Public Policy Position
Amicus Curiae in *City of Warren v Bezy* (MCOA Case No. 341369)

The Government Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 655 members. The Government Law Section is not the State Bar of Michigan and the position expressed herein is that of the Government Law Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Government Law Section has a public policy decision-making body with 21 members. On June 22, 2018, the Section adopted its position after a discussion and vote at a scheduled meeting. 16 members voted in favor of the Section's position on the amicus curiae in *City of Warren v Bezy* (MCOA Case No. 341369), 0 members voted against this position, 2 members abstained, 3 members did not vote.

Contact Person: Steven P. Joppich

Email: sjoppich@jrsjlaw.com

STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE CITY OF WARREN,

Plaintiff-Appellant,

-vs-

CLAYTON JAMERS BEZY,

Defendant-Appellee.

_____/

Court of Appeals No. 341639

Macomb County Circuit Court
Case No. 2017-000111-AR

37th District Court
Case No. W 165701

BERRY MOORMAN P.C.
RANDOLPH M. WRIGHT (P 24458)
ANDREA M. PIKE (P 74755)
Attorneys for Plaintiff-Appellant
255 E. Brown Street, Suite 320
Birmingham, MI 48009
(248) 645-9680

ETHAN VINSON (P 26608)
CAITLIN MURPHY (P 75741)
Co-Counsel for Plaintiff-Appellant
One City Square, Suite 400
Warren, MI 48093
(586) 574-4671

CANNABIS COUNSEL, PLC
JULIA A. GILBERT (P 74262)
ALAN L. KAUFMAN (P 24337)
Attorneys for Defendant-Appellee
2930 E. Jefferson Avenue
Detroit, MI 48207
(313) 446-2235

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC
THOMAS R. SCHULTZ (P 42111)
Attorney for *Amici Curiae*
27555 Executive Drive, Suite 250
Farmington Hills, MI 48331
(248) 489-4100

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AMICUS CURIAE BRIEF BY

MICHIGAN MUNICIPAL LEAGUE, MICHIGAN TOWNSHIPS ASSOCIATION, AND GOVERNMENT LAW SECTION OF THE STATE BAR OF MICHIGAN

IN SUPPORT OF PLAINTIFF-APPELLANT CITY OF WARREN

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC
Thomas R. Schultz (P 42111)
Attorney for *Amici Curiae*
27555 Executive Drive, Suite 250
Farmington Hills, MI 48331-3550
(248) 489-4100

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STATEMENT OF THE BASIS OF JURISDICTION

Amici adopt the Statement of Jurisdiction as set forth by Appellant City of Warren in its Brief on Appeal.

STATEMENT OF THE QUESTIONS PRESENTED

I. Under Michigan's strong local home rule tradition, the preemption of local law by state law requires clear legislative intent. The voters who approved the MMMA did not clearly intend to immunize medical marijuana patients and caregivers from all local land use laws, and the circuit court's finding of such immunity ignores both that lack of intent and the concept of local home rule. **Should the circuit court's decision be reversed and the authority of local governments to reasonably regulate—even if they cannot prohibit—medical marijuana land uses be confirmed by this Court?**

Plaintiffs/Counter-Defendants/Appellants answers: Yes
Defendant/Counter-Plaintiff/Appellee answers: No
The Trial Court answered: No
The Court of Appeals should answer: Yes
Amici Curiae MML, MTA, and GLS answer: Yes

STATEMENT OF INTEREST

The Michigan Municipal League (MML) is a Michigan non-profit corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership comprises hundreds of Michigan cities and villages, many of which 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, which is broadly representative of its members. The purpose of the Legal Defense Fund is to represent the member cities and villages in litigation of statewide significance.

The Michigan Townships Association (MTA) is a Michigan non-profit corporation whose membership consists of more than 1,225 townships within the State of Michigan (including both general law and charter townships) joined together for the purpose of providing education,

exchange of information, and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government services under the laws of and statutes of the State of Michigan. The MTA is governed by a Board of Directors who are township government officials.

The Government Law Section of the State Bar of Michigan (GLS) is a voluntary membership section of the State Bar of Michigan, comprising approximately 692 attorneys who generally represent the interests of government corporations, including cities, villages, townships and counties, boards and commissions, and special authorities. Although the Section is open to all members of the State Bar, its focus is centered on the laws, regulations, and procedures relating to governmental law. The Government Law Section provides education, information and analysis about issues of concern to its membership and the public through meetings, seminars, the State Bar of Michigan website, public service programs and publications. The Government Law Section is committed to promoting the fair and just administration of public law. In furtherance of this purpose, the Government Section participates in cases that are significant to governmental entities throughout the State of Michigan. The Section has filed numerous *amicus curiae* briefs in state and federal courts. The position expressed in the *amicus curiae* brief is that of the Government Law Section only and is not the position of the State Bar of Michigan.

The governing bodies of the above three entities have all authorized and directed this office to file an *amicus curiae* brief in the within cause in support of the Plaintiff-Appellant City of Warren.

STATEMENT OF FACTS

Amici adopt the Statement of Facts as set forth by Appellant City of Warren in its Brief on Appeal.

STANDARD OF REVIEW

Whether the Michigan Medical Marihuana Act (MMMA), MCL 333.26421, *et seq.*, preempts a local municipal ordinance is a question of law, to be reviewed de novo by the Court. *Ter Beek v Wyoming*, 491 Mich 1, 8; 846 NW2d 531 (2014).

The rules for finding preemption are discussed throughout the remainder of this Brief.

ARGUMENT

Under Michigan's strong local home rule tradition, the preemption of local law by state law requires clear legislative intent. The voters who approved the MMMA did not clearly intend to immunize medical marijuana patients and caregivers from all local land use laws, and the circuit court's finding of such immunity ignores both that lack of intent and the concept of local home rule. The circuit court's decision should be reversed and the authority of local governments to reasonably regulate—even if they cannot prohibit—medical marijuana land uses should be confirmed by this Court.

A. Introduction and Summary of Argument

The most remarkable thing about the circuit court's opinion in this case is the nonchalance with which it finds the entire concept of municipal zoning and the entire set of land use laws and principles to be irrelevant where the land use is marijuana. That's not to say that the lower court did so unprofessionally, or somehow cavalierly; its opinion checks the boxes it necessary to produce a complete and workman-like opinion: discussion of the right sections of the Michigan Medical Marihuana Act, MCL 333.26421 *et seq* (MMMA); reference to the proper rules of statutory construction about discerning legislative intent; fair description of the case law relating to

preemption under *People v Llewellyn*, 402 Mich 314; 257 NW2d 902 (1997); and citation to the only Michigan Supreme Court opinion to address zoning and land use in the context of medical marijuana, *Ter Beek v City of Wyoming*, 495 Mich 1; 846 NW 2d 531 (2014).

All leading ultimately to its ruling that the City of Warren has no authority to make the Defendant-Appellee (a primary caregiver growing his own plants) register like any other business being operated out of a home in a single-family neighborhood and be subject to basic safety inspections to make sure the activities have proper and safe services (electrical, etc.), nor even any authority to respond to complaints of foul odors emanating from the home. While the opinion mentions the City's zoning authority under the Michigan Zoning Enabling Act, MCL 125.3101 *et seq* (MZEA), it is primarily in the context of the decision by the Supreme Court in *Ter Beek* that a municipality is preempted by the MMMA from attempting to completely prohibit such medical marijuana uses, as opposed to regulating aspects of them. The bottom line for the lower court here, after imprecisely applying *Ter Beek*, is that *any* regulation of the "medical use" of marijuana on top of that provided in the MMMA itself—12 plants per patient and an enclosed, locked facility—is precluded, even where those regulations are the result of typical land use considerations and are not prohibitory.

While the City's appeal of that decision has been pending in this Court, this Court has now issued its own opinion in *DeRuiter v Township of Byron*, ___ Mich App ___; ___ NW2d ___ (2018) (COA No. 338972, issued July 17, 2018), reaching a similarly broad conclusion: that the MMMA preempts local zoning and land use laws, including the ordinance at issue there that governed the location of medical caregiver operations, requiring them to be conducted as regulated home occupations, not allowed in a commercial zoning district. The Court's opinion again has all the boxes checked and runs through all the expected arguments before reaching its conclusion. Like the circuit court in this case, the *DeRuiter* opinion ends up treating the *Ter Beek* case as

determinative of the issue. Unlike the circuit court here, *DeRuiter* does at least mention, in addition to the MZEA, the concept of constitutional home rule generally (which includes references to townships)—albeit only in the passing context of noting that the local authority thereunder is subject to state law.

Taken together, it looks like a decade after the voters adopted the MMMA, and after years of communities applying typical land use regulations in connection with MMMA-compliant land uses in their communities, we are now going to create a separate land use animal where literally anything goes—noise, lights, odor, traffic, fertilizer and pesticide storage—and apparently goes anywhere it wants. Omnipresence of marijuana uses in all zoning districts regardless of those carefully-laid master plans for future land use nearly every community undertakes. A land use free-for-all. Because that's ultimately the logical result of these rulings.

The problem with the lower court's formulation of the test ("any" additional regulation is preempted as a direct conflict—which is the same as *DeRuiter's*—is that it admits no middle ground. If addressing odor is forbidden, so is dealing with light and noise and pollution and vermin that spill onto the neighbor's property. If you cannot regulate the location of the use—maybe the single most important, most elemental thing about zoning—then you cannot really regulate anything else about it. Building height, lot coverage, minimum number of parking spaces, basic habitability rules like having running water…these are all things that are locally regulated, through the very ordinance scheme that these cases now say cannot be applied to this uber-land use.

Ter Beek doesn't require this conclusion. The Court there specifically emphasized that it was *not* saying that no local land use ordinances are permitted in the medical marijuana context, and it did so in language that seemed to convey some exasperation with the very idea that a finding of preemption in the case before it (which was an attempt not to regulate the use but

instead to completely prohibit it) could lead to this kind of case, or a finding of complete preemption of "any" additional regulation. And yet, here we in fact are.

We have arrived at this point because the circuit court in this case (and subsequently the *DeRuiter* Court) overlooked the most important part of the concept of constitutional home rule in Michigan: the mandate directed to the courts to liberally construe the right of local governments to regulate and pass laws in their favor, and to uphold that right if at all possible to do so. The Michigan Supreme Court describes just how fundamental those home rule rights are to our constitutional form of government in *Associated Builders v City of Lansing*, 499 Mich 177; 880 NW2d 765 (2016), a post-*Ter Beek* case. Courts must try to harmonize potentially conflicting legislation so that the right of home rule isn't lost. That means trying to find a way for the MZEA and the MMMA to actually coexist.

The circuit court does not mention home rule; the *DeRuiter* Court mentions it but then disregards it. The result is a preemption analysis that is simply incomplete. If this Court gives proper weight to the MZEA, as a statement of what sorts of actions municipalities may undertake to provide for the health, welfare, and safety of their citizens, and heeds the constitutional directives in the HCRA, the conclusion that the circuit court erred, and that the City of Warren is not preempted from enforcing reasonable zoning and land use rules, will be unavoidable.

B. The circuit court misconstrued *Ter Beek's* "direct conflict" preemption analysis to be what the *Ter Beek* court specifically said it was not—a determination that no local government land use regulation of the medical use of marijuana is permitted.

The circuit court found that Warren's local land use ordinance provisions were preempted by the MMMA "based on" *Ter Beek*. (Slip Op. p. 4.) The circuit court found preemption under the "immunity from penalty" provisions, §4(a) (for patients) and §4(b) (for caregivers), but arguably also found, by reference to *Ter Beek*, preemption under §7(e) of the MMMA, which

states that all other legislative acts inconsistent with the MMMA "do not apply" to the medical use of marijuana. MCL 333.26427(e).

The circuit court did briefly acknowledge that the *Ter Beek* Court forcefully denied that it was holding that no local regulation of medical marijuana uses was permitted—but then concluded that is exactly what *Ter Beek* held. The circuit court misread and misapplied *Ter Beek*.

1. Rules of preemption generally.

Unlike the City of Warren ordinance, the Wyoming ordinance at issue in *Ter Beek* was intended to be a complete prohibition against medical marijuana use, even if that use was conducted entirely in compliance with the MMMA. In finding that such an ordinance was preempted by §4(a) of the MMMA, the Supreme Court engaged in a standard "implied preemption" analysis under *People v Lewellyn, supra*.

Llewellyn identifies three kinds of preemption. The first is *express* preemption, which applies when the state law "expressly provides that the state's authority to regulate a specified area is to be exclusive. . . ." 401 Mich at 323.

There are two kinds of *implied* preemption under the *Llewellyn* formulation: "direct conflict" preemption and "occupation of the field" preemption:

> A municipality is precluded from enacting an ordinance if 1) the ordinance is in direct conflict with the state statutory scheme, or 2) if the state statutory scheme pre-empts the ordinance by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation.

The test for determining whether there is a "direct conflict" between a state and local law has been variously stated, but the formulation in *Rental Property Owners Ass'n of Kent County v Grand Rapids*, 455 Mich 246, 262; 566 NW2d 514 (1997), is a common version:

> . . . [I]n determining whether the provisions of a municipal ordinance conflict with a statute covering the same subject, the test is whether the ordinance prohibits an act which the statute permits, or permits an act which the statute prohibits.

Id. at 262.

As for "field preemption," under *Llewellyn,* courts are to consider three factors in determining whether the legislature has impliedly occupied the field so as to preclude location action:

> [P]reemption of a field of regulation may be implied upon an examination of *legislative history*. *Walsh v River Rouge*, 385 Mich 623; 189 NW2d 318 (1971)
>
> *[T]he pervasiveness* of the state regulatory scheme may support a finding of pre-emption. *Grand Haven v Grocer's Cooperative Dairy Co.,* 330 Mich 694, 702; 48 NW2d 362 (1951); *In re Lane*, 58 Cal 2d 99; 22 Cal Rptr 857; 372 P2d 897 (1962); *Montgomery County Council v Montgomery Ass'n, Inc.*, 274 Md 52; 325 A2d 112, 333 A2d 596 (1975). While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer pre-emption, it is a factor which should be considered as evidence of pre-emption.
>
> *[T]he nature of the regulated subject* matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest.

Llewellyn, 401 Mich at 323-324. (Emphasis added.) The *Ter Beek* Court evaluated the City of Wyoming zoning ordinance under the "direct conflict" test, and the circuit court here (at least nominally) did the same. Implied preemption by virtue of direct conflict will thus be the focus of this Brief.[1]

2. The City of Warren's regulations.

Unlike the City of Wyoming's zoning ordinance in *Ter Beek*, which amounted to a flat prohibition of the medical use of marijuana through the terse statement that "[u]ses that are contrary to federal law, state law or local ordinance are prohibited," the City of Warren specifically *authorizes and allows* the medical use of marijuana in its zoning ordinance—it just subjects that

[1] Where there is express preemption, there's obviously no need to engage in the implied preemption analysis. Express preemption is not at issue when evaluating local land use regulations adopted under the MZEA and HRCA, since the MMMA does not specifically assert its primacy over such laws. The *Ter Beek* Court did not address express preemption at all.

use to typical zoning and/or other land use regulations that might apply to other uses within the City that are completely unrelated to marijuana.

Section 501 of Warren's Zoning Ordinance, adopted under the MZEA, describes "growing, storing, or cultivating marijuana or processing or manufacturing marijuana into a usable form" as among the "Uses Permitted" in Section 5.01(m) in the R-1-A, One-Family Residential District. However, other provisions within that subsection attach some additional requirements in order to engage in the use. These include, for example, registering the dwelling with the Department of Buildings and Safety Engineering and passing an administrative safety inspection for electrical, heating, plumbing, storage, and disposal of materials as well as some filtration requirements for proper ventilation. See subsections (2), (3), and (4). These are typical land use regulations for similar home occupations generally throughout the state. They do not prohibit a particular use so much as describe the manner in which the use can be conducted.[2]

[2] Section 5.01 (m) Uses permitted.
Growing, storing, or cultivating marihuana or processing or manufacturing marihuana into a usable form, except that such uses may be permitted if all of the following conditions are satisfied:

(1) The use, storage, cultivation, growth, manufacturing or processing of the medical marihuana is in compliance with the Michigan Medical Marihuana Act, MCL 333.264231 et seq., as amended, including but not limited to the requirements stated in Section 4, MCL 333.26424, as amended, and in accordance with all applicable ordinances and regulations, including the Fire Protection Code and Article VI of Chapter 22 of the Code of Ordinances;
(2) The dwelling is registered with the department of buildings and safety engineering and has passed an administrative safety inspection for electrical, heating, plumbing, storage, and disposal of materials or water used in connection with the marihuana;
(3) The dwelling has a filtration for its ventilation system or unit to prevent the emission of odors upon neighboring properties, and which has been inspected by and meets with the satisfaction of the Department of Buildings and Safety Engineering;
(4) No more than one (1) person may grow, cultivate, manufacture, store or process marihuana in each dwelling structure;
(5) The growth, cultivation, manufacture, or storage of medical marihuana occurs solely at the property under exclusive control, through written lease, contract or deed in favor a qualifying patient who occupies the property as his or her principal residence;
(6) The legal owner or property manager of the residential dwelling authorizes the use, storage, cultivation, growth, or processing of the marihuana;
(7) No more than one (1) person per residential dwelling may cultivate, grow, manufacture or process marihuana on the premises who otherwise meets the standards in this section.
(8) The uses permitted in this subsection (m) are allowed only in the residential districts classified as R-1-A, R-1-B, R-1-C, R-1-P, R-2 and -3, unless expressly permitted elsewhere in this Code.

Another of the regulations at issue, relating to odor, is found in the City's nuisance ordinance, and therefore is considered to be a "police power" or regulatory ordinance adopted under the general authority of the HRCA.[3] Section 21-92(e) defines strong or foul odors caused by "growth, cultivation and/or excessive use or consumption of marijuana" as a nuisance. Marijuana odors have, in other words, been added to the existing list of potentially harmful odors caused by other things such as animals, stagnant pool, and garbage, chemicals or industrial activities, and burning garbage, rubber and/or other materials or substances."

Finally, Warren's zoning ordinance requires anyone operating any business from a home to do so in compliance with the zoning and other ordinances of the City—which would include activity by people such as the Defendant here, who is engaged in services as a caregiver for others outside the property at issue. Warren Zoning Ordinance Section 4.01.

All in all, this is not the complete prohibition as found in *Ter Beek*, but actually quite the opposite: standard land use regulations governing the "wheres" and "hows" of conducting an otherwise lawful and permitted use.

3. Relying on Ter Beek, the circuit court held that literally no land use regulations can be applied by a local government so long as the right number of marijuana plants are kept in a "enclosed locked facility" as required by the MMMA

The circuit court's analysis starts with a reference to §4 of the MMMA, MCL 333.26424, which provides protections for patients, caregivers, physicians, and others when engaging in the medical use of marijuana in compliance with the MMMA. This §4 is commonly described as the "immunity" section of the Act. As a qualifying patient and primary caregiver, the Defendant in

(9) No use, storage, growth, cultivation or processing of marihuana is permitted in Downtown Center District as described in Appendix A of the Code of Zoning Ordinances, Section 21-B.

[3] See MCL 117.4i(9), relating to general police powers authority.

this case would appear to be entitled to application of both §4a and §4b.[4] The circuit court keys in on the phrase common to both that states a patient "is not subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to, civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the *medical use of marihuana* in accordance with this act," and a caregiver is not subject to penalty "for assisting a qualified patient . . . with the *medical use of marihuana*. . . ." (Emphasis added.)

Citing *Ter Beek*, the circuit court first broadly posits that the "immunity provision of the MMMA preempts the Warren ordinances such that Appellee could not be penalized while in compliance with the MMMA." (Slip Op, p 4.) It moves from there to noting that the *only* requirement in the MMMA regarding the medical use of marijuana is that the maximum required number of plants must be adhered to, and that the plants must be kept in an enclosed locked facility:

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[4] Sec. 4. (a) A qualifying patient who has been issued and possesses a registry identification card *is not subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act*, provided that the qualifying patient possesses an amount of marihuana that does not exceed a combined total of 2.5 ounces of usable marihuana and usable marihuana equivalents, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount. The privilege from arrest under this subsection applies only if the qualifying patient presents both his or her registry identification card and a valid driver license or government-issued identification card that bears a photographic image of the qualifying patient.

(b) A primary caregiver who has been issued and possesses a registry identification card *is not subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for assisting a qualifying patient to whom he or she is connected through the department's registration process with the medical use of marihuana in accordance with this act*. The privilege from arrest under this subsection applies only if the primary caregiver presents both his or her registry identification card and a valid driver license or government-issued identification card that bears a photographic image of the primary caregiver. ***

> . . . [A] registered caregiver is not subject to a 'penalty in any manner" if the caregiver possesses marijuana 'in forms and amounts that do not exceed . . . 12 marijuana plants kept in an enclosed locked facility. . . .

And then it jumps straight to its conclusion, which judicially adds, through implication, language that does not exist in the MMMA:

> Here, given the extensive and detailed definition of a 'enclosed, locked facility' describing how a primary caregiver must keep and cultivate medical marijuana to be in compliance with the MMMA, it is *implied* that there are no other requirements. Thus, the Warren ordinance directly conflicts by providing additional requirements not included within the MMMA. (Emphasis added.)

The lower court hammers home its finding of absolute prohibition on any other local regulation of medical marijuana use—including typical zoning and land use rules—as follows:

> Where the MMMA does not specifically prohibit registered primary caregivers from keeping marijuana plants on their residential properties, *any* ordinance that prohibits MMMA authorized activity in such location is in direct conflict and cannot be applied as written. (Emphasis added.)

Arguably, by proclaiming such a sweeping rule against "any" municipal ordinance, the circuit court has strayed out of the "direct conflict" realm (which is the test that *Ter Beek* applied) and wandered into a finding that the MMMA "occupies the entire field" of regulation of medical use marijuana—including all aspects, apparently, of land use related to such use. *Ter Beek* says no such thing, and the circuit court does not actually undertake the "occupies the field" legal analysis that is set forth in *Llewellyn*.

4. Contrary to the circuit court's apparent understanding, Ter Beek dealt only with a finding of implied preemption in the context of a complete prohibition on the medical use of marijuana; it did not find either direct conflict or field preemption as to any regulatory scheme other than complete prohibition—in fact, just the opposite is true.

The *Ter Beek* Court found that the City of Wyoming's complete prohibition ordinance was preempted because it "directly conflicts with the MMMA by permitting what the MMMA expressly prohibits—the imposition of a 'penalty in any manner' on a registered qualifying patient whose medical use of marijuana falls within the scope of §4(a)'s immunity." *Id*. at 20.

The defining characteristic of the City of Wyoming ordinance was in fact its *complete prohibition* of the medical use of marijuana—either as a qualifying patient or as a caregiver. Or as the Supreme Court framed it, the fact that its whole purpose was "denying the ability to engage in MMMA compliant conduct." *Ter Beek* at 21. While it found the Wyoming prohibitory ordinance to be preempted, the Court expressly acknowledged during the course of its opinion that the MMMA does not create a general right for individuals to use or possess marijuana in Michigan, citing *People v Kolanek*, 491 Mich 382, 394; 817 NW2d 528 (2012), and focused instead on the immunity from enforcement aspect of the law. The Wyoming ordinance, it found, penalized the exact thing the MMMA sought to shield from penalty: the medical use of marijuana in the broad sense as approved by the voters; the general right to be able to cultivate and use it at all.

The Court also went out of its way to specifically state that it was *not* finding that "any" additional regulation beyond the number of plants and containment within a closed locked facility would be prohibited under the MMMA's §4 immunity:

> Contrary to the City's concern, this outcome does not 'create a situation in the State of Michigan where a person, caregiver or group of caregivers would be able to operate with no local regulation of their cultivation or distribution of marijuana.' Ter Beek does not argue, and ***we do not hold, that the MMMA forecloses all local regulation of marijuana; nor does this case require us to reach whether and to what extent the MMMA might occupy the field of medical marijuana regulation***. (Emphasis added.)

Ter Beek at fn. 9. The Court also emphasized that its finding of preemption was only "to the extent of this conflict." *Id.* at 24.

The MMMA allows the medical use of marijuana under certain circumstances: "[t]he medical use of marihuana is allowed under state law to the extent that it is carried out in accordance with" the MMMA. MCL 333.26427(a) The City of Wyoming ordinance in *Ter Beek* did not allow medical use of marijuana under *any* circumstances within the City, and therefore contemplated the imposition of a penalty for any and all activities related to the medical use of

marijuana. The *Ter Beek* Court viewed those two positions to be *entirely irreconcilable* and thus found a direct conflict and preemption under *Lewellyn*.

By contrast, the City of Warren *does* allow the medical use of marijuana, but seeks to reasonably regulate it, on basic public health, safety and welfare grounds, as a land use in the normal course of its regulatory and zoning authority. *Ter Beek* does not answer the question whether that is okay—it specifically left that question to be answered another day, and specifically denied having any opinion on it at all.

Like the City of Warren in this case—and like the *Amici* will in this Brief—the City of Wyoming had relied heavily, as the basis for its ordinance, on the broad authority granted to municipalities under the MZEA, arguing that such an extensive regulatory role should be sufficient to withstand a preemption claim. The *Ter Beek* Court rejected that line of argument, finding that "the fact that the Ordinance is a local zoning regulation enacted pursuant to the MZEA does not save it from preemption." *Ter Beek* at p. 542. However, it did so in the context not of §4 immunity, but by reference to the "inconsistent acts" language of the MMMA, §7(e), which states: [a]ll other acts and parts of acts inconsistent with [the MMMA] do not apply to the medical use of marihuana as provided for by this act."

The context of that finding relative to the MZEA should not be ignored. The MMMA permits the medical use of marijuana, but the City of Wyoming ordinance prohibited the medical use of marijuana. Here, the City of Warren ordinance expressly *permits* the medical use of marijuana—but subjects it to some minimal, reasonable regulations like any other land use. The language of *Ter Beek's* analysis of the MZEA, therefore, is simply inapposite to the question that was before the circuit court. *Ter Beek* said that Wyoming went too far. Its opinion did not answer the question "how far can we go?"

If this Court follows the implied preemption analysis in *Lewellyn,* and does so in the context of general rules of statutory interpretation with an appropriate understanding of the scope and extent of the home rule authority for local governments in Michigan, and of the MZEA, the conclusion that a municipality, like Warren, may apply reasonable land use regulations that do not prohibit the medical use of marijuana will be reached.

C. A correct application of the preemption doctrine under Michigan law results in the conclusion that there is no preemption of reasonable, regulatory—and non-prohibitory—land use laws by virtue of either the MMMA's immunity provision (§4[a] and/or 4[b]) or the "inconsistent acts" language of § 7(e).

1. There was no clear intent on the part of the voters approving the MMMA to completely immunize medical marijuana patients and caregivers from any and all local land use laws, even if you look at its "plain language."

(a) General rules of interpretation—the point is to discern intent.

The Court's opinion in *Ter Beek* is a good jumping off point for the proposition that, even though the MMMA is an initiated law, and was not prepared and enacted by the State Legislature, this Court's function is still to find and apply the intent of the voters who approved the language of the law:

> As we have recently explained, the intent of the electors governs the interpretation of voter-initiated statutes such as the MMMA, just as the intent of the legislature governs the interpretation of legislatively-enacted statutes. *People v Bylsma*, 493 Mich 17, 26; 825 NW2d 543 (2012). The first step when interpreting a statute is to examine its plain language, which provides the most reliable evidence of intent. If the statutory language is unambiguous, no further judicial construction is required or permitted because we must conclude that the electors intended the meaning clearly expressed.

Ter Beek at 8. While the Supreme Court in *Ter Beek* seemed to find the meaning and application of the §4 immunity provisions of the MMMA to be "plain" enough as regards the *complete prohibition* of *any* otherwise permitted medical use of marijuana, that does not help this Court in applying the language of the MMMA—either §4 immunity or §7(e) "inconsistent acts" language—

to a completely different situation: the regulation of the land use aspects of medical marijuana as a permitted use.

To start, it is more than a little odd to have to treat this law like any other law for purposes of deciding what the "legislative" intent was. As an initiated law, it was written by people who do not normally write laws, and was "enacted" by voters who do not normally read laws. Thus, courts have not been hesitant to call the MMMA ambiguous in some contexts, and to engage in "interpretation" of its provisions. This is particularly true of the §4 immunity provision.

In *People v Koon*, 494 Mich 1, 8; 832 NW2d 724 (2013), the Supreme Court noted, somewhat exasperatedly, that "[i]t goes without saying that the MMMA is an imperfect statute, the interpretation of which has repeatedly required this Court's intervention." The Supreme Court stated again, in *People v Hartwick*, 498 Mich 192, 198-200; 870 NW2d 37 (2015), that the initiative process itself can lead to ambiguity and the necessity for courts to look behind the language for legislative [voter] intent:

> Unlike the procedures for the editing and drafting of bills proposed through the Legislature, the electorate—those who enacted this law at the ballot box—need not review the proposed law for content, meaning, readability, or consistency. *** The lack of procedural scrutiny in the initiative process leaves the process susceptible to the creation of inconsistent or unclear laws that may be difficult to interpret and harmonize. The MMMA is such a law. While the MMMA has been the law in Michigan for just under seven years, this Court has been called on to give meaning to the MMMA in nine different cases. The many inconsistencies in the law have caused confusion for medical marijuana caregivers and patients, law enforcement, attorneys, and judges, and have consumed valuable public and private resources to interpret and apply it. This confusion mainly stems from the immunity, MCL 333.26424 (§4), and the affirmative defense, MCL 333.26428 (§8), provisions of the MMMA.

That said, the Courts have also made clear that, while engaged in the effort to discern the voters' intent, the normal rules of interpretation apply. As such, words and phrases must be given their plain and ordinary meaning. *Pohutski v City of Allen Park*, 465 Mich 675; 683 NW2d 219 (2002); *DiBenedetto v West Shore Hospital*, 461 Mich 394, 402; 605 NW2d 300 (2000). And

it remains fundamental that "courts may not rewrite the plain language of [a] statute to substitute their own policy decisions for those already made by the legislature." *DiBenedetto, supra*, at 405. Nor may courts speculate about an unstated purpose or probable intent of the legislature beyond the language used in the statute. *Pohutski, supra*, at 683. On the other hand, technical words and phrases, and those that have acquired a peculiar and appropriate meaning in the law, shall be construed and understood as such. *People v Bylsma*, 493 Mich 17, 31; 825 NW2d 543 (2012).

Statutory provisions are also not to be read in isolation, but rather are to be read together to harmonize their meaning and give effect to the act as a whole. *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). "[W]ords and phrases used in an act should be read in the context of the entire act and assigned such meanings to harmonize with the act as a whole." *People v Cousins*, 480 Mich 240, 249; 747 NW2d 849 (2008) (quotation marks and citation omitted).

(b) No discernable intent can be found on the face of the ballot proposal or the language of the initiated law to immunize patients or caregivers from all local land use laws.

The MMMA was never actually intended to govern land use issues. There is no mention of "zoning" or "land use laws" in the ballot proposal for 2008 as placed before the voters in the general election. There is no mention of land use laws or rules. In fact, there is no specific mention of municipalities, or local governments, or local ordinances of any kind.

What the voters who read the ballot question would have seen were some very general statements about what the proposed law would do:

PROPOSAL 08-1

A LEGISLATIVE INITIATIVE TO PERMIT THE USE AND CULTIVATION OF MARIHUANA FOR SPECIFIC MEDICAL CONDITIONS.

The proposed law would:

- Permit physician-approved use of marijuana by registered patients with debilitating medical conditions including cancer, glaucoma, HIV, Aids, Hepatitis C, MS and other conditions as may be approved by the Department of Community Health.
- Permit registered individuals to grow limited amounts of marijuana for qualifying patients in an enclosed locked facility.
- Require Department of Community Health to establish an identification card system for patients qualified to use marijuana and individuals qualified to grow marijuana.
- Permit registered and unregistered patients and primary caregivers to assert medical reasons for using marijuana as a defense to any prosecution involving marijuana.

While the description does talk about a "defense to prosecution," nothing about that phraseology leads a reader to think that zoning and land use ordinances cannot be enforced.

For those who actually read the full text of the initiated law, the result is no different. While §4(a) and §4(b) talk about not being subject to penalty for the "medical use" of marijuana, as broad as that term is it still does not actually use any language that would seem to encompass land uses:

> 'Medical use of marihuana' means the acquisition, possession, cultivation, manufacture, extraction, use, internal possession, delivery, transfer, or transportation of marihuana, marihuana-infused products, 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). There is no reference here to *where* you do these things or *how* you do them. There is no reference to the zoning or land use or regulatory authority of any kind.

The same is true of the language of §7e that just talks about "[a]ll other acts . . . inconsistent with [the MMMA]." This provision on its face does not say that it is talking about zoning or land use laws; nothing about it necessarily jumps one to the conclusion that its effect is to basically overturn the entire concept of zoning as relates to marijuana uses. In fact, the requirement that the "other acts" be "inconsistent with" the MMMA leaves a lot of room for interpretation and application (as is in fact now occurring here many years later).

Courts have also sometimes found the preamble to a statute to be instructive on the question of intent. Here, the MMMA does contain a section relating to "findings," which states in full:

> 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 marijuana. Michigan joins in this effort for the health and welfare of its citizens.

Again, nothing about that language leads the ordinary reader, or ordinary voter, to the conclusion that his neighbor will be absolutely exempt from any and all zoning and land use laws in a way that no other use of that land would be.

In fact, the opposite might well be true, since it states that Michigan "joins" the efforts of other states that "do not penalize the medical use and cultivation of marijuana." Some of those states mentioned—while not "penalizing" it—do *in fact allow* zoning and land use regulations with respect to medical marijuana.[5] So perhaps some Michigan voters noted that.

If the circuit court's test is adopted—if *any* regulation that is in addition to the limitation on the number of plants and the requirement that the plants be contained in an "enclosed locked facility" is preempted not because there is a direct and obvious conflict, but because "it is *implied* that there are no other requirements" (Slip Op, p 7)—then regulations on *any* other aspect of the use, cultivation, or storage of marijuana would necessarily fall by the wayside.

This case involves (among other things) strong odors affecting neighbors. So even though the words of §4 and §7, or the definition of "medical use" might be "plain," trying to figure out whether the voters actually meant to allow their neighbor the unfettered right to assault their senses with marijuana cultivation smells in a way that the neighbor could not with, say over-ripe garbage (or to pick something also generally allowed, the smell of cooking bacon, or garlic—but doing so 24 hours a day), is not as simple. The circuit court's position is certainly the easy way out: the Defendant is cultivating within the bounds of the MMMA, and any attempt to make him do slightly more would require imposing a penalty if he does not. Did the voters really intend that?

But why stop there? What about nighttime lighting that spills from an outdoor facility onto a neighboring property? What if the defendant here happened to believe that loud music is essential to the health and welfare of a growing crop (or the efficiency of the employees working on the crop)? An ordinance that states a grow operation must comply with a lighting or noise

[5] For example, California allows local zoning regulation, as the court in *Ter Beek* had to concede when it distinguished *Riverside v Inland Empire*, 56 Cal 4th 729; 156 Cal Rptr 3d 409; 300 P3d 494 (2013).

ordinance would be preempted under this circuit court's analysis. What if the MMMA-compliant activity is carried out in such a way that it attracts vermin or insects? As discussed in Section 4 of the Brief below, the preemption-from-all-regulation approach just doesn't work.

Both the circuit court's short shrift analysis and the *DeRuiter* Court's more detailed one amount to the same basic verbal shrug: "Not our problem." That is not how this is supposed to work—especially not when other rules of statutory construction and interpretation have to be applied, and be applied in a way that is specifically in favor of municipal authority to adopt such additional regulations.

The people of Michigan voted to be allowed to use medical marijuana in a normal sense—to not be prosecuted merely for ingesting, growing, or taking delivery of medical marijuana. They did not vote to create this super land use classification that is immune from regulation by their local government in the normal course: reasonable location, height, area, and bulk regulations that do not altogether prohibit the use, and basic public nuisance protections against careless or unscrupulous people engaged in some aspect of the medical use of marijuana. *That* conclusion is mandated by the other rules that this Court is obligated to actually use in its analysis.

2. Since the "plain language" of the MMMA does not answer the question here, the Home Rule Provisions of the 1963 Michigan Constitution and the Michigan Zoning Enabling Act (MZEA) provide a needed context for the Court's preemption analysis.

Because the City of Wyoming ordinance constituted a complete ban on the medical use of marijuana, it is not surprising that the Supreme Court's opinion in *Ter Beek* was more or less unintrigued by either the concept of home rule and how it might be reckoned with a complete prohibition of a use specifically permitted under the MMMA, or with the applicability of the MZEA as a state law of equal stature to the MMMA. In its view, the City of Wyoming ordinance was so clearly inconsistent with the MMMA that the Court did not feel the need to engage those rules.

While the statement by the *Ter Beek* Court was terse and clear—"the fact that the ordinance is a local zoning ordinance does not save it from preemption," 495 Mich at 22—what the Court ultimately held was that applying the complete use prohibition zoning ordinance section specifically adopted by the City of Wyoming was in essence penalizing the individual in that case "for the medical use of marijuana," which is exactly what the MMMA prohibits. Here, that is not the case. The Defendant/Appellee here is being cited for violating a law enacted under laws (the MZEA and the HRCA) that are of equal stature to the MMMA.[6] Applying a penalty in that context does not violate §4 immunity, because it is not for "medical use." And it does not violate §7(e), because both laws can be read together.

This argument is fleshed out in Section 3 of this Brief, below. But to start, a little more background on home rule and the MZEA is needed.

(a) Home rule is not some esoteric concept; it is our constitutional form of government and courts are obligated to enforce it.

The Court in *Ter Beek* introduced its preemption discussion with the comment that "the required analysis on this point is not complex." 491 Mich at 19. While the Court did briefly mention the City of Wyoming's home rule authority under the Michigan Constitution to "adopt resolutions and ordinances relating to its municipal concerns," Const 1963, art. 7, §22, it promptly noted that the City's power is "subject to the Constitution and the law," under the same provision. It then cited the 2003 case of *AFSCME v Detroit*, 468 Mich App 388, 410; 662 NW2d 695 (2003), for the proposition that "[w]hile prescribing broad powers, this provision specifically provides that ordinances are subject to the laws of the state, i.e., statutes." That was the entirety of the Court's home rule analysis.

[6] This Brief will not address the issue whether a civil citation is a "penalty," or whether a request for injunctive relief is a penalty. *Ter Beek* appears to address that issue (495 Mich at 20-21), and in any event the likelihood is that municipalities often seek some sort of enforcement action in the event of an ordinance violation.

But *this* time—with an ordinance that is not a complete ban, and actually permits the medical use of marijuana—the required analysis *is* complex. And it *does* require the Court to think about the extent to which a finding of preemption of reasonable regulation by local government (well) short of a complete prohibition is a constitutional right of local government that must be accorded some weight in this discussion.

Ter Beek was decided in 2014. A couple of years later, the Michigan Supreme Court was called on to discuss the expansive scope of Michigan's home rule authority for local governments in a much more direct way, and its analysis is extremely relevant to this case. *Associated Builders and Contractors v City of Lansing*, *supra*, involved a trade association that filed suit against the City of Lansing challenging the constitutionality of its ordinance requiring contractors performing work on municipal contracts to pay its laborers and mechanics prevailing wages and benefits.

The Association relied on an old case, *Attorney General ex rel Lennane v Detroit*, 225 Mich 631; 196 NW 391 (1923). *Lennane* involved a determination under the state's then-current 1908 Constitution to the effect that the City of Detroit could not enact a similar ordinance and related city charter provision relating to local wages. The *Lennane* Court held that the regulation of wages paid to third-party employees working on municipal construction contracts was exclusively a matter of "state" and not "municipal" concern.

In an expansive opinion expressly overruling *Lennane*—an unusual step—the Court in *Associated Builders* noted initially that the Michigan Constitution had been amended in 1963 to broaden the language of Article 7, Section 22, which now provides:

> 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. (Emphasis added.)

Citing the "Address to the People" portion of the new 1963 Constitution, the Court highlighted the intention of the framers that this section be a "more positive statement of municipal powers, giving home rule cities and villages full power over their own property and government, subject to this constitution and law." *Id.* at 637-638.

The *Associated Builders* Court then went on to discuss another new constitutional provision, Article 7, §34, which is not referred to or discussed in any way in the *Ter Beek* decision:

> ***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. (Emphasis added.)

Id. at 186. Elaborating the boundaries of home rule generally, and how the actions of local governments (both cities and townships) are to be treated by the Court under the constitutional mandate of liberal construction of state law in a municipality's favor, the Court said:

> Under our current constitution, there is *simply no room for doubt about the expanded scope of authority of Michigan cities and villages*: '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.' Moreover, these powers over 'municipal concerns, property and government' are to be 'liberally construed.' In contrast to the *Lennane* Court briefly interpreted the more limited language in 1908 Constitution – granting cities and villages the right to 'pass all laws and ordinances relating to municipal concerns' – decided upon a narrow conception of local authority and declared, with scant analysis, that a prevailing wage law similar to this one was exclusively a matter of 'state concern'. (Emphasis added.)

Id. at 187.

This leads the *Associated Builders* Court into a discussion of the concept of state vs local concerns, and (of note for the situation here) the Court quite forcefully rejects the idea that something cannot be of *both* state and local concern:

> Furthermore, *Lenanne's* holding appears to rest on an implicit dichotomy: if something is a matter of 'state concern' it cannot also be a matter of 'local concern.' But this binary understanding does not comport with the plain language of the 1963 Constitution, which grants cities and villages broad powers over 'municipal

> concerns, property and government,' whether those powers are enumerated or not. The relevant constitutional language does not state that a matter cannot be a 'municipal concern' if the state might also have an interest in it. While a binary understanding of state and local governmental power might have been common 100 years ago, the ratifiers of the 1963 Constitution do not appear to have worked under the same apprehension – instead, we are left with their words: 'The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor.'

To be sure, the Court's conclusion in the *Associated Builders* case was not exactly a surprise. Similar language had been used by other courts. For example, in *Adams Outdoor Advertising, Inc. v City of Holland*, 234 Mich App 681; 600 NW2d 339 (1999), *aff'd* 463 Mich 675; 625 NW2d 377 (2001), this Court held that "unless a power or right is *specifically proscribed* by law, home rule city has broad authority to enact ordinances for the benefit of the health, safety and welfare of its residents. Home rule cities are not limited to only those powers expressly enumerated." *Id*. at 689 (emphasis added). The Court expanded on its conclusion by specific reference to Article 7, §22:

> Accordingly, it is clear that home rule cities enjoy not only those powers specifically granted, but they may also exercise all powers not expressly denied. *Home rule cities are empowered to form for themselves a plan of government suited to their unique needs, and upon local matters, exercise the treasured right of self-governance.* (Emphasis added.)

Id. at 687.[7]

But the emphatic nature of the *Associated Builders* Court's analysis, as well as its affirmation that matters of local concern can overlap with issues that have state-wide implications, is what is relevant here, because here the Court is charged with the task of construing what the language of the MMMA means in context of two laws (the MZEA and the HRCA) not referred to in, or even clearly implicated by, the MMMA. By *constitutional mandate*, the Court must construe

[7] The *Adams* Court went on to broadly describe the powers of all local government units in Michigan by stating: "Our municipal governance system has matured to one of general grant of rights and powers, subject only to certain enumerated restrictions instead of the earlier method of granting enumerated rights and powers definitely specified." *Id.* at 688. That grant of rights is not simply bestowed upon municipalities by the legislature; it includes authority granted directly, and the 1963 Constitution itself.

that language in a manner that is liberally in favor of the City of Warren and local governments generally.

It is true that Article 7, §22 of the Constitution specifically states that the municipal authority described therein is "subject to the laws of this state" which certainly includes the MMMA itself. But the converse is also true: the immunity language of §4 and the "inconsistent acts" languages of Section 7 of the MMMA must be liberally construed in favor of local government authority to pass ordinances and resolutions in furtherance of municipal interest and municipal government; the MMMA is in that sense "subject to" the HRCA.

While the complete prohibition language of the City of Wyoming ordinance might not have compelled the Court in *Ter Beek* to spend a significant amount of time trying to harmonize the broad authority of a local government to regulate land uses and their effects on the public health, safety, and welfare, the fact that the ordinance provisions at issue do not amount to a complete prohibition, but rather actually permit the medical use of marijuana, subject to reasonable regulation just like any other land use, compels a different and more searching analysis before reaching the conclusion of preemption.

(b) The MZEA is not just some other state law; it is a venerable set of rules of long-standing importance that nearly every community in Michigan relies on to protect its citizens, businesses, and property owners.

As part of its delegation of the right to establish their own charters, the HRCA expressly authorizes cities to provide in them for the establishment of "districts or zones within which the use of land and structures [that] may be regulated by ordinance." MCL 117.4i(c). This authority, along with the MZEA (which applies to townships as well), represents one of the most important powers possessed by a local government for protecting its citizens from harm and, of equal importance, to pursue for them basic quality of life interests. The MMMA has a narrow scope: allowing the use of marijuana for certain purposes. By contrast, the authority that is exercised

under the MZEA for the broad protection against harm and the promotion of quality of life is not likely to be provided in any other manner. For that reason, well-established rules relating to city zoning must be considered in any analysis.

Local legislative action by a city establishing and amending zoning use districts and related rules, often directed to the protection of the jealously guarded single-family neighborhood, is at the very heart of a city's general policy-making efforts to protect the safety and quality of life of its residents. As Justice Marshall observed in his dissent in *Village of Belle Terre v Boraas*, 416 US 1, 13; 94 S Ct 1536; 39 L Ed 2d 797 (1974), with regard to the zoning power:

> "It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life."

The landmark case decided by the Supreme Court of the United States in 1926, *Village of Euclid v Amber Realty Co.,* 272 US 365; 47 S Ct 114; 54 ALR 1016; 71 L Ed 303 (1926), when the exercise of the zoning power *per se* was challenged as a violation of due process, very decisively concluded that zoning is a valid exercise of power, not only to protect the community (particularly residential neighborhoods) from nuisance conditions, but also to make the community a better place to live; in other words, zoning is a valid and needed exercise of power to both protect the community from harm and promote quality of life.

Euclid was followed in Michigan when the Supreme Court decided *Cady v City of Detroit*, 289 Mich 499, 514; 286 NW2d 805 (1939), in which the Court held that zoning ordinances have:

> …for their purpose regulated municipal development, the security of home life, the preservation of a favorable environment in which to rear children, the protection of morals and health, the safeguarding of the economic structure upon which the public good depends, the stabilization of the use and value of property, the attraction of a desirable citizenship and fostering its permanency, are within the proper ambit of the police power.

In *Schwartz v City of Flint*, the Court recognized that:

> Zoning, by its nature, is most uniquely suited to the exercise of the police power because of the value judgments that must be made regarding aesthetics, economics, transportation, health, safety, and a community's aspirations and values in general. 426 Mich 295, 313; 395 NW2d 678 (1986).

Gackler v Yankee Springs Township similarly held that improving the aesthetics of an area amounts to the advancement of a reasonable government interest. 427 Mich 562, 572; 398 NW2d 393 (1986). And one of the authoritative national treatises on zoning and planning has observed that:

> The history of police power regulation of land development and use in this country is one of ever-expanding scope and intensity. Courts have ruled that the lawful scope of the police power includes landmark and historic district restrictions, architectural controls and a variety of other forms of aesthetic restrictions, regulation of development in wetlands and coastal areas, growth management controls, zoning to affirmatively provide for the special housing needs of low-and moderate-income groups and the elderly, subdivision exactions, and a variety of other land use and environmental restrictions . . . .

Rathkopf's The Law of Zoning and Planning § 1:8 (4th ed.)

Protecting the health and welfare and sustaining a city's quality of life are critical objectives in today's world. To simply brush aside this component of land use regulation in favor of allowing complete immunity for one land use—marijuana cultivation and sale—is an act of greater import than the circuit court appears to acknowledge. The narrow focus of the MMMA is marijuana use for medical reasons—important, certainly, since the voters have said so. But in saying so they did not specifically signal that they were giving up on all their other interests.

No statute operates in a vacuum, no matter how assertive its language. The MZEA and the MMMA coexist. When the MZEA addresses matters of land use, the MMMA must also be consulted. And when the MMMA addresses matters of land use, particularly in light of Const 1963, art 7, §22 and 34 as recently interpreted and confirmed by the post-*Ter Beek* decision in *Associated Builders*, the MZEA must also be consulted.

3. There is no "direct conflict" between the MMMA and the Warren ordinances, because they can stand together and both be applied.

It is a fair reading of *Llewellyn* and its progeny that preemption is not favored, and cannot be presumed. Preemption is intended to be the extreme case beyond which the court cannot sustain a municipal ordinance without sacrificing the state's superior position.

In reviewing the circuit court's ruling below, the requirement is for a *direct* conflict, as described in *Ter Beek,* and before that in *Lewellyn*. By its terms that requires a *literal* incompatibility, not some sort of *implied* incompatibility, which is what the lower court essentially found when it stated that "by including a limitation on the number of plants and a requirement that the plants be kept in an enclosed locked facility it is *implied* that there are not other requirements." (Slip Op, p. 4; emphasis added.) That is not so.

Conflict preemption, by its very terms, is intended to apply where the state's interests can *only* be achieved by precluding local action. Here, the "state" can realize its desire to allow the cultivation of marijuana, and its desire to have that done on a limited scale in an enclosed, locked facility, while still allowing the normal land use regulations that attend any other land use.[8]

Some of the best discussion of what a "conflict" involves is in *Ter Beek* itself, albeit in the context of whether the MMMA conflicted with the federal Controlled Substances Act, 21 USC 801, *et seq.* The Court discussed the "positive conflict" concept, where two laws "cannot consistently stand together," *Id.* at 11, or "when it is impossible to comply with both federal and state

[8] *Amici*, unlike the parties, are not going to address the applicability of "field occupation" preemption, even though, arguably, the finding of "direct conflict" by both the circuit court in this case and the Court of Appeals in *DeRuiter* on the basis that "any" additional regulation is precluded amounts to exactly that. But even a cursory review of the standards for field preemption in *Llewellyn* make it even more unlikely. There is no legislative history to review that would lead to the conclusion. As for the pervasiveness of the MMMA, although its text may be long and complicated, given that the MZEA is so extensive on its own and there are no real actual "regulations" in the MMMA, as discussed more below, a finding of pervasive regulatory preclusion at the state level is not possible. Nor does the subject matter demand uniformity. Even setting aside that the whole point of home rule and zoning is that each community is different and variety is, ultimately, the spice of home rule and zoning, there is no reason for uniformity beyond some bare minimum (like, for example, the number of plants). Perhaps that's why the courts so far have focused on the "direct conflict" approach.

requirements . . . or when a law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 12. This latter formulation, according to *Ter Beek*, was applied by the US Supreme Court in *Wyeth v Levine*, 555 US 555, 567-581; 129 S Ct 1187; 173 L Ed 2d 51 (2009), with the statement that a federal law did not preempt a state law unless there was a "direct and positive conflict. . . ."

The "permit/prohibit" formulation set forth in *Rental Properties* is often cited in Michigan case law. It was used in a case cited by *Llewellyn*, *Builders Ass'n v Detroit*, 295 Mich 272, 277; 294 NW 677 (1940), which involved a state law that precluded conducting business on Sundays. That state law contained an exception for those who observed the Sabbath on Saturday. The City of Detroit adopted its own Sunday "blue law," but provided no exceptions for other Sabbath days—in other words, it specifically prohibited something that the state ordinance allowed (conducting business on Sunday provided you observed the sabbath on Saturday). *Builders Ass'n* thus clearly invokes the formulation that "if a city ordinance prohibits something which a state statute permits, or vice versa, there is a conflict and the state law must prevail." *Id.* at 276.

Lewellyn also noted *Miller v Fabius Township Board*, 366 Mich 250; 114 NW2d 205 (1962), which involved a finding by the Michigan Supreme Court that a local ordinance prohibiting water skiing between the hours of 4:00 p.m. and 10:00 a.m. was *not* preempted by a state law that, among other regulations, authorized skiing from one hour after sunset until one hour before sunrise. The majority of the Michigan Supreme Court found: "Since the cited statutes do not expressly control the period of regulation covered by the ordinance, it must be concluded there is no conflict. The ordinance speaks only where the statutes are silent."

Lewellyn also cites *Walsh v River Rouge*, 385 Mich 623, 637; 189 NW2d 318 (1971), which, while mostly about preemption by field occupation does cite a law review article by Michael H. Feiler, entitled "Conflict Between State and Local Enactments—The Doctrine of Implied

Preemption," 2 Urban Lawyer 398 (1970). Professor Feiler had the following to say about the nature of a direct conflict for preemption purposes:

> The clearest case of conflict between ordinances and statues is the express or grammatical conflict. In this situation the local legislature may act upon the subject matter in question, but only insofar as their provisions do not conflict with statutory provisions. Thus, it is basic that local enactments may not permit what statutes prohibit, nor may they prohibit what the statutes permit.

Id. at 400. Professor Feiler notes that "cases of clear contradiction are rare," but then goes on to observe:

> It is necessary, however, to comprehend that all of the preemption cases proceed from this basic premise that local government may not prohibit what is permitted by statute, and *vice versa*. The problem lies in deciding what it is that the legislature has prohibited (including, of course, the possibility of local legislation itself), or what the legislature has permitted through its statutes. As shall be subsequently discussed, the most difficult of these problems . . . is how a legislature goes about permitting something—or whether there is a distinction between merely permitting and legalizing conduct not expressly included within a statutory scheme.

Id. at 400-401.

That is a particularly interesting formulation: How *did* the MMMA really go about "permitting" the medical use of marijuana? Can it really be seriously said that the MMMA provisions relating to "medical use" of marijuana are fully self-contained such that "any" locally added requirement is completely prohibited? That, literally, limiting oneself to the number of plants specified and keeping them in an enclosed locked facility are the *only* expectations as far as land use or other civil regulatory concepts are concerned? Merely stating the question makes clear that the answer is no.

To the extent the circuit court finds that the MMMA is actually weighing in on *land use* issues when it prescribes the number of plants and requires an "enclosed, locked facility," then that invokes the idea that the MMMA and the MZEA are statutes on the same subject matter and therefore must be "harmonized." In reading two statutory schemes together, the primary

objective is not to decide which applies and which is swept aside. Rather, the two schemes must be read together harmoniously.

> The Court must, first and foremost, interpret the language of a statute in a manner that is consistent with the *intent of the Legislature*. 'As far as possible, effect should be given to every phrase, clause, and word in the statute. . . . A statute must be read *in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained*.

Bush v Behrooz-Bruce Shabahang, et al, 484 Mich 156, 166-167 (2009). (Emphasis supplied; footnote references omitted.)

Stated otherwise, two statutes that relate to the same subject or share a common purpose are *in pari materia* and must be read together. The goal of the *in pari materia* rule is to give effect to legislative purpose distributed across multiple harmonious statutes. When two statutes lend themselves to a construction that avoids conflict, that harmonious construction should control. *People v Rahilly*, 247 Mich App 108, 112-113 (2001).

Indeed, courts have characterized the need to at least attempt a reading of common-purpose statutes together in consistent terms: "If by any reasonable construction two statutes can be reconciled and a purpose found to be served by each, both must stand . . . The duty of the courts is to reconcile statutes if possible and to enforce them. . ." *Valentine v McDonald*, 371 Mich 138, 143-145 (1963). (Emphasis supplied).

Those concepts, when applied in the context of the pervasive history of the MZEA and the obligatory deference to the City's status as a home rule city, lead to a very different conclusion than the one reached by the circuit court and the Court in *DeRuiter*.

(a) Applying the Warren ordinances does not violate §4 immunity provisions of the MMMA.

The circuit court's argument in this case is essentially that any additional regulation beyond the number of plants and the enclosed locked facility language constitutes a direct conflict between the MMMA and any local ordinance. The conclusion does not follow, however. It

followed in *Ter Beek*, but only because the penalty under the zoning ordinance was for engaging in the medical use of marijuana—no matter how it was done, where it was done, etc.

That is not the case here. In *Ter Beek*, the Court was left with no choice but to conclude that what Wyoming was doing was "penalizing" the use of marijuana (medical use or otherwise). The city's ordinance precluded the use the plaintiff wanted to engage in because—and only because—it was marijuana. That the regulation was even in the zoning ordinance was secondary to the intention of the City to simply "get around" the MMMA by relying on a federal prohibition of what the MMMA specifically permitted. That is important: the City of Wyoming's regulation, by its terms and on purpose, prohibited what the MMMA permitted. It can also be said the other way around—it "penalized" something that the MMMA said that it could not—but the result is the same.

The Warren ordinance, by contrast, permits what the MMMA permits, but adds some regulations. This is not a "mention of one thing evidences an intent to exclude all other things" situation.[9] This is a *Miller v Fabius* situation—the mere fact that the state has provided some regulation does not preclude some additional regulations unless that is made perfectly clear somehow. When the City "penalizes" a person who does not follow those added regulations, it is penalizing the person for *that*, not for the "medical use" of marijuana.

That point is worth emphasizing. The City of Wyoming ordinance just prohibited everything related to the medical use of marijuana, as that term is defined in the MMMA. So it could be argued that the regulation, and the "penalties" imposed for violating it, were intentionally aimed at prohibiting what was allowed (the medical use of marijuana) by the state, or permitting what was prohibited by the state (penalties for the medical use). Here, the City of Warren

[9] See, e.g., *People v Carruthers*, 310 Mich App 590, 604; 837 NW2d 16 (2013) (the maxim *expressio unius est exclusio alterius* [the expression of one thing suggests the exclusion of all others] means that the express mention of one thing in a statutory provision implies the exclusion of similar things).

ordinance allows what the state allows, but with some additional regulations of the normal land use and zoning sort. The penalties imposed for not complying with those additional regulations relate to those regulation, and not to the medical use itself.

There are cases where the appellate courts of this state have held uses immune from local zoning and land use regulations. But it is worth noting that, for the most part, they tend to reach that conclusion *because there is someone else doing the regulating*. See, for example, *Northville v Northville Public Schools*, 469 Mich 285 (2003) (pervasive state regulatory scheme and authority granted to school superintendents); *Dearden v Detroit*, 403 Mich 257; 269 NW2d 231 (1978) (extensive prison system regulations); *Pittsfield Charter Township v Washtenaw County*, 468 Mich 702; 664 NW2d 193 (2003) (county authority over its own buildings).

That is not present here. There's no system of regulating the "wheres" and "hows" of marijuana cultivation being undertaken pursuant to the MMMA. The MMMA put a seemingly arbitrary limit on the number of plants and then came up with a way to keep them from being stolen or falling into the wrong hands, with the "enclosed locked facility" requirement. That is not a regulatory scheme; that's just a semi-concession to the fact that the plants are otherwise illegal to possess.

This case seems more like *Frens Orchards, Inc. v Dayton Twp. Bd.*, 253 Mich App 129; 654 N2d 346 (2002), in which the plaintiff argued that portions of the Public Health Code, Occupational Safety and Health Act, and related administrative rules pertaining to agricultural labor camps, preempted a township ordinance restricting the location of migrant worker housing. In issuing a license, the department considered whether the camp and its proposed operation would conform to minimum standards of construction, operation, health, sanitation, sewage, water supply, plumbing, and garbage and rubbish disposal set forth in rules promulgated pursuant to the statute. The administrative rules further regulated the camps to ensure the health and

safety of migrant laborers. Other rules similarly regulated the health and safety conditions of the camp, setting standards for water supply, construction methods and materials, fire safety and first aid, electric supply to a shelter, bathing, toilet, and laundry facilities, and sewage, garbage, and refuse disposal. Both the statutes and rules, however, regulated the *location* of a camp only in terms of its relationship to other conditions that would affect the health and safety of the camp's occupants. This Court concluded that the *location* of agricultural labor camps was *not* pervasively regulated by the statutes or associated rules and reading the pertinent sections of the zoning ordinance in conjunction with the cited statutes revealed that the ordinance addressed concerns not affected by the statutes and administrative rules.

(b) Applying the Warren ordinances does not violate the §7(e) "inconsistent acts" provision of the MMMA.

Just because we are talking in this case about *implied* preemption does not mean that it does not have to be *clear*. Both the circuit court and the Appellee caregiver in this case mention the "inconsistent acts" language of Section 7(e), in addition to the §4 immunity sections. The word "inconsistent" is obviously not defined in the MMMA, but it has a plain and ordinary meaning: something not compatible or in keeping with something else; something in disagreement with something else. So, for instance, a local ordinance that states a qualifying patient can have *more than* 12 plants, or that the plants can be kept in a place that is *not* locked or enclosed in any manner, would certainly be inconsistent with the provisions of the MMMA to the contrary. This Court and all the parties would likely agree that such a municipal regulation would even be in "direct conflict" with the state law.

But regulations that are more strict are not viewed that way. Regulations that are more strict are typically thought of as acting *in addition to* state regulation, or in a way that is *complementary to* a state regulation. Thus, for example, the result in *Miller v Fabius Twp*, *supra*, where the Supreme Court stated that a more restrictive local time limitation on waterskiing, which

takes into account the specific characteristics of the local lake involved, did not represent a direct conflict with the state law, but was rather complementary to it. This situation is more like that in *Maple BPA, Inc v Bloomfield Charter Twp.*, 302 Mich App 505, 511-515; 838 NW2d 915 (2013), where a gas station brought an action against a township arguing that its ordinance limiting the sale of alcohol at automobile service stations was preempted by state law and this Court held that the state statute regarding sale of alcoholic beverages did not directly conflict with the township's zoning ordinance regarding the sale of alcohol at automobile service stations merely because the latter was more strict.

The same is certainly true here, where the City of Warren ordinance specifically describes medical use of marijuana as a *permitted use* in the R-1-A District, but merely assigns to that use some additional regulations that are in furtherance of the public health, safety, and welfare of the citizens and occupants of the City—all within the normal course of its broad regulatory authority under the MZEA and local police powers under the HRCA.

The lower court and Appellee point to the seemingly "absolute" language of another subsection of the MMMA, §7(a), which says the medical use of marijuana "is allowed" as long as it complies with the other terms of the MMMA. That proves maybe a bit too much. Many land uses are obviously legal—allowed—without the need to call that out. Cultivation of "regular" crops for example. The sale of goods and services. Building and living in a house. The only reason the "medical use" of marijuana needed to be called out as "allowed" is because it is not, really—it is a federal crime. And yet, in calling out the medical use of marijuana as "allowed" in Michigan, the voters did not signal any intent to make it an "Uber Land Use."

Moreover, the "absolutely allowed, no restriction" view of the MMMA is also overblown. Take, for example, the First Amendment of the United States Constitution: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." That is straightforward: no

law. And yet, oddly, neither the Detroit Free Press nor the Detroit News would likely make an argument that they could simply plop their press operations—with their acre-sized printing presses included—in the middle of a residential neighborhood without regard to whatever community's zoning ordinance. The News and the Free Press are certainly permitted to exist—they are "allowed." They are permitted to print newspapers. Printing presses are also legal. And not being able to put its press operations wherever it chooses to certainly "abridges" a newspaper's ability to conduct its business. And yet no one would assert the argument in that context.

The First Amendment also says "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ." Again—no law. "Free exercise" is pretty broad. And yet, literally countless courts have acknowledged the right of communities to determine where places of worship can be placed within a community so long as those are placed pursuant to regulations that are rational and otherwise permitted.

It is no response to say "But there is caselaw on those sorts of regulations that has been written and evolved over years, etc." The MMMA and its ilk are brand new. The courts are just now being asked to formulate that law that governs how those uses will be treated as unanticipated questions arise. If the courts undertake their *constitutionally-mandated liberal* review of all the MZEA and other land use related authority, they will be find that such regulations are not "inconsistent with" the MMMA and that there is no direct conflict between these complementary provisions. The circuit court did not do that. The courts cannot simply nod at the constitution's provisions regarding local governmental authority. *Associated Builders* made that clear. Those provisions mean something; they are a statement of a form of government, not something to be noted and then not considered again.

4. Because the MMMA and traditional local land use controls can be harmonized, a finding of preemption unnecessarily leads to unintended (absurd) results.

The appellate courts of this state have been clear about their fidelity to the principle that the job of the courts is to apply the text of a law as written, and if it has unintended consequences, that is a matter to take up with the legislature (or, here, the voters); the cases discussing this "plain language" rule of determining legislative intent are noted above. But there is a limit to that rule. As this Court noted in *Detroit Int'l Bridge Co. v Commodities Export Co*, 279 Mich App 662; 760 NW2d 565 (2008), there is still some application in Michigan of the "absurd results" rule: "a statute need not be applied literally if no reasonable lawmaker could have conceived of the ensuing result."

In this situation, the Court is being asked essentially to *imply* a conflict that yields a practical immunity from the time-honored rezoning constraints for one and only one land use—a use that literally remains illegal under federal law and that can have identifiable and serious adverse effects on adjacent properties (e.g., odor, lighting, visual, etc.). Doing so does not just fail to avoid an absurd or unintended result; it actually produces the absurd result, with no proof that the voters wanted this, or expected it.

One of the criticisms of plain language textualism is that it cannot account for the lack of foresight on the part of legislators. The idea that we *might* know that the legislature did not intend to do something, but . . . the language is clear, so we must apply it as written, and they can always fix it, right? Except, with a voter-initiated law, it is exceedingly difficult to fix. A legislative fix requires a heroic effort of three-quarters of the legislature (MI Const 1963, art 2, §9), and a citizen vote fix is, well, not easy either.[10]

[10] It has been suggested that that the Legislature, when it was creating the new regulatory schemes for larger commercial operations in the Medical Marijuana Facilities Licensing Act, MCL 333.27101 *et seq*., which does specifically address local zoning authority, "could have" amended the MMMA to make local land use authority clear. Or the Legislature could have done so when it amended the MMMA on two occasions since its passage. The fact

This situation is perhaps even more unusual because the courts are not being asked to engage in some sort of historical analysis of the legislative intent of some long-ago lawmakers. This vote just happened in 2008. There was no discussion among the greater public that anyone has pointed to about zoning laws and other land use laws now being completely inapplicable to the growing and cultivation of marijuana, or its storage or distribution. There was no discussion of that in the legislative analyses created contemporaneously with the ballot proposal.

If the test is really as the lower court says it is (any additional regulation beyond the number of plants and an enclosed, locked facility is prohibited), how is that actually going to work?

- Could the Appellee create a grow house that covered every square inch of his single-family lot—even though the zoning ordinance limits lot coverage to, say, 40%?
- Do setbacks apply to the grow house?
- Can the Appellee build a 40-foot silo in his residential neighborhood that houses marijuana?
- Does *someone* have to live in the house since it is a single-family residential neighborhood, and having the principal use of the house, as something other than a single-family dwelling would otherwise be illegal?
- Can 10 people assigned the task of cultivating plants live in a single-family home, even though they don't meet the definition of a "family"?

that it did not do so, by implication, must mean that it did not intend the same authority to apply to caregivers and patients. It is hard to speculate about legislative intent, as many decisions of this Court have noted. But it seems equally likely (or more so) that the Legislature did not do so because it did not think it had to. That it knew that *Ter Beek* certainly did not require such action on its part, and that the MZEA and the constitutional home rule mandates should suffice to protect the rights of local communities.

- Can 20 caregivers with enclosed, locked facilities and the right number of plants each set up shop in a single-family home? Does anyone have to actually live there?
- Can Appellee blare music to help the plants grow?
- Does the house have to be connected to water and sewer?
- Can the Appellee place his enclosed locked facility with the right number of plants on City park land? What about in the intersection of two major highways? The open space of his subdivision? If he cannot be "penalized" for his "MMMA-compliant activity," how does a municipality regulate that conduct?
- What if the Appellee wanted to build his grow house out of, say, asbestos?
- Are there parking requirements if a large grow house is done, say, in a commercial area downtown, where a number of caregivers set up shop? If they do improvements to the building, do they need a site plan? Do they need building permits?
- Does "immunity" from "penalty" for the acquisition of marijuana mean that Appellee can steal it?
- If there is immunity from the transportation of marijuana, does that mean Appellee can speed?

This exercise in futility (or absurdity) could go on forever. But the circuit court's answer to all these questions would still seem to be: *Any* regulation beyond the right number of plants in an enclosed, locked facility is invalid.

There is already confusion being caused by the lack of consistency in the application of land use rules. For example, this Court recently decided *Charter Township of York v Miller*, 322 Mich App 648; 915 NW2d 373 (2018), in which it upheld the right of a caregiver to grow marijuana outdoors (on the basis of some specific statutory language) despite the fact the Township's zoning

ordinance purported to prohibit that (finding a "direct conflict"). (There was some discussion in *York* about the preemption issue, but the specific authority found in the MMMA for outdoor growing made that discussion relatively straightforward; this case is not so clear).

But the *York* Court also seemed to agree that the caregiver had to comply with the Township's various construction and construction permit requirements. That seems inconsistent with the broad analysis in the circuit court case here. At a minimum, this Court needs to clarify those rules.

Zoning and land use laws and principles existed when people went to vote on the MMMA. They still exist and they should apply even to the land use aspects of the medical use of marijuana. Medical marijuana land uses should be treated like other land uses. What is allowed is reasonable regulation. While a zoning ordinance is presumed to be valid and constitutional, it must also be reasonable, and must relate to appropriate governmental interests. See generally *Kropf v City of Sterling Heights*, 391 Mich 139; 215 NW2d 179 (1974). The City's ordinances should be subject to those rules as well.

The circuit court's approach cannot work, and it is not required by *Ter Beek*.

CONCLUSION AND RELIEF REQUESTED

It has no doubt come as a surprise to many local legislators throughout the state who voted for the MMMA as an initiated law that they were giving up their roles as public officials to act in the interests of the public health, safety, and welfare of their citizens, businesses, and property owners where the effects of medical marijuana land uses on their community are concerned. It would be one thing if they had traded that role away knowing that someone else would be there to pick up the slack—the county, perhaps, or even the state itself. But there is no alternative regulatory scheme in the MMMA; there are no rules set forth in that law beyond the two that the circuit court focuses on.

It is possible that many of the folks who live next to badly-operated grow operations voted for the MMMA, but it is also likely that they did not anticipate that there would be no one to complain to about the illegal occupancies of the house next door, or the odors or excessive noise or light, or really anything associated with someone 20 feet away engaged in otherwise MMMA-compliant activity.

There is no direct conflict between the MMMA and the authority to regulate land uses provided for in the MZEA and the HRCA. They can stand together and be applied consistently with one another. The circuit court's decision to the contrary should be reversed and the authority of local governments to reasonably regulate—even if they cannot prohibit—medical marijuana land uses should be confirmed by this Court.

Respectfully submitted,

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC

/s/ Thomas R. Schultz
THOMAS R. SCHULTZ (P 42111)
Attorney for *Amici Curiae*
27555 Executive Drive, Suite 250
Farmington Hills, MI 48331-3550
(248) 489-4100

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2018, I electronically filed the foregoing paper with the Clerk of the Court using the TrueFiling system which will send notification of such filing to all counsel of record.

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC

/s/ Julie A. Hinkle
Julie A. Hinkle
27555 Executive Drive, Suite 250
Farmington Hills, MI 48331-3550
(248) 489-4100