3407 of the MZEA could allow the City of Wyoming to seek enforcement of its ordinance by possible "injunctive relief." *Ter Beek, supra.* at 454. The Court of Appeals concluded that because Mr. Ter Beek faced the threat of possible injunctive relief for engaging in conduct for which he otherwise benefitted from express immunity pursuant to MMMA, that the threat of an injunction was enough to be considered a "penalty in any manner," thus conflicting with provisions of the MMMA. *Ter Beek v. City of Wyoming*, 297 Mich. App. at 454, 823 N.W.2d at 869. The Court of Appeals consideration of how the MZEA may affect Ter Beek's claim, however, did not go far enough in "assessing the [cited] provision in the context of the whole ZEA." *Kyser v. Twp.*, 486 Mich. at 540, 786 N.W.2d at 558-59. The Court of Appeals decision threatens the "empower[ment of] localities to plan for, and regulate, a broad array of land uses, taking into consideration the full range of planning concerns that affect the public health, safety, and welfare of the community."*Kyser v. Twp.*, 486 Mich. 514, 541-42, 786 N.W.2d 543, 559 (2010).

The cited provision of the MZEA relied upon by the Court of Appeals provides, in relevant part, as follows:

> **125.3407 Certain violations as nuisance per se.**
>
> Except as otherwise provided by law, a use of land or a dwelling, building, or structure, including a tent or recreational vehicle, used, erected, altered,

> razed, or converted in violation of a zoning ordinance or regulation adopted under this act is a nuisance per se. The court shall order the nuisance abated, and the owner or agent in charge of the dwelling, building, structure, tent, recreational vehicle, or land is liable for maintaining a nuisance per se. The legislative body shall in the zoning ordinance enacted under this act designate the proper official or officials who shall administer and enforce the zoning ordinance and do 1 of the following for each violation of the zoning ordinance:
>
> (a) Impose a penalty for the violation.
>
> (b) Designate the violation as a municipal civil infraction and impose a civil fine for the violation.
>
> * * *

MCL 125.3407 (emphasis).

This Court has observed as follows regarding a local unit of government's authority to zone and control for its local concerns:

> Zoning constitutes a legislative function. *Schwartz v. City of Flint,* 426 Mich. 295, 309, 395 N.W.2d 678 (1986). The Legislature has empowered local governments to zone for the broad purposes identified in MCL 125.3201(1). This Court has recognized zoning as a reasonable exercise of the police power that not only protects the integrity of a community's current structure, but also plans and controls a community's future development. *Austin v. Older,* 283 Mich. 667, 674–675, 278 N.W. 727 (1938). Because local governments have been invested with a broad grant of power to zone, "it should not be artificially limited." *Delta Charter Twp. v. Dinolfo,* 419 Mich. 253, 260 n. 2, 351 N.W.2d 831 (1984). Recognizing that zoning is a legislative function, this Court has repeatedly stated that it " 'does not sit as a superzoning commission.' " *Macenas v. Village of Michiana,* 433 Mich. 380, 392, 446 N.W.2d 102 (1989) (citation and emphasis omitted); *Brae Burn, Inc. v. Bloomfield Hills,* 350 Mich. 425, 430–431, 86 N.W.2d 166 (1957). Instead, "[t]he people of the community, through their appropriate legislative body, and not the courts, govern its growth and its life." *Brae Burn,* 350 Mich. at 431, 86 N.W.2d 166. We reaffirm these propositions.

*Kyser v. Twp.*, 486 Mich. 514, 520-21, 786 N.W.2d 543, 547-48 (2010).

In *Kyser*, a property owner challenged a township's zoning rule which excluded gravel mining at her property because such land use was outside of the area designated for gravel

mining within the township. Therein, this court reviewed whether the common law "no very serious consequences" rule, as pronounced in *Silva v Ada Twp.*, 416 Mich 153, 330 N.W.2d 663 (1982), was still applicable considering later revisions to the Township Zoning Act, formerly MCL 125.297a and the MZEA[4] when a township zoning rule is challenged as exclusionary in nature and in violation of due process protections. *Kyser, supra* at 539 – 543. After *Silva*, Michigan's zoning enabling laws were amended to provide protection to property owners from exclusionary zoning. As observed in *Kyser*,

> * * * the Legislature itself superseded the rule of *Silva* by enacting the exclusionary zoning provision, MCL 125.297a.[5]
>
> * * *
>
> MCL 125.297a is now recodified in nearly identical form as MCL 125.3207 under the ZEA, which 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.
> >
> > MCL 125.3207 prohibits municipalities from enacting any zoning ordinance "totally prohibiting" a given land use if a "demonstrated need" exists for that use, unless there is no location where the use may be "appropriately located," the use is "unlawful."

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[4] "Until 2006, there were three separate zoning enabling acts in Michigan: one for city and village zoning, one for township zoning, and one for county zoning. In 2006, the Legislature enacted the ZEA, 2006 PA 110, effective July 1, 2006, which consolidated the zoning enabling authority for all local governments." MCL 125.3101 *et seq. Kyser v. Twp.*, 486 Mich. 514, 540, 786 N.W.2d 543, 558 (2010), FN 19.

[5] This specific holding in *Kyser v. Twp.*, 486 Mich. 514, 786 N.W.2d 543, itself appears to be superseded by recent revisions to MZEA at MCL 125.3205(3) which reincorporates *Silva's* "very serious consequences" test for zoning relating to mining operations. The subsequent amendment provides, in part, that "the standards set forth in *Silva v Ada Township*, 416 Mich 153 (1982), shall be applied." See, Public Act 113 of 2011, effective July 20, 2011. This subsequent amendment did not otherwise modify the rules relating to analysis necessary on exclusionary zoning claims under MCL 125.297a.

*Kyser v. Twp.*, 486 Mich. at 539 - 540, 786 N.W.2d at 558 (2010)(emphasis added).

In concluding that subsequent legislative amendments superseded the common law previously applicable to an exclusionary zoning challenge to zoning rules prohibiting the extraction of natural resources, this Court stated as follows:

> Fundamental to determining whether the exclusionary zoning provision supersedes the "no very serious consequences" rule is assessing the provision in the context of the whole ZEA. The ZEA establishes the framework for a local government to create a comprehensive zoning plan to promote the public health, safety, and welfare of the community. MCL 125.3201(1) empowers local legislative bodies to zone for a broad range of purposes and addresses the establishment of land-use districts.

*Kyser v. Twp.*, 486 Mich. at 540, 786 N.W.2d at 558-59. The broad authority granted to local municipalities to adopt "a comprehensive zoning plan" for the promotion of "public health, safety, and welfare of the community" cannot be ignored here when considering that Mr. Ter Beek contends the *exclusionary nature* of the City of Wyoming zoning regulation should not apply to his intended land use. Yet, the Court of Appeals decision simply left unaddressed the relevant factors controlling such inquiry. See, *e.g. Adams Outdoor Adver., Inc. v. City of Holland*, 463 Mich. 675, 684, 625 N.W.2d 377, 382 (2001)(holding, "to sustain a claim that a city engaged in unlawful exclusionary zoning . . . , one must show that: (1) the challenged ordinance section has the effect of totally prohibiting the establishment of the land use sought within the city or village, (2) there is a demonstrated need for the land use within either the city or village or the surrounding area, (3) a location exists within the city or village where the use would be appropriate, and (4) the use would be lawful, otherwise.").

The Court of Appeals, in its analysis of the MZEA, simply failed to assess the *existing* protections against the total prohibition of a land use and whether the circumstances presented by Mr. Ter Beek's perceived injury in the face of this zoning rule meet standards relevant in

consideration of the same. Is there a "**demonstrated need**" for the particular land use at issue within the City of Wyoming. MCL 125.3207. Are there locations "within either that local unit of government or the surrounding area" such as the greater Grand Rapids community that should have been considered in evaluating the desired land use? MCL 125.3207. Does the MZEA's unequivocal endorsement of land use regulations which prohibit land uses that are "unlawful" have no meaning? MCL 125.3207. These questions are left unaddressed by the Court of Appeals and all municipalities, regardless as to how they may choose to zone for or regulate their unique land use activities, are threatened.

4. The claimed use by Mr. Ter Beek is not clearly a land use in violation of the City of Wyoming Zoning Code and as such, the Court of Appeals finding of incompatibility between this local land use regulation and the provisions of the MMMA was in error.

To any extent the challenged zoning provision touches upon MMMA protected activities, the record below is simply insufficiently developed to support the preemption finding by the Court of Appeals. The challenged City of Wyoming zoning provision is within "Article II. – Districts and General Requirements" of Chapter 90 of the Code of Ordinances for the City of Wyoming and provides as follows:

> **Sec. 90-66. - Uses prohibited by law.**
>
> Uses not expressly permitted under this article are prohibited in all districts. Uses that are contrary to federal law, state law or local ordinance are prohibited.

Sec. 90-66, City of Wyoming, Zoning Code.

The City of Wyoming Zoning Code defines "use" as follows:

> **Sec. 90-21. - Definitions "U".**
>
> * * *
>
> **Use: See "accessory use, building or structure" and/or "principal building or use".**

(City of Wyoming Zoning Ord. Sec. 90-21)(emphasis added).

> **Sec. 90-17. - Definitions "P".**
>
> * * *
>
> **Principal building and use:**
>
> **(1) *Principal building* (also called a "main building"): A building or, where the context so indicates, a group of buildings in which is conducted the principal use of the lot on which the building is situated.**
>
> **(2) *Principal use* (also called a "main use"): The primary use to which the premises are devoted and the primary purpose for which the premises exist.**

(City of Wyoming Zoning Ord. Sec. 90-17)(emphasis added).

Moreover, Chapter 90 of the City of Wyoming Codified Ordinances concerns only one subject "Zoning," and contains the city's comprehensive zoning rules as explained by the following section of the City of Wyoming's Zoning Code:

> **Sec. 90-34. - Scope of chapter.**
>
> No building or structure or part thereof shall be erected, constructed, reconstructed, altered or maintained, and no new use shall be made of any building, structure or land or part thereof except in conformance with the provisions of this chapter. New plats shall comply with this chapter.

Sec. 90-34, City of Wyoming, Zoning Code.

Absent from the Court of Appeals analysis, however, is any consideration as to what specific uses the City of Wyoming's Zoning Code regulates. The Court of Appeals merely concluded that the City's ordinance prohibited "any medical use of marijuana pursuant to the

MMMA on any property within the city of Wyoming [as] a violation of defendant's zoning ordinance." *Ter Beek v. City of Wyoming*, 297 Mich. App. at 454, 823 N.W.2d at 868.

The Court of Appeals was simply too eager to leap to the conclusion that *any* personal use of property is regulated by the challenged City of Wyoming Zoning Ordinance. The scope of a zoning ordinance is necessarily limited to its express language contained therein. Here, absent from the Court of Appeals analysis is any consideration whatsoever as to whether the prospective use presented by Mr. Ter Beek, "grow[ing] and us[ing] marijuana for medical purposes in his home" as a "qualified medical-marijuana patient," is a "use" that even meets the definition of "use" under the City of Wyoming Zoning Ordinance. *Ter Beek v. City of Wyoming*, 297 Mich. App. 446, 450, 823 N.W.2d 864, 867. Unaddressed is whether such use is "the primary use to which the premises are devoted and the primary purpose for which the premises exist."(City of Wyoming Zoning Ord. Sec. 90-17). The record below is simply insufficient to allow consideration of the challenged use which itself does not appear to have been the primary use or primary purpose for which Mr. Ter Beek's premises exist. For this reason, further development of a record is necessary to determine whether the claimed use is a "use" threatened by the City of Wyoming Zoning Code provisions.

The need to more fully develop a record as to the exact nature of Mr. Ter Beek's intended land use is further supported by long standing principles applicable to municipal authority to regulate land use. Zoning rules govern use of land, and not necessarily every action a person undertakes while occupying one's land.

> Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities.

*Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 386-87, 47 S. Ct. 114, 118, 71 L. Ed. 303 (1926)(emphasis added). Moreover, land owners are held to the express language in a zoning ordinance, nothing more and nothing less. Accordingly, not all personal conduct or action undertaken by a land owner necessarily invokes zoning ordinance considerations.

> The United States Supreme Court found nearly 80 years ago that preserving the residential nature of a neighborhood and limiting traffic for the safety of local residents are both legitimate interests that may be advanced by a zoning regulation. Moreover, a basic goal of land use regulation is to segregate incompatible uses.

*Dorman v. Twp. of Clinton*, 269 Mich. App. 638, 651-52, 714 N.W.2d 350, 360 (2006), citing *Paragon Properties Co. v. City of Novi*, 452 Mich. 568, 573, 550 N.W.2d 772, 774 (1996) which observed "*Euclid* upheld the enforcement of a zoning ordinance, reasoning that modern pressures on land use have created sufficient public interest in the segregation of incompatible land uses to justify a diminution in property values.")(emphasis added).

Mr. Ter Beek, by his complaint for declaratory relief, appears to have fastened onto a perceived purpose of the ordinance which is simply not expressed by its plain terms. The Court of Appeals also seemed swayed, in part, by an offered reason for the challenged zoning regulation noting that the City of Wyoming in its brief on appeal:

> * * * acknowledges that the purpose of the ordinance "is to regulate the growth, cultivation and distribution of medical marihuana in the City of Wyoming * * * "

*Ter Beek v. City of Wyoming*, 297 Mich. App. 446, 453, 823 N.W.2d 864, 868. However, whether or not the proffered reason for the ordinance is the only reason the ordinance was enacted, should not control this court's interpretation of the plain language of the challenged zoning regulation. This court has previously held that legislative purposes behind any zoning regulation need not be investigated by property owners when making lawfully permitted use of

their lands. *Tel-Craft Civic Ass'n v. City of Detroit*, 337 Mich. 326, 332, 60 N.W.2d 294, 297 (1953) As noted in *Tel-Craft Civic Ass'n*,

> There was nothing unusual about the ordinance or its application to this property and we are of the opinion that there was no duty upon the defendants to search beyond the provisions of the ordinance itself.

*Id.* (emphasis added).

There are a variety of activities that may be undertaken on private property that are criminal in nature that do not necessarily invoke a zoning violation as well. This is because zoning regulations govern the use of land, as defined by the particular zoning ordinance. While committing a murder in one's home would certainly be a violation of State law, such conduct in one's home should not equate to a zoning violation because such conduct is not likely the principal use of a building or dwelling regulated by zoning rules. Likewise, here, the self administering of medicinal marijuana by Mr. Ter Beek within his home is not likely the principal use of Mr. Ter Beek's home. Accordingly, even if such activity is punishable by Federal law, if not state law, such actions would not appear to violate Wyoming's local land use regulations because such use is not likely the "primary use to which the premises are devoted and the primary purpose for which the premises exist." (City of Wyoming Zoning Ord. Sec. 90-17). As noted by the Court of Appeals, Mr. Ter Beek "has not been charged with violating the [zoning] ordinance, nor has he been subjected to any penalties, fines, or injunctions." *Ter Beek v. City of Wyoming*, 297 Mich. App. 446, 450, 823 N.W.2d 864, 867. Again, however, the record is insufficient to allow a full exploration of this issue and for this reason the Court of Appeals decision must be reversed.

In considering a challenge to a local zoning ordinance which was claimed to operate as an unconstitutional taking of land, this court observed:

> Michigan has adopted the view that to sustain an attack on a zoning ordinance, an aggrieved property owner must show that if the ordinance is enforced the consequent restrictions on his property preclude its use for any purposes to which it is reasonably adapted.

*Kropf v. City of Sterling Heights*, 391 Mich. 139, 162-63, 215 N.W.2d 179, 189 (1974)(emphasis added). While the challenge to the City of Wyoming's ordinance here is not that it operates as an unconstitutional taking of Mr. Ter Beek's property, the observation noted above is important when considering that when it comes to the rights of citizens to make use of their property, it is the *primary use* of land which controls such review.

Here, if the City of Wyoming had no zoning ordinance in place, this court has made clear that "in the absence of a zoning ordinance an owner has the right to make any desired use of his premises not amounting to a nuisance." *Anchor Steel & Conveyor Co. v. City of Dearborn*, 342 Mich. 361, 367, 70 N.W.2d 753, 756 (1955). What may constitute "nuisance" use of land requires more than pointing to some activity by a land owner that a private person or the public may disfavor. For instance, to constitute "a nuisance per se is 'an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings.'" *Capitol Properties Grp., LLC v. 1247 Ctr. St., LLC*, 283 Mich. App. 422, 427, 770 N.W.2d 105, 109 (2009). Here, it is precisely those land uses, whether considered nuisance or otherwise, which exist "at all times and under any circumstances, regardless of location or surroundings" which the City of Wyoming has the authority to regulate by virtue of its zoning ordinance. *Id.* Moreover, as recently observed by this Court, even uses which may touch upon otherwise immune activities under the MMMA may be enjoined as a public nuisance if otherwise in violation of the Public Health Code and not expressly sanctioned by the MMMA. *State v. McQueen*, 493 Mich. 135, 148-49, 828 N.W.2d 644, 651 (2013)("the MMMA does not explicitly provide for businesses that dispense marijuana to patients.').

In the context of zoning law, distinctions often must be made between primary and accessory uses of land when determining whether a proposed land use is permissible.

> An "accessory use" is generally defined as a use "which is clearly incidental to and customarily found in connection with and located on the same zoning lot as is the principal use to which it is related".

*Groveland Twp. v. Jennings*, 106 Mich. App. 504, 512, 308 N.W.2d 259, 262 (1981) aff'd, 419 Mich. 719, 358 N.W.2d 888 (1984). Here, the Court of Appeals simply gave no consideration whatsoever as to whether Mr. Ter Beek's "grow[ing] and us[ing] marijuana for medical purposes in his home," as a "qualified medical-marijuana patient" was a principal use or accessory use of his land. *Ter Beek v. City of Wyoming*, 297 Mich. App. 446, 450, 823 N.W.2d 864, 867. The ordinance was simply declared to be in conflict the State's Medical Marijuana Act and struck down. Again, the Court of Appeals analysis did not go far enough.

The record is insufficiently developed to know precisely which zoning district Mr. Ter Beek appears to reside within. To the extent Mr. Ter Beek has a residence, the following zoning rules are relevant to principal uses of residences located in R-1, R-2 and ER residential districts:

> **Sec. 90-96. - Principal permitted uses.**
>
> In the R-1, R-2 and ER residential districts, the following uses shall be permitted:
>
> (1) Single-family detached dwellings. For mobile home standards see section 90-841 et seq.
> (2) Churches and church facilities normally incidental thereto, provided that ingress and egress from the site is onto a major thoroughfare or collector street. Church sites shall be a minimum of three acres.
> (3) Publicly owned facilities, except public elementary, intermediate or high schools.
> (4) Off-street parking.
> (5) Accessory buildings and uses customarily incidental to the principal permitted uses.
> (6) Foster care facilities, nursery schools, day nurseries and child care facilities for the care of not more than six people as defined by the Michigan Family Independence Agency.
> (7) Home occupations.

The City of Wyoming Zoning Code defines an accessory use as follows:

> *Accessory use, building, or structure:* A use, building or structure which is clearly incidental to, customarily found in connection with, subordinate to, and located on the same zoning lot as the principal use to which it is related, and devoted exclusively to the main use of the premises.

Sec. 90-2, City of Wyoming, Zoning Code.

In the context of residential zoning, this Court has observed that many activities may take place within one's home and may or may not be considered in contravention of a local zoning ordinance based on their incidental or accessory nature in the context of home occupation:

> * * * it became apparent at an early stage in the growth of the law of zoning that residential districts could not be confined to residential purposes only. From earliest times it had been customary, for example, for the doctor, or the lawyer, to have an office in his home. This was true, also, of the milliner, the music teacher, and the seamstress. But in all of these cases the business use is merely incidental or accessory, the house remaining primarily a home, not the headquarters for a business. In arriving at decision as to which use is predominant, the courts consider such factors as the customs and practices of the community, as well as of the occupation involved, the amount and kind of machinery necessary to the accomplishment of the business objective, the traffic, both personal and vehicular, incidental thereto, the effect of the conduct of the business upon the tranquility and residential character of the neighborhood, and similar factors.

*City of Muskegon Heights v. Wilson*, 363 Mich. 263, 267-68, 109 N.W.2d 768, 770-71 (1961). The Court of Appeals decision in this case, however, assumes that every home activity, if unlawful in any manner, comes under the umbrella of the challenged zoning restriction. This conclusion was premature and cannot be sustained on the record developed below.

## CONCLUSION

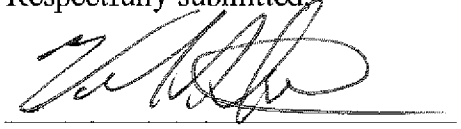
The MZEA is a "comprehensive" statutory scheme, which "defines the fundamental structure of a zoning ordinance by requiring a zoning plan to take into account the interests of the entire community and to ensure that a broad range of land uses is permitted within *that* community." *Kyser v. Twp.*, 486 Mich. 514, 541-42 (emphasis added). Within the MZEA statutory scheme, municipalities are empowered to enact zoning ordinances unique to their localities for the protection of what they may determine affects *their* public health, *their* safety, and *their* welfare. The Court of Appeals' reaction to Mr. Ter Beek's perceived (but unrealized) threat to his personal activities threatens to undermine the MZEA's clear statutory framework. The MZEA is properly equipped to provide adequate protection to Mr. Ter Beek and others believing that an exclusionary land use regulation inhibits their personal activities on land.

Municipalities are entrusted with the responsibility of providing often overlooked but basic and necessary community caretaking services. These municipal services and functions, in large part, require certainty as to the location, extent and control of land uses within political subdivisions. Municipalities also require certainty with respect to areas of land use exempt from these important considerations. If Mr. Terbeek is able to forgo the MZEA procedures for determining whether his excluded land use (if excluded at all) is somehow an unlawful regulatory control of his land, the ability of municipalities to undertake and provide such important community services will be compromised.

## RELIEF SOUGHT

Michigan Municipal League, respectfully requests that this Honorable Court reverse the Court of Appeals' decision and confirm that Michigan's municipalities, in whatever context each determines appropriate to zone and regulate their own unique land use activities, will be protected by the legislative framework established by the MZEA in answering such questions. Michigan residents should not be held hostage in local planning by advocates for expansion of medical marijuana use.

Respectfully submitted,



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Dated: August 19, 2013