



Recreational Marihuana Q&A



michigan municipal league

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MMMA –	Michigan Medical Marihuana Act, patient/caregiver model
MMFLA –	Medical Marihuana Facilities Licensing Act, medical facilities licensed by the State and located in municipalities that opt in
MRTMA –	Michigan Regulation and Taxation of Marihuana Act, recreational (non-medical) marihuana businesses to be licensed by the State and located in municipalities that do not opt out
LARA –	State of Michigan Department of Licensing and Regulatory Affairs, department responsible for rule making and licensing of marihuana

complete prohibition of recreational commercial establishments by voter initiative.

- Q4: May municipalities opt out of the MRTMA now and opt in later? What about the reverse: opt in now and opt out later?
- A. Yes, you can opt out now and opt in later. You can change your mind and later revise your ordinance. Opting out after opting in is likely more problematic. The licenses are for one year only, though. A lawfully licensed and established recreational marihuana business which is not in violation of any regulation might argue that it should be permitted to continue to operate as a non-conforming use, or that by prohibiting its continued operation that such amount to a unconstitutional regulatory taking. However, Federal courts would not likely recognize that form of “taking” in the context of marihuana due to it being an unlawful Schedule 1 substance, since one might have a recognizable “reasonable investment backed expectation” by trading in an unlawful substance.

Opting In/Opting Out

- Q1: If a municipality chooses to do nothing in response to the new recreational MRTMA law, how will the law affect it?
- A. If you do nothing, then you are effectively "opting in" to permit recreational marihuana commercial businesses.
- Q2: What is the timeline for a municipality to opt out?
- A. Applications for recreational marihuana business licenses will begin to be accepted on December 6, 2019. Under the terms of the MRTMA, LARA has one year from the date of the November 2018 election certification to prepare. However, there is word that Governor Whitmer would like the timing fast-tracked to perhaps as early as June 2019.
- Q3: How does a municipality opt out?
- A. Although the statute doesn't provide language for municipalities opting out, nor how to do it, since ordinances are mentioned in the statute you are likely better protected if you opt out by ordinance rather than resolution. Additionally, the MRTMA permits the

- Q5: Does a village have to opt out of both the MMFLA and MRTMA, or just recreational? We don't want either.
- A: The MRTMA requires an opt out. The MMFLA does not—medical marihuana facilities can only locate in your municipality if you opt in.
- Q6: Our municipality didn't do an ordinance to opt out but instead recently passed a Resolution setting a "moratorium" on recreational marihuana businesses in our community until December 31, 2019. We wanted time to do more research, let State of Michigan establish rules, regs, etc. Are we vulnerable to allowing marihuana businesses to come in since we didn't opt out?
- A. While moratoria are generally not favored by courts, they are not unlawful either. It is recommended that a moratorium not last any longer than one year, and a six-month term, even if extended by another 6-month term is likely preferred, so long as the community is actively working on defining the issues and working on options as to how to best address the issues.
- Q7: Can municipalities decide to allow only microbusinesses?

Interaction with other Marihuana Statutes – MMMA and MMFLA

A. The statute isn't clear on this, but we think the answer may be a "qualified yes" since the language of the MRTMA permits a municipality to "provide for the number of marihuana establishments." Ostensibly, a community could solely provide for a certain number or perhaps an unlimited number of micro businesses but provide that no other types of recreational marihuana establishment be permitted. However, given the less than certain and vague language of the statute, final guidance will likely come from the courts or clarifying legislation.

Q8. Does "prohibit" mean all, or can the municipality pick and choose the businesses and only choose some?

A: The statute is less than clear on whether municipalities can pick and choose which type of establishments they will allow. However, there is an argument for doing so. If deciding to take this type of course of action, consult with your municipal attorney for guidance.

Q9: If a township opts out, does that mean a village within that township has opted out—and the inverse as well? If township opts in is the village allowed to opt out?

A: The statute doesn't mention counties—just cities, villages, and townships. Villages are governmental entities and pass their own ordinances separate from townships.

Q10. Does the 150-plant limitation for a micro business mean 150 growing plants in addition to additional plants drying?

A. No. "Cultivate" means "to propagate, breed, grow, harvest, dry, cure, or separate parts of the marihuana plant by manual or mechanical means" under the MRTMA. Since cultivation includes both growing and drying, the 150-plant limitation at any one time would include both operations.

Q11. Does a general law village need to hold public hearings on MRTMA? Our zoning person thinks it's a police action that doesn't need a hearing.

A. Licensing is the exercise of the police power; determining where a particular business may locate is a zoning issue subject the process set forth in the Michigan Zoning Enabling Act.

Q12: Can a caregiver grow recreational marijuana for his own use?

A: Probably, yes. Being a registered caregiver does not preclude one from growing recreational marihuana for yourself. There's an argument for growing 24 plants on the premises—12 plants could be grown for medical, and 12 plants for recreational.

Q13. Where do caretakers fall? Can they sell directly to consumers?

A. Under the MMMA, the patient/caregiver act, caregivers can be compensated for the costs associated with assisting their patients in the use of medical marihuana. Under the MMFLA, provisioning centers may only sell to registered caregivers and patients. Under the MRTMA, only a micro business or a marihuana retailer may sell marihuana; individuals cannot sell recreational marihuana—it can only be "gifted," so long as the transfer is not advertised or promoted to the public.

Q14. What impact would opting out of medical marijuana have on caregivers using their homes for their businesses?

A. The MRTMA will not affect the MMMA. The patient/caregiver model will continue, the same as it was before the recreational proposal was passed. However, note should be taken that the Michigan Court of Appeals has ruled that municipalities may not limit caregivers to "home occupations" under local zoning ordinances.

Q15. If a municipality opted in to MMFLA can it keep out recreational marihuana retailing centers?

A. This is not clear in the statute. There are two schools of thought. One approach argues that given the language in the MRTMA permitting municipalities to completely prohibit recreational marihuana establishments, that even though a community has opted to permit medical marihuana facilities, it need not permit recreational marihuana businesses. The

other approach argues that since the MRTMA prohibits a municipality from adopting an ordinance which prohibits a grower, processor or retailer from operating at a location shared with a facility operating pursuant to a MMFLA license, means that a community opting in to permit medical marijuana facilities may not prohibit recreational growers, processor or retailers. The final answer will likely come from the courts. Again, consult with your municipal attorney.

to be reduced to reflect the actual cost of those services.

* Kalamazoo requires an upfront application fee for its medical marijuana licenses but refunds a portion of the application fee for those who didn't get a license.

Licensing

Q19: When will LARA start issuing licenses?

A. Under the MRTMA, LARA has one year from the law's effective date of December 6, 2018 to put its regulatory framework in place and begin to accept applications. But indications are that Governor Whitmer would like LARA to start accepting applications as early as the summer of 2019. If the State isn't ready by December 2019, then municipalities are on the front line—businesses can come to your community and ask for a license. Your municipality becomes the regulatory agency for a year, not the State.

Q16: Could a municipality opt in to medical establishments, but out of recreational? If so, can this be in the same ordinance, or would it have to be in two separate ordinances?

A: See the answer to the question above, but arguably a community can say yes to opt in to medical and no to recreational. Two separate ordinances would seem to be a better approach, but there is nothing that legally requires it, so it might be done with a single ordinance.

Q17: If a business has been licensed as a medical facility, must it also be licensed as a recreational facility if it applies?

A: The business would have to separately qualify for a recreational license. For the first 24 months after the State begins to accept applications, applicants for a recreational retailer, process, class B or C grower, or transporter must be licensed under the MMFLA to engage in the medical marijuana business. For the first 24 months, LARA will only accept applications from Michigan residents for licensure as a class A grower or a microbusiness. However, after one year, LARA may accept applications from anyone, if it determines that additional licenses are needed to minimize the illegal marijuana market, to efficiently meet the demand for marijuana or to provide reasonable access to marijuana in rural areas of the State.

Q20: Can municipalities license and regulate recreational marijuana businesses ahead of the State?

A: Only in the circumstance where the State is not ready to accept applications in December 2019. Otherwise the MRTMA says that a business needs a State license first. Once a business gets a State license then it can get a municipal license (if the municipality wants to license; municipalities don't have to). It is ill-advised for a municipality to regulate before a State license is issued. Municipalities will be the regulatory agency IF, after one year, the State hasn't put in a regulatory framework.

Q18: Has the \$5,000 municipal licensing fee (under the MMFLA) been challenged (if municipality is not even doing fire inspections, etc.)?

A. You must be able to demonstrate that the cost of enforcement and administering of the law is costing the local government approximately \$5,000. If those costs are substantially less than \$5,000, the fee needs

Q21: What are the pros and cons of a municipality deciding to license marijuana?

A. LARA will come up with rules but will not decide anything about zoning (where businesses can be located) and hours of operation, for instance. So, zoning needs to be addressed at the local level, regardless. Licensing at the local level may permit greater ability to inspect and monitor recreational marijuana businesses, but the ability for law enforcement inspections under the MRTMA is not as broad as under the MMFLA. Additionally, if the municipality seeks to limit the number of licensed recreational marijuana establishments, it must

employ a “competitive process intended to select applicants who are best suited to operate in compliance with (the MRTMA) within the municipality.” Unfortunately, the statute provides no other guidance as to what that process should look like so as to provide a safe harbor; as a result, this may put municipalities at risk of lawsuits from applicants who do not receive a license.

Q22: Will LARA regulate how many licenses are in one municipality, such as with liquor licenses?

A: No.

Q23: Will a village with 10 empty buildings be forced to potentially allow 10 recreational marijuana businesses if they allow one?

A: It depends on whether the village chooses to limit the number of establishments and how its zoning ordinance is written regarding the applicable zones where the various types of marijuana establishment are permitted to operate, along with separation distances from schools and residential zones.

Q24: Can a municipality charge an application fee along with the annual license—for example, a \$2,500 application fee? This is done in Colorado with many communities.

A: The statute is silent on this. The \$5,000 fee set forth in the MRTMA is for administration (and enforcement) costs—seems like processing an application would be included in this fee. Also, keep in mind that an administrative fee must approximate the actual cost of providing the service; otherwise it is an unlawful tax. It is also not a good idea to follow another state’s process since the underlying statutory authority is likely to be different from that in the Michigan law.

Q25: Are the licensing restrictions applicable for the first 24 months after the effective date of the Act, or first 24 months after LARA’s rules and regulations are released?

A: 24 months from the effective the date of Act (December 6, 2019).

Q26: If a municipality does have a license fee of up to \$5,000, what types of expenses CAN it go toward for enforcement? (Since the new law doesn’t allow for inspections like officers do routinely for liquor).

A: Anything your municipal clerk, law enforcement agency, or inspections staff does to review the application, the applicant, or proposed site of the business. Then once the business is established, if you can demonstrate that that these businesses generate complaints or more calls for services so as to demonstrate the need for increased resources, then those costs ought to be included as well so as to demonstrate the need to charge up to \$5,000 as a fee.

Q27: It seems this will cost villages a bit to get their lawyer/zoning official up to speed on this. Couldn’t an argument be made that the \$5,000 is used to help recoup upfront costs?

A: Probably. Legal services associated with administration and enforcement would be part of a legitimate argument to support the amount of the fee.

Effects of Opting In

Q28: If a municipality opts in is it required to have 24-7 police support?

A: No. Police support is not required by this new Act.

Q29: If a municipality opts in, how will that affect eligibility for federal/State grants? If a municipality is getting federal grant money, won’t the federal government deny it because the municipality allows recreational marijuana?

A: You will have to look at the language of the grants—for instance, is there language on maintaining a drug free work place or anything like that? Certain municipal employees who are federally-grant funded, could be made subject to a zero-tolerance drug policy. Otherwise you are probably OK. If the grant language poses a problem, a municipality might consider whether the federal government is co-opting local and State government to carry out federal drug policy? Several communities have successfully challenged law enforcement grants that require compliance with federal immigration law by the local

municipality. The issue is currently in litigation in several federal courts.

Q30: May the municipality increase the distance from preexisting schools to further than 1,000 feet?

A. 1,000 feet is the limitation set forth in the MRTMA. You would likely get challenged if you increased the distance. 1,000 feet is a standard under both Michigan and federal Drug-Free School Zone laws. It should be noted that the MRTMA permits a municipality to reduce the distance requirement.

Miscellaneous

Q.31: What can a city do if a citizen calls and says his neighbor is selling marihuana out of his home?

A. Not much. This would be very hard to prove. Marihuana has been decriminalized—violations are now a civil infraction.

Q32: Can home growers sell their marihuana?

A. No, the recreational statute says that it may be “gifted,” but not sold. Caregivers, under the MMMA, can get paid as recompense for the cost of providing the service/product.

Q33: Since people can’t “sell” recreational marihuana, can they sell other things, such as t-shirts or \$75 and give a “gift” baggie of marihuana as a thank-you, like we’ve seen in other States?

A. A real possibility. That is already happening in Michigan—there is a company that is selling and delivering chocolate and the driver is giving away free pot to those that purchase chocolate. This practice will likely be challenged. It will be up for the courts to decide.

Q34: Can you clarify if it is 12 plants per person per household or 12 plants per household?

A. 12 Plants per person over 21 in the household. That said, there may be argument to assert that it is a 12 plant per premises limit. The MRTMA at § 5.1 (b) says “provided that not more than 12 marihuana plants are possessed, cultivated, or processed on the premises at once,” leading to the assertion of a 12 plant per premises limit. However, the introductory language to

§5.1 says “the following acts by a person 21 years of age or older are not unlawful”, and then subsection (b), begins with the phrase “within the person’s residence” before stating the 12-plant limit. Like other issues with the MRTMA, this issue of the proper interpretation of the language in question will likely be decided by the courts

Q35: Can municipalities pass odor control ordinances?

A. This will depend on whether and to what extent LARA addresses the issue. Any local regulation may not be inconsistent with State administrative rules, but a municipality could adopt a provision to require system to diffuse odors consistent with an applicable State rule or in the absence of a rule, look to see what the Stille DeRosset Construction Code allows you to do.

Q36: Can tourists come to Michigan and purchase marihuana?

A. As long as they are 21 years of age or older.

Q37: Can the DDA prohibit marihuana establishments in the downtown district?

A: It is not likely that a DDA can do that—the municipality has authority for zoning, etc. not the DDA. A DDA is not really empowered to regulate businesses. But ask your municipal attorney.

Q38: How does CBD oil/products fit into all this? Is a store allowed to sell CBD oil if the municipality opts out?

A: In the lame duck session of the Legislature, several bills (PA 641, 642, and 648 of 2018) were adopted addressing hemp and hemp products which severely limited or prohibited local regulation. Currently (April 1, 2019) the Michigan Department of Agriculture and Rural Development (MDARD) is developing a licensing program for hemp growers to meet both state and federal laws. At this time, the FDA has not approved CBD for use in food or drink or as a dietary supplement.

Q39: On the subject of the taxes going toward municipalities, schools, etc. with a cash-based business, how can we be sure there is accurate reporting of the sale prices and actual income a

business may have? Couldn't they charge a steep price and only report a lesser price to avoid paying as much tax?

A: LARA (and the Michigan Department of Treasury) will probably address this issue in their rules. Most likely there will be a tracking system to track recreational seed to sale just like medical marihuana.

Q40. Can a city charge a city sales tax on the sale of the recreational marijuana?

A. No. Michigan cities are not authorized to charge sales tax.

Q41: Has there been any input from the Michigan Building Codes Commissioner as far as ventilation requirements for odors, fire suppression requirements due to flammability concerns...can a municipality restrict an establishment based on building code issues?

A: LARA has addressed some of that in the rules for medical marihuana, so we expect similar standards will be applicable to recreational. As a municipality, you cannot be stricter than LARA rules.

Q42: It is my understanding that municipal governments cannot limit marijuana related accessory business? i.e.: hydroponic stores, smoking supplies.

A: Pipes and bongs can be used for tobacco and pipe tobacco—not specifically for marihuana. Soil and fertilizer aren't just for marihuana. The definition of "marihuana accessories" in the MRTMA states that the equipment, product, or material must be "specifically-designed" for marihuana. This language makes it very difficult for a municipality to somehow regulate or say someone violated a law because they are trading in marihuana accessories. It would have to be shown that it is exclusively designed for marihuana.

Q43. How effective is the testing of under the influence of marihuana in a motor vehicle?

A. This area is still under development. Tests can show if an individual has used marihuana, not whether he or she is presently under the influence. On March 26th, a report was issued from the Impaired Driving Safety Commission appointed by then-Governor Snyder that suggests there not be a THC limit to be considered

driving impaired. The conclusion was reached due to findings that there is no set number of nanograms of TCH that causes a certain degree of impairment.

Q44. If a car is pulled over for speeding and the police find marihuana, what happens to the marihuana?

A. If possible, the driver can a) turn it over to person who is 21 years of age or older; or b) secure it in the motor vehicle. If those options are not available, and it is confiscated by police officers a municipality should consider requiring the individual to seek a court order for its return. Under the federal Controlled Substances Act, there is a law enforcement exception, but it is an open question whether returning marihuana in this circumstance falls within the exception. California courts say it does, while Colorado courts say that it doesn't. This issue will likely have to be decided by Michigan courts.

Q45. Are hemp products now legal in Michigan?

A. In the lame duck session of the Legislature, several bills (PA 641, 642, and 648 of 2018) were adopted addressing hemp and hemp products which severely limited or prohibited local regulation. Currently (April 1, 2019) the Michigan Department of Agriculture and Rural Development (MDARD) is developing a licensing program for hemp growers to meet both state and federal laws. Consult with your municipal attorney to see how these new laws might impact your community.

Q46. Can a community pass an ordinance that the city is the only entity allowed to sell retail marijuana? A community in Oregon has done this.

A. Interesting question. More research is necessary to provide an answer.

Q47. Do you agree that a city-owned campground can prohibit recreational marijuana use inside their mobile homes?

A. The MRTMA permits a landlord to prohibit or regulate the consumption and cultivation of marihuana on rented premises, but a landlord may not prohibit a tenant from lawfully possessing or consuming marihuana in a manner other than smoking.

Q&A with Andrew Brisbo, Director of LARA's Bureau of Marijuana Regulation

(from the League's Capital Conference on March 20, 2019)

Q48. Now that recreational has been decriminalized, will the medical marijuana industry go away?

A. It may be reduced some, but most likely will not go away. There are several reasons for this: medical marijuana is used by people under the age of 18 (for seizure disorders, for instance); some patients prefer to purchase it in a medical setting; and medical marijuana purchases do not have the 10 percent excise fee that recreational purchases will have. In Colorado, the number of medical patients went from 115,000 to about 85,000 after recreational marijuana was passed there.

Q49. For the standard of a marijuana establishment being required to be located 1,000 feet from a school—where does that 1,000 feet measurement start?

A. That standard will have to be addressed/defined in your municipal zoning ordinance.

Q50. When LARA receives an application for recreational marijuana, how will it contact the municipality where the applicant proposes to locate?

A. LARA staff will look on the municipality's website for the clerk's phone number.

Q51. Our municipal attorney recommended our city pass a one-year moratorium. Some on our council are uncomfortable with that, because it is not a firm "yes" or a firm "no." How will LARA interpret a city's moratorium?

A. You can inform LARA that a moratorium means "no," and we will follow that.

Q52. Are social club licenses OK during the year before the recreational rules come out from LARA?

A. They aren't prohibited, but they are also not authorized by the voter-initiated statute. If this activity gets underway, it may have to be rolled back once the regulatory program is in place. We do not know yet.