STATE OF MICHIGAN

IN THE SUPREME COURT

(Appeal from the Michigan Court of Appeals)

JOHN TERBEEK,

Plaintiff/Appellee,

V

CITY OF WYOMING,

Defendant/Appellant.

Case No. 145816
Court of Appeals No. 306240
Lower Court No. 10-11515-CZ

BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

This matter is before the Court pursuant to the Order of the Court dated April 3, 2012, granting Leave to Appeal from the Court of Appeal decision in case number 306240.

STATEMENT OF QUESTIONS FOR REVIEW

I. IS THE CITY OF WYOMING ZONING CODE WHICH PROHIBITS ANY USE WHICH IS CONTRARY TO FEDERAL LAW, STATE LAW OR LOCAL ORDINANCE SUBJECT TO STATE PREEMPTION BY THE MICHIGAN MEDICAL MARIHUANA ACT?

THE CIRCUIT COURT ANSWERED: . . . . . NO (on other grounds)
THE COURT OF APPEALS ANSWERED . . . . . .YES
DEFENDANT/APPELLANT ANSWERS. . . . . .NO

II. IS THE MICHIGAN MEDICAL MARIHUANA ACT SUBJECT TO PREEMPTION BY THE FEDERAL CONTROLLED SUBSTANCES ACT?

THE CIRCUIT COURT ANSWERED . . . . . .YES
THE COURT OF APPEALS ANSWERED . . . . . NO
DEFENDANT/APPELLANT ANSWERED . . . . . YES

Statement of Facts

1. The Michigan Medical Marihuana Act, Initiated Law 1 of 2008, was enacted pursuant to voter initiative in November 2009 with an effective date of December 4, 2008 (MCL 333.26421 et seq.).

2. The City of Wyoming enacted an amendment to its zoning ordinance, Section 90-66 on December 6, 2010 with an effective date of December 21, 2010.

3. Section 90-66 of the Wyoming City Code provides:

> "USES PROHIBITED BY LAW. Unless not expressly permitted under this Ordinance are prohibited in all districts. Uses that are contrary to federal law, state law or local ordinance are prohibited."

4. The provisions of the zoning code of the City of Wyoming is similar to that of numerous other municipalities throughout the State of Michigan enacted in response to the Michigan Medical Marihuana Act.

5. Plaintiff, John TerBeek, a Wyoming resident and a qualified medical marijuana patient filed a complaint for declaratory relief in the Kent County Circuit Court on November 10, 2010 and an amended complaint on December 15, 2010.

6. Hearings were held in the Kent County Circuit Court before the Honorable Dennis B. Leiber on June 17, 2011 and July 15, 2011.

7. By opinion dated September 1, 2011, Judge Leiber rendered an opinon and entered an Order denying Plaintiff's motion for Summary Disposition (declarative relief) and granting Summary Disposition to the Defendant, City of Wyoming.

8. In his opinion, Judge Leiber determined that although the zoning code of the City of Wyoming might conflict with the Michigan Medical Marihuana Act, the Michigan Medical Marihuana Act is preempted by the federal Controlled Substances Act and therefore does not preempt the provisions of the zoning code of the City of Wyoming.

9. Plaintiff filed a claim of appeal with the Michigan Court of Appeals on September 16, 2011.

10. The Court of Appeals rendered its opinion on July 31, 2012, reversing the Order of Summary Disposition of the Kent County Circuit Court stating that the provisions of the zoning code of the City of Wyoming is preempted by the Michigan Medical Marihuana Act and further stating that the federal Controlled Substances Act does not preempt the Michigan Medical Marihuana Act.

11. This Court granted Leave to Appeal on April 3, 2013.

VI. ARGUMENT

1. APPELLANT RESPECTFULLY SUBMITS THAT THE PROVISION OF THE ZONING CODE OF THE CITY OF WYOMING WHICH PROHIBITS A USE THAT IS CONTRARY TO FEDERAL LAW, STATE LAW OR LOCAL ORDINANCE IS NOT SUBJECT TO STATE PREEMPTION BY THE MICHIGAN MEDICAL MARIJUANA ACT.

The Michigan Medical Marihuana Act (MMMA), Initiated Law 1 of 2008, MCL 333.26421 et seq, was enacted pursuant to a voter referendum in November 2008 with an effective date of December 4, 2008. Because the Act came into being through the initiatory process rather then through the normal legislative process there was no legislative analysis, committee hearings or other process which would create a legislative history as would normally occur. As a result, the City of Wyoming along with many other local units of government within the state, was left with the necessity of dealing with a statute which created more questions then answered. Among those were questions of locations for the cultivation, preparation and distribution of medical marijuana including potential medical marijuana dispensaries, retail outlets and issues regarding the application of building and fire code regulations. In addition, the cultivation and possession of marijuana was and remains illegal under federal law. Pursuant to the Comprehensive Drug Abuse, Prevention and Control Act of 1970, 21 US C 801 et seq, marijuana is a schedule 1 drug, illegal under virtually all circumstances.

After the effective date of the MMMA, the City of Wyoming began to debate the issues of regulation of the cultivation, distribution and commercialization of medical marijuana. In addition the City attempted to take into consideration how the provisions of this Act would affect the health, safety and welfare of its citizens in both residential neighborhoods and commercial and industrial zones. Ultimately the City Council amended the zoning code of the City of Wyoming by amending section 90-66 of the Code which states as follows:

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

This Ordinance was adopted as a provision of the Zoning Code following the procedures required under the Michigan Zoning Enabling Act, Act 110 of the Public Acts of 2006 as amended, MCL 125.3101 et seq. That procedure included hearings before the Planning Commission, recommendation to the City Council and ultimately enactment by Wyoming City Council. It is the position of Appellant, City of Wyoming, that the Michigan Medical Marihuana Act does not preempt the provisions of the zoning code of the City of Wyoming.

A. THE MMMA DOES NOT CREATE AN ABSOLUTE RIGHT TO GROW AND DISTRIBUTE MARIJUANA.

Both federal courts and the courts of this state have repeatedly stated that the MMMA does not create any absolute right to grow, use or possess marijuana. The MMMA provides a limited exemption from criminal prosecution for qualified patients and caregivers who comply with the provisions of the Act. That exemption does not create a right to cultivate and distribute marijuana in violation of local zoning regulations or the Public Health Code of the State of Michigan.

In *People v Robert Lee Redden*, 290 Mich App 65, 799 NW 2d 184 (2010) the Court of Appeals affirmed the reinstatement of criminal charges against the Defendant. In addition to stating that the MMMA is superceded by Federal law, the concurring opinion of Judge O'Connell states at page 91:

> "Further the MMMA does not create any sort of affirmative *right* under state law to use or possess marijuana."

In State of *Michigan v McQueen et al*, 293 Mich App 644, 811 NW 2d 513 (2011) the Court of Appeals analyzed the Michigan Medical Marihuana Act in conjunction with the Public Health Code stating at pages 658-659:

> "The MMMA stands in sharp contrast to the PHC. Unlike the PHC's classification of marihuana as a schedule I controlled substance, the MMMA, which was enacted as the result of an initiative adopted by voters in the November 2008 election, *Redden*, 290 Mich App at 76, declares that as discovered by modern medical research there are beneficial uses for marihuana in treating or alleviating the symptoms associated with a variety of

> debilitating medical conditions. MCL 333.26422(a). Nonetheless, the MMMA operates under the framework, established by the PHC, that it is illegal to possess, use, or deliver marihuana. The MMMA did not legalize the possession, use, or delivery of marihuana. *People v King*, ____ Mich App ____; ____ NW 2d ____ (2011); see also *Redden*, 290 Mich App at 92 (O'CONNELL, P.J., concurring) ("The MMMA does not repeal any drug laws contained in the Public Health Code, and all persons under this state's jurisdiction remain subject to them."). Rather, the MMMA sets forth very limited circumstances in which persons involved with the use of marihuana, and who are thereby violating the PHC, may avoid criminal liability.

This Court has affirmed that determination in *People v Kolanek*, 491 Mich 382, 817 NW 2d 528 (2012), where the Court states at page 394:

> "The MMMA does *not* create a general right for individuals to use and possess marijuana in Michigan. Possession, manufacture, and delivery of marijuana remains punishable offenses under Michigan law."

That concept is affirmed in the recent case of *State v McQueen*, 493 Mich 135, 828 NW 2d 644 (2013).

The decision of the Court of Appeals provides for a greatly expanded application of the MMMA. That decision would create a situation in the State of Michigan where a person, caregiver or a group of caregivers would be able to operate with no local regulation of their cultivation and distribution of marijuana. Not only is this a misapplication of the terms of the MMMA, but it greatly expands the scope of that Act as determined by other decisions of the courts in this state.

B. THE MMMA DOES NOT MEET THE REQUIREMENTS FOR STATE PREEMPTION OF A LOCAL ORDINANCE.

The general standard for preemption of a local ordinance is the commonly cited case of *People v Llewellyn*, 401 Mich 314 (1977) where the court states at page 322:

> "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 preempts 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."

Although this general language may appear to be broad enough to preempt virtually every local ordinance where there is some type of state regulatory statute in place, an analysis of that decision and other decisions indicates that the courts have been very circumspect in applying that doctrine to invalidate local ordinances. In fact, the *Llewellyn* decision states at page 324, 325:

> "As to this last point, examination of relevant Michigan cases indicates that where the nature of the regulated subject matter calls for regulation adapted to local conditions, and the regulation does not interfere with the state regulatory scheme, supplementary local regulation has generally been upheld."

(Footnote 12 cites several instances where zoning ordinances have been upheld in the face of state preemption challenges.)

This Court in *Burt Township v DNR*, 459 Mich 659, 593 NW 2d 534 (1999) upheld the application of the local zoning ordinance of Burt Township in opposition to the Natural Resources and Environmental Protection Act of the State of Michigan which granted extensive powers to the Department of Natural Resources, stating at page 668:

> "However we agree with the Court of Appeals majority that, unlike the statute at issue in Dearden, there is nothing in the NREPA that similarly suggests a 'clear expression' of legislative intent to vest the DNR with exclusive jurisdiction over its subject matter and thus to exempt the DNR's activities in this case from the Burt Township zoning ordinance."

The Court further stated at page 666:

> Thus, we conclude that it is incumbent upon the DNR to establish a clear legislative intent to exempt the DNR's activities from the Burt Township zoning ordinance."

Although Appellant acknowledges that it is not absolutely necessary for a statute to specifically state that it preempts local ordinances, it is a provision that certainly could have been included in the MMMA. More importantly, Appellant would submit that although the MMMA may regulate such areas as applications for and receipt of cards for

medical marijuana users and caregivers as well as a general exemption from criminal prosecution for those in compliance with the ordinance, it does not fully occupy the field of regulation, particularly in terms of zoning regulations. There is simply no mention of local zoning, building and fire safety codes in the statute. Therefore it is impossible to establish a clear legislative intent to exempt all uses under the MMMA from local zoning regulation.

C. THE MMMA DOES NOT SPECIFICALLY PREEMPT LOCAL ZONING REGULATION.

The City of Wyoming as a municipal corporation organized under the Home Rule City Act, Act 279 of 1909, MCL 117.1 et seq., is allowed to enact a zoning ordinance to regulate the development and use of land. As stated in Section 201 of that Act, MCL 125.3201:

> "Sec. 201. (1) A local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of 1 or more districts within its zoning jurisdiction which regulate the use of land and structures to meet the needs of the state's citizens for food, fiber, energy and other natural resources, places of residence, recreation, industry, trade, service and other uses of land, to ensure that use of land is situated in appropriate locations and relationships, to limit the inappropriate overcrowding of land and congestion of population, transportation systems, and other public facilities, to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation and other public service and facility requirements and to promote public health, safety, and welfare.
>
> (4) A local unit of government may adopt land development regulations under the zoning ordinance designating or limiting the location, height, bulk, number of stories, uses and size of dwellings, buildings, and structures that may be erected or altered, including tents and recreational vehicles."
>
> (emphasis supplied)

Limiting the use of property within the City of Wyoming to uses which are not in direct violation of federal law is a legitimate regulation of uses of land. In addition it

falls within the ability of the local government to enact regulations which promote the public health, safety and welfare of its citizens. Issues which are not provided for in the MMMA which fall upon the City to regulate include such issues as the establishment of medical marijuana dispensaries, application of fire and building codes to the cultivation of medical marijuana which of necessity in a climate such as the State of Michigan require an extraordinary amount of extra heat and light for which the electrical system of a residential property may not be sufficient and other safety issues involving the growth and distribution of marijuana. In order to address these issues as is allowed by the Zoning Enabling Act of the State of Michigan, the City of Wyoming chose to enact a zoning regulation which simply provided that if the use of land which is in violation of federal law it cannot be allowed. This is only a regulation of the use of property within the City of Wyoming.

Specifically, Plaintiff lives in an older home in a residential area of the City of Wyoming (Plaintiff's Affidavit in support of motion for summary disposition). It is exactly this type of structure with its older electrical and HVAC system which creates the greatest potential for fires and other similar problems due to violations of the building and fire codes established under the codes of the City of Wyoming.

The broad grant of authority to a local municipality to use its zoning powers to advance local interests is stated in the case of *Kyser v Kasson Township*, 486 Mich 514 (2010) where the Court states at page 520:

> "Zoning constitutes a legislative function. *Schwartz v City of Flint*, 426 Mich 295, 309, 395 N.W.2d 678 (1986). The Legislature has empowered local governments to zone for the broad purposes identified in MCL 125.3201(1). This Court has recognized zoning as a reasonable exercise of the police power that not only protects the integrity of a community's current structure, but also plans and controls a community's future development. *Austin v Older*, 283 Mich 667, 674-675, 278 N.W. 727 (1938). Because local governments have been invested with a broad grant of power to zone, 'it should not be artificially limited'. *Delta Charter Twp. V Dinolfo*, 419 Mich 253, 260 n. 2, 351 N.W.2d 831 (1984). Recognizing that zoning is a legislative function, this Court has repeatedly stated that it 'does not sit as a superzoning commission'. *Macenas v Village of Michiana*, 433 Mich 380, 392, 446 N.W.2d 102

(1989) (citation and emphasis omitted); *Brae Burn, Inc. v Bloomfield Hills*, 350 Mich 425, 430-431, 86 N.W.2d 166 (1957). Instead 'the people of the community, through their appropriate legislative body and not the courts, govern its growth and its life."

The presumption of validity of that ordinance is also stated by the Court at pages 521-522:

> "A zoning ordinance is presumed to be reasonable. *Brae Burn*, 350 Mich at 432, 86 N.W. 2d 166. Starting with such a presumption, the burden is upon the person challenging such an ordinance to overcome this presumption by proving that there is no reasonable governmental interest being advanced by the zoning ordinance. *Id.* Stated another way, the challenger must demonstrate 'that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of his property'. *Id.* Under this standard, a zoning ordinance will be struck down only if it constitutes 'an arbitrary fiat, a whimsical *ipse dixit*, and ...there is no room for a legitimate difference of opinion concerning its unreasonableness."

Despite Plaintiff's claim to the contrary, Section 90-66 of the Wyoming City Code is a zoning regulation. The ordinance is located in the zoning code of the City, and was passed through the procedures required in the City zoning code and the Zoning Enabling Act. This included appropriate public hearings before the Planning Commission, a report from the Planning Commission to the City Council and enactment of the amendment to the City Code by the City Council. This is not a police regulation which regulates the possession and use of marijuana. The City Code provides for a police regulation to prosecute individuals for possession of marijuana as a misdemeanor under Section 50-162 which is a criminal ordinance. Plaintiff has not alleged nor has Plaintiff been charged with any violation of this section of the City Code.

Although not a binding precedent for this court, it is interesting to note that a state which has struggled with the medical marijuana issue longer than the State of Michigan is the State of California. In a recent decision of the California Supreme Court in *City of Riverside v Inland Empire Patients Health and Wellness Center, Inc.*, ____ P 3rd ____

2013 WL 1859214 (Cal.), the California Supreme Court upheld the application of a local zoning ordinance which provided a ban on facilities that distribute medical marijuana and held that the California Compassionate Use Act and Medical Marijuana Program Act do not prohibit local zoning ordinances. In analyzing the application of local zoning ordinances to those Acts the Court states at page 1:

> "In the exercise of its inherent land use power, the City of Riverside (City) has declared, by zoning ordinances, that a '[m]edical marijuana dispensary' – '[a] facility where marijuana is made available for medical purposes in accordance with' the CUA – is prohibited use of land within the city and may be abated as a public nuisance. The City's ordinance also bans, and declares a nuisance, any use that is prohibited by federal or state law.
>
> Nothing in the CUA or the MMP expressly or impliedly limits the inherent authority of a local jurisdiction, by its own ordinances, to regulate the use of its land, including the authority to provide that facilities for the distribution of medical marijuana will not be permitted to operate within its borders. We must therefore reject defendants' preemption argument, and must affirm the judgment of the Court of Appeals."

The rationale of this decision applies equally to the issue of preemption of local zoning ordinances by the MMMA in the State of Michigan.

In determining how to properly apply and regulate the cultivation and distribution of medical marijuana within the City of Wyoming, the City Council properly considered the purposes of local zoning ordinances and determined that it was appropriate to ban uses in violation of federal law. The debate prior to the enactment of the ordinance at both the Planning Commission and City Council included such issues as the desire to prohibit dispensaries within the City of Wyoming, to address fire and safety issues with marijuana being grown, processed and stored in residential facilities and issues of police regulations such as break-ins, home invasions and theft.

The Court of Appeals decision would seem to indicate that since this is not a regulation "to regulate which areas of the City the medical use of marijuana as permitted by the MMMA may be carried out" (footnote 4) that somehow this is invalid zoning ordinance. The Michigan Zoning Enabling Act does not require every possible land use

to be allowed in every unit of government. Specifically, Section 207 of the Act, MCL 125.3207 states:

> Sec. 207. A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a local unit of government in the presence of a demonstrated need for that land use within either that local unit of government or the surrounding area within the state, unless a location within the local unit of government does not exist where the use may be appropriately located or the use is unlawful."

Appellant would submit to this Court that there is no "demonstrated need" for the land use of cultivating and distributing marijuana within the City of Wyoming. That requirement for a demonstrated need in order to determine whether the state statute preempts a local zoning ordinance was upheld by this Court in the case of *Kyser v Kasson Township*, supra, at 539. Appellant would submit that there is no requirement that simply because a resident of a local unit has a medical marijuana certificate or a caregiver certificate, they must be allowed to cultivate and distribute medical marijuana in any zone or structure within the City. There is no demonstrated need since medical marijuana is likely available from caregivers in other areas including municipalities in the surrounding area which have chosen, as is their right, to differently regulate the cultivation and distribution of medical marijuana. If an adjoining municipality chooses to allow registered patients and caregivers to cultivate and legally distribute medical marijuana to residents of the City of Wyoming, there is no demonstrated need for the cultivation and distribution of medical marijuana in violation of the City of Wyoming Zoning Code. The concept that medical marijuana may be obtained from outside sources and transported for use within a municipality or other unit of government which more closely regulates the cultivation and distribution of medical marijuana is shown by a recent amendment of the Michigan Penal Code which allows for the transportation of medical marijuana in a vehicle. Act 460 of the Public Acts of 2012 provides an amendment to Section 474 of the Penal Code to provide for transportation of medical marijuana. Obviously this section contemplates the fact that a medical marijuana patient may obtain medical marijuana from a location other then in the place where they live.

D. APPELLANT WOULD SUBMIT TO THIS COURT THAT THE COURT OF APPEALS' INTERPRETATION OF PENALTY IS TOO BROAD.

The Court of Appeals, using a dictionary definition of "penalty" so broadly define the provisions in Section 4(a) of the Act, MCL 333.26424(a) so as to make virtually any regulation of the use, cultivation and distribution of medical marijuana by a qualifying patient or caregiver impossible. The Court states:

> "Thus, any sanction imposed pursuant to the ordinance rests on the premise that the medical use of marijuana permitted by the MMMA is criminal activity, a proposition that is in direct conflict with the MMMA. In addition, we reject the notion implied in defendant's brief on appeal that enforcing the ordinance through the remedy of civil injunctive relief is not a penalty."

This extremely broad interpretation of the term "penalty" under the statute would grant the cultivation and distribution of medical marijuana a status far and above any other land use within the State of Michigan. To thus characterize the Medical Marihuana Act as "super zoning" is not hyperbole.

The fact that cultivation and distribution of medical marijuana is still subject to local regulation is well established by decision of this Court in *State v McQueen*, supra. In that case the Court upheld a public nuisance action filed by the Isabella County Prosecuting Attorney on behalf of the State of Michigan. In doing so the Court upheld the right to obtain injunctive relief against uses which are not specifically provided for in the MMMA. In doing so the Court held that neither the immunity provision under Section 4 or the affirmative defense under Section 8 of the Act would prohibit injunctive relief under a public nuisance theory.

Section 407 of the MZEA, MCL 125.3407 states in part as follows:

> "Except as otherwise provided by law, a use of land or a dwelling, building, or structure, including a tent or recreational vehicle, used, erected, altered, razed, or converted in violation of a zoning ordinance or regulation adopted under this act is a nuisance per se. The court shall order the nuisance abated,..."

Based upon this section of the statute and this Court's interpretation of the public nuisance statutes along with the provisions of the MMMA, a civil injunction or similar order would not constitute a "penalty in any manner" as stated by the Court of Appeals.

Violation of Section 90-66 of the Code of the City of Wyoming, as is true of any provision in the zoning code of the City of Wyoming would be considered a civil infraction under Section 1-27 of the Code of the City of Wyoming. Although civil fines can be imposed for civil infraction violations, that is not the only remedy which a court can impose. In addition to standard injunctive relief as noted above, the enabling legislation for municipal civil infractions also allows a district court significant latitude in establishing remedies without imposing penalties. Section 8727 of the Revised Judicature Act, MCL 600.8727 states in part in subparagraph (5):

> "(5) In addition to ordering the defendant to pay a civil fine, costs, a justice system assessment, and damages and expenses, the judge or district court magistrate may issue a writ or order under section 8302."

The reference to Section 8302 is to subsection (4) of Section 8302 of the RJA, MCL 600.8302 which states in part:

> "(4) In action under chapter 87, the district court may issue and enforce any judgment, writ, or order necessary to enforce the ordinance. The grant of equitable jurisdiction, and authority to the district court under this subsection ..."

These sections would give the district court the right to fashion an equitable remedy which would not involve a criminal or civil penalty and therefore not subject a medical marijuana user to a "penalty in any manner". For example, a court could simply order the city to remove equipment, plants or other items which would be in violation of the ordinance without subjecting the property owner to a civil or criminal penalty. Since a judge would clearly have the right to waive fines and costs, in enforcing an order under Section 8302, the court could enforce the ordinances without subjecting the property owner to a penalty. Finally, the Court of Appeals opinion assumes that a property owner or other person subject to an order of the court would violate that order and therefore be subject to some other form of enforcement action.

In determining whether or not the Zoning Code of the City of Wyoming is preempted by the MMMA, it is also appropriate to look at the situation of the Plaintiff in this case. Plaintiff is an individual who has not been arrested or prosecuted by the City for his possession or use of medical marijuana. By affidavit submitted to the lower court, Plaintiff alleges that he has been and continues to be supplied by a caregiver residing in his home in compliance with the ordinance. Since the Zoning Code of the City of Wyoming post dates Mr. TerBeek's medical marijuana certificate and the caregiver certificate, he would be considered a non-conforming use pursuant to the MZEA. In addition, he could certainly be supplied by a caregiver outside of the City of Wyoming subject to different regulations and be allowed to legally transport his medical marijuana to his home in the City of Wyoming. Although not part of this appeal, Plaintiffs standing is questionable.

II. APPELLANT RESPECTFULLY SUBMITS THAT THE MICHIGAN MEDICAL MARIJUANA ACT IS SUBJECT TO PREEMPTION BY THE FEDERAL CONTROLLED SUBSTANCES ACT.

It is the position of the Appellant City of Wyoming that the Michigan Medical Marijuana Act is preempted by the federal Controlled Substances Act under both the conflict and obstacle preemption doctrines. In decisions by the Kent County Circuit Court held that the federal Controlled Substances Act preempted the state statute therefore it was unenforceable in such a way as to preempt local zoning control.

1. **Conflict Preemption.**

The doctrine of conflict preemption applies when there is an actual conflict between a federal statute and a state statute so that it is impossible to comply with both statutes at the same time. *Geier* v *American Honda Motor Co.*, 529 U.S. 861; 128 S. Ct. 1913 (2000). There is no question that there is a direct conflict between the federal CSA and the state MMMA. The MMMA allows numerous actions which are specifically prohibited by the CSA. Specifically, as interpreted by Plaintiff, the MMMA allows the cultivation and distribution of marijuana including significant growth and distribution in residential and commercial areas of the city in direct violation of the CSA. Although appellee argues that the two laws can co-exist, the only way that can be done is for the State of Michigan, the City of Wyoming and every other municipal government to ignore

the provisions of the CSA. Appellee's entire argument hinges on the claim that the City can simply choose to ignore the federal statute. In turn it also requires the federal government and its law enforcement personnel to ignore the federal statute based upon a state statute.

Not only does this create an enormous problem for local governmental units, it also creates significant problems for legitimate medical marijuana patients. Law enforcement personnel are required to ignore their oath of office to support and enforce not only the laws of the State of Michigan but of the United States. It opens the door to medical marijuana mills where doctors without any legitimate doctor/patient relationship provide certificates, in some cases without even seeing the "patient" and whose medical office consists of a post office box. It raises the potential for medical marijuana dispensaries which are in clear violation of federal statute and presents enormous problems for coordinated federal and state enforcement of controlled substance laws. In addition it creates a significant problem for even legitimate medical marijuana users to determine what is legal and what is illegal.

It is not possible to comply with both the Michigan Medical Marihuana Act and the Federal Controlled Substances Act. The conflicts are too numerous for any person or unit of government to comply with both laws.

2. **Obstacle Preemption.**

Obstacle preemption is applied to a Federal/State preemption where the state law creates "an unacceptable obstacle to the accomplishment and execution of the full purposes and objectives of Congress, ..." *Wyeth v Levine*, 555 U.S. 555, 564-565, 129 S. Ct. 1187, 1193 (2009).

In *Crosby v National Foreign Trade Council*, 530 U.S. 363, 120 S. Ct. 2288 (2000) the U.S. Supreme Court invalidated a Massachusetts law barring state entities from buying goods or services from companies doing business with Burma based upon preemption by federal law. The court outlined the applicable preemption doctrine at pages 372-372 as follows:

> "A fundamental principle of the Constitution is that Congress has the power to preempt state law. Even without an express provision for preemption, we have found that state law must yield to a congressional Act in at least two

> circumstances. When Congress intends federal law to 'occupy the field,' state law in that area is preempted. And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute. We will find preemption where it is impossible for a private party to comply with both state and federal law, and where 'under the circumstance of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.' What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." (Internal citations omitted)

The Court went on to conclude that the state statute was invalid as "an obstacle to the accomplishment of congress' full objectives under the federal act". (503 U.S. 374 – 375).

The MMMA clearly undermines the purposes of the Federal Controlled Substances Act. It allows what the federal statute prohibits. In doing so there can be no question that it stands as a direct obstacle to the accomplishment of the purposes of congress in passing the Controlled Substances Act. The Court went on to say that the fact that it may be possible to, in some instances, comply with both statutes does not change the state statutes invalidity as being in direct conflict with federal law stating at 503 U.S. 379:

> "The conflicts are not rendered irrelevant by the State's argument that there is no real conflict between the statutes because they share the same goals and because some companies may comply with both sets of restrictions. The fact of a common end hardly neutralizes conflicting means, and the fact that some companies may be able to comply with both sets of sanctions does not mean that the state Act is not at odds with achievement of the federal decision about the right degree of pressure to employ."

The fact that the MMMA allows numerous activities which are in direct violation of the federal statute has already required addressing of these issues by numerous federal and state courts relative to the conflicts created by this "legislation". Courts have had to wrestle with such issues as the legalization of the sale of marijuana under the guise of

compassion clubs, co-ops and other sources, medical marijuana dispensaries and issues regarding the cultivation of medical marijuana in private residences. This not only creates issues for persons such as Appellee but also creates numerous issues for law enforcement. There can be little question that the use and cultivation of marijuana authorized under the MMMA directly creates significant and unsolvable obstacles to the enforcement of the federal statute.

Congress passed the Controlled Substances Act in 1970, in the Comprehensive Drug Abuse Prevention and Control Act of 1970, (21 U.S. 801 et seq.). As part of that Act marijuana is a schedule I drug illegal under virtually all circumstances outside of scientific studies. The Michigan Medical Marihuana Act seeks to make legal that which the federal statute specifically declares to be illegal. In doing so it violates the supremacy clause of the United States Constitution which states in Article VI section 2:

> "(2) This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Application of this provision to state and local regulations was affirmed by the Michigan Supreme Court in the case of *City of Detroit v Ambassador Bridge Company*, 41 Mich 29, 748 N.W.2d 221 (2008).

The fact that the Federal Controlled Substances Act preempts state Medical Marihuana statutes has been determined by the United States Supreme Court in the case of *Gonzales v Raich* et al, 545 US 1, 125 S. Ct. 2195 (205). The question before the Court is stated by Justice Stevens at 545 U.S. 5 as follows:

> "The question presented in this case is whether the power vested in Congress by Article I, § 8, of the Constitution 'to make all Laws which shall be necessary and proper for carrying into Execution' its authority to 'regulate Commerce with foreign Nations, and among the several States' includes the power to prohibit the local cultivation and use of marijuana in compliance with California law."

In determining that the federal statute does apply to the California Medical Marijuana Act the Court states at page 22:

> "In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding. (citations omitted) Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, 21 U.S.C. § 801(5), and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Thus, as in *Wickard* when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within it authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce... among the several States.' U.S. Const., Art. I, § 8. That the regulation ensnares some purely intrastate activity is of moment. As we have done many times before, we refuse to excise individual components of that larger scheme."

That the Controlled Substances Act supercedes the Michigan Medical Marihuana Act has been stated by the United States District Court for the Eastern District of Michigan in the case of *United States v Hicks*, 722 F.Supp.2d 829 (E.D. Mich 2010). That decision specifically holds that the Michigan Medical Marihuana Act does not preempt or supercede federal law regarding the possession or use of marijuana stating at pages 832, 833:

> "Under the federal Controlled Substances Act ("CSA") 21 U.S. C. § 801 et seq., marijuana is categorized as a Schedule I substance, see 21 U.S.C. § 812(c), Schedule I(c)(10), which indicates, *inter alia*, that 'Congress expressly found that the drug has no acceptable medical uses.' *Gonzales v Raich*, 545 U.S. 1, 27, S.Ct. 2195, 162 L.Ed.2d 1 (2005). The CSA prohibits the possession of Schedule I substances, except for in the use of government-approved research projects. See *United States v Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 490, 121 S.Ct.

> 1711, 149 L.Ed.2d 722 (2001); see also 21 U.S.C. §§ 823(f), 844(a).
> [1] It is indisputable that state medical-marijuana laws do not, and cannot, supercede federal laws that criminalize the possession of marijuana. See *Gonzales*, 545 U.S. at 29, 125 S.Ct. 2195 ('The Supremacy Clause unambiguously proves that if there is any conflict between federal and state law, federal law shall prevail.') *United States v $186,416.00 in U.S. Currency*, 590 F.3d 942, 945 (9th Cir. 2010). ('The federal government has not recognized a legitimate medical use for marijuana, however, and there is no exception for medical marijuana distribution or possession under the federal Controlled Substances Act.'); *United States v Scarmazzo*, 554 F.Supp.2d 1102, 1109 (E.D.Cal. 2008). ('Federal law prohibiting the sale of marijuana is valid, despite any state law suggesting medical necessity for marijuana'); *United States v Landa*, 281 F.Supp.2d 1139, 1145 (N.D.Cal. 2003). ('Our Congress has flatly outlawed marijuana in this country, nationwide, including for medicinal purposes.')"

The fact that the cultivation and distribution of marijuana is prohibited by the Controlled Substances Act and therefore preempts a state initiative had previously been stated in the case of *United States v Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 121 S. Ct. 1711 (2001). The Court specifically held that there is no medical necessity exception to the prohibitions provided in the Controlled Substances Act. This is exactly what the MMMA attempts to do in allowing the cultivation and distribution of medical marihuana to "qualified patients" and "caregivers".

The lower court correctly cited the case of *Emerald Steel Fabricators, Inc. v Bureau of Labor and Industries*, 348 Or 159 (2009). Although that case arose out of context of an employment discrimination claim, the court's opinion from a state with a similar medical marijuana statute is instructive. The Oregon Supreme Court specifically held that to the extent that the Oregon statute which affirmatively authorizes the use of medical marijuana it is preempted by federal law leaving it without effect.

In doing so the court cited the case of *Michigan Canners and Freezers Association v Agricultural Marketing and Bargaining Board et al*, 467 U.S. 461, 104 S. Ct. 2518 (1984). In that decision the U.S. Supreme Court held that the Michigan Agricultural and Bargaining Act was violation of and therefore preempted by the Federal

Agricultural Practices Act of 1967. In making that determination the court states at page 477:

> "The Michigan Supreme Court held that 'while § 2303 makes it unlawful for a handler to coerce a producer to join or belong to an association, it does not forbid a state from requiring exclusive representation of individual producers where a producer majority sees fit. 416 Mich at 719, 332 N.W.2d at 139. The Michigan Act, however, empowers producers' associations to do precisely what the federal Act forbids them to do. Once an association reaches a certain size and receives its accreditation, it is authorized to bind nonmembers, without their consent, to the marketing contracts into which it enters with processors. In effect, therefore, an accredited association operating under the Michigan Act may coerce a producer to enter into or maintain ... a marketing contract with an association of producers or a contract with the handler – a clear violation of § 2303(c).
>
> In addition, although the Michigan Act does not compel a producer to join an association, it binds him to the association's marketing contracts, forces him to pay fees to the association, and precludes him from marketing his goods himself. See n.6, supra. In practical effect, therefore, the Michigan Act imposes on the producer the same incidents of association membership with which Congress was concerned in enacting § 2303(a).
>
> In conclusion, because the Michigan Act authorizes producers' associations to engage in conduct that the federal Act forbids, it stands as an obstacle to the – accomplishment and execution of the full purposes and objectives of Congress." (emphasis supplied)

These cases are certainly applicable to the arguments made by Appellee. They make clear that while it may be possible to comply with both statutes by simply ignoring one it is not a legitimate argument where the terms of one statute are so clearly in opposition to the terms of the applicable federal statute. The fact that the MMMA can co-exist with the federal statute by simply ignoring the federal statute is in direct contradiction to the holding of these cases.

In *People of the State of Michigan v Robert Lee Redden*, 290 Mich App 65, 799 N.W.2d 184 (2010) the Michigan Court of Appeals affirmed the reinstatement of criminal

charges against the Defendant. The concurring opinion of Judge O'Connell is instructive in that in addition to recognizing and concurring with the majority opinion as to the significant problems created by the MMMA, the opinion specifically states that the MMMA is superceded by federal law, stating at page 91:

> "On November 4, 2008, the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 et seq., was passed by referendum and went into effect soon thereafter. It is without question that this act has no effect on federal prohibitions of the possession of consumption of marijuana. The Controlled Substances Act, 21 USC 801 et seq., classified marijuana as a Schedule I substance, 21 USC 812(c), meaning that Congress recognizes no acceptable medical uses for it, and its possession is generally prohibited. See *Gonzales v Raich*, 545 U.S. 1, 27; 125 S.Ct. 2195; 162 L.Ed.2d 1(2005); *United States v Oakland Cannabis Buyers' Co-op*, 532 U.W. 483, 490; 121 S.Ct. 1711; 149 L.Ed.2d 722 (2001). As a federal court in Michigan recently recognized, 'It is indisputable that state medical-marijuana laws do not, and cannot, supercede federal laws that criminalize the possession of marijuana.' *United States v Hicks*, _____ F Supp 2d _____ (No. 07-20176, ED Mich, 2010); 2010 WL 2724286 at 3, citing *Gonzales*, 545 U.S. at 29 ('The Supremacy Clause unambiguously provides that that if there is any conflict between federal and state law, federal law shall prevail.'); *United States v $186,416.00 in U.S. Currency*, 590 F3d 942, 945 (CA 9, 2010) ('The federal government has not recognized a legitimate medical use for marijuana, however, and there is no exception for medical marijuana distribution or possession under the federal Controlled Substances Act').

III. CONCLUSION

Based upon the provisions of the Michigan Zoning Enabling Act and the interpretations of the Michigan Medical Marijuana Act of the Courts of the State of Michigan, Appellant submits to this Court that Section 90-66 of the Zoning Code of the City of Wyoming is not preempted by the Michigan Medical Marijuana Act. Appellant further submits to the Court that the Michigan Medical Marijuana Act is preempted by the Federal Controlled Substances Act.

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