STATE OF MICHIGAN
IN THE SUPREME COURT OF MICHIGAN

CHRISTIE DeRUITER,

Plaintiff/Counter-Defendant/
Appellee,

v.

TOWNSHIP OF BYRON,

Defendant/Counter-Plaintiff/
Appellant.
_____/

Supreme Court No.: _____

Court of Appeals Docket No. 338972

Lower Court Case No.: 16-04195-CZ
Honorable Paul J. Sullivan

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APPLICATION FOR LEAVE TO APPEAL OF DEFENDANT/APPELLANT TOWNSHIP OF BYRON

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

In *Ter Beek v. City of Wyoming*, 495 Mich 1; 846 NW2d 531 (2014), this Court addressed the validity of a city ordinance which effectively prohibited all medical marijuana use based on a federal criminal statute, concluding that the ordinance directly conflicted with the Michigan Medical Marihuana Act, MCL 333.26421, *et seq.* ("MMMA"). In reaching its conclusion, this Court noted that it was not invalidating zoning provisions which regulate the location of permitted land uses:

> Contrary to the City's concern, this outcome does not "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." 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.

Id. at 23, n. 9.

Contrary to the above passage, the published Opinion of the Michigan Court of Appeals in this case does "create a situation in the state of Michigan where … caregiver[s] … would be able to operate with no local regulation…". It forecloses all local zoning regulations for caregivers.

The decision of the Court of Appeals is clearly erroneous. If left undisturbed, the decision effectively renders any and all zoning land use regulations which address caregiver grow operations void and unenforceable.

A. Case Overview – Summary of Background Facts

Plaintiff/Appellant, Christie DeRuiter, ("DeRuiter") resides in Byron Township. DeRuiter alleged that she is a "qualifying patient" and a "qualifying caregiver" under the MMMA.

Nothing about the present case implicates DeRuiter's status as a qualifying patient or her personal use of medical marijuana. The Byron Township Zoning Ordinance ("Zoning Ordinance")

does not regulate the possession or consumption of medical marijuana by qualifying patients in any way.

Indeed, the Zoning Ordinance as it pertains to medical marijuana tracks and mirrors the language of the MMMA. However, in the area of zoning, upon which the MMMA is silent, the Township has acted, permitting – *by right* – the uses and activities of MMMA-compliant caregivers as an accessory use to *any* dwelling in *any* location within the Township. In other words, wherever someone has a home, in whatever zoning district, that person may have a home occupation, including as an MMMA-compliant caregiver.

Nonetheless, DeRuiter ignored this provision and leased a commercial building to engage in caregiver activities. Defendant/Counter-Plaintiff/Appellant, Township of Byron, ("Township"), did not take any action against DeRuiter for her activities, but as with all zoning enforcement, notified the owner of the subject property that the land uses occurring on the subject property did not comply with the Zoning Ordinance.

DeRuiter responded by filing a Complaint in the Kent Circuit Court seeking declaratory and injunctive relief on a single issue: whether the Zoning Ordinance is void and unenforceable "to the extent" that it conflicts with the MMMA. The Township similarly filed a Counter-Complaint seeking to enforce its Zoning Ordinance.

As the Zoning Ordinance does not conflict with the MMMA, it is valid and enforceable. Specifically, nothing in the MMMA regulates the location within a municipal entity of this otherwise permissible use, as the Township has done through its Zoning Ordinance. The ability to specify a location for a permitted land use is not unique to the cultivation and distribution of medical marijuana, but occurs for all types of lawful and constitutionally protected land uses. That is the essence of zoning.

B. Summary of Error

The only issue presented and decided by the Court of Appeals concerned whether the Township Zoning Ordinance may regulate the location of caregiver land uses. The Court clearly erred in concluding that the Zoning Ordinance – which permits by right the cultivation of medical marijuana as an accessory use to a dwelling unit throughout the township – conflicts with the MMMA requirement that medical marijuana be kept an enclosed, locked facility. The Court erred in concluding that the Township's interest in enforcing its Zoning Ordinance through the equitable remedy of injunction constituted a penalty "for assisting a qualifying patient" under the MMMA. Finally, the Court erred by employing a field preemption analysis, and concluding that caregiver grow operations are completely exempt from zoning provisions.

C. Case Significance – Impact of Court of Appeals' Decision

The impact of the Court of Appeals' decision goes well beyond the interest of the parties in this case. The decision completely slams the door on any land use zoning regulation that pertains to caregiver grow operations. This is unchartered territory.[1] Respectfully, the decision of the Court of Appeals turns the law of zoning on its head.

D. Relief Requested

For the independent reasons summarized in this Application, Defendant/Appellant, Township of Byron, respectfully requests that its Application for Leave to Appeal be granted. Alternatively, should this Court choose not to exercise its discretion in granting leave, the

[1] The Township points out, however, that nearly the identical issue is already being brought before this Court on Application for Leave to Appeal from the Court of Appeals' Published decision in *York Charter Township v. Miller*, 322 Mich App 648; _____NW2d _____ (2018). See Supreme Court Docket No. 157527. The Court should consider consolidating the two cases for purposes of briefing and oral argument.

Township respectfully requests that this Court issue a decision or Preemptory Order reversing the Court of Appeals' decision for the reasons stated herein pursuant to MCR 7.305(H)(1).

II. STATEMENT OF APPELLATE JURISDICTION

As set forth below, the Michigan Supreme Court has jurisdiction concerning this Application for Leave to Appeal pursuant to MCR 7.305(B)(1), (2), (3) and (5).

III. STATEMENT OF DECISION APPEALED

Defendant/Appellant submits this Application for Leave to Appeal the July 17, 2018 published Opinion and Order of the Michigan Court of Appeals which incorrectly affirmed the Opinion and Order of Kent County Circuit Court Judge Paul J. Sullivan, entered on June 9, 2017.

IV. STATEMENT OF QUESTIONS PRESENTED

The issue presented and decided by the Court of Appeals, and the issue addressed in this Application is whether Section 3.2.H of the Zoning Ordinance is preempted by the MMMA, and thus is unenforceable. The general issue of preemption raises several questions set forth below.

1. **DOES THE BYRON TOWNSHIP ZONING ORDINANCE, WHICH PERMITS BY RIGHT THE CULTIVATION OF MEDICAL MARIJUANA AS AN ACCESSORY USE TO A DWELLING UNIT IN ALL ZONING DISTRICTS THROUGHOUT THE TOWNSHIP, DIRECTLY CONFLICT WITH THE MICHIGAN MEDICAL MARIHUANA ACT WHICH REQUIRES THAT GROW OPERATIONS TAKE PLACE IN AN ENCLOSED, LOCKED FACILITY?**

   APPELLANT/TOWNSHIP SAYS: "No."
   APPELLEE/DeRUITER SAYS: "Yes."
   THE COURT OF APPEALS SAYS: "Yes."

2. **DOES THE TOWNSHIP'S ENFORCEMENT OF ITS ZONING ORDINANCE PERTAINING TO THE LOCATION OF LAWFUL CAREGIVER GROW OPERATIONS BY SEEKING AN INJUNCTION CONSTITUTE A "PENALTY" AGAINST A CAREGIVER "FOR ASSISTING A QUALIFYING PATIENT"?**

   APPELLANT/TOWNSHIP SAYS: "No."
   APPELLEE/DeRUITER SAYS: "Yes."
   THE COURT OF APPEALS SAYS: "Yes."

3. **IS THE TOWNSHIP'S ZONING ORDINANCE PREEMPTED BY THE MMMA UNDER THE DOCTRINE OF FIELD PREEMPTION?**

   APPELLANT/TOWNSHIP SAYS: "No."
   APPELLEE/DeRUITER SAYS: "Yes."
   THE COURT OF APPEALS SAYS: Indicated that it did not need to address the question, but employed a field preemption analysis.

V. STANDARD OF REVIEW

The issue of whether the MMMA preempts the Byron Township Zoning Ordinance is a question of law which is reviewed de novo. *Ter Beek v. City of Wyoming, supra,* 495 Mich at 8. Preemption is a question of law concerning statutory interpretation and legislative intent. *Wold Architects & Engineers v. Strat,* 474 Mich 223, 233; 713 NW2d 750, 756 (2006). In analyzing whether a municipal ordinance is preempted, courts are bound to interpret statutes as written. *Twp of Homer v. Billboards By Johnson, Inc,* 268 Mich App 500, 502; 708 NW2d 737, 739 (2005), citing *Gladych v. New Family Homes, Inc,* 468 Mich 594, 597; 664 NW2d 705 (2003). Any arguments as to the wisdom or fairness of the result must be addressed to the legislature, not the courts. *See People v. Kirby,* 440 Mich 485, 493–494; 487 NW2d 404 (1992).

In *Michigan Gun Owners, et al v. Ann Arbor Public Schools, et al* (Dkt. No. 155196, decided July 27, 2018), this Court recently addressed the issue of field preemption, and summarized the standard of review as follows:

> Whether the state has preempted a local regulation, which the state can do expressly or by implication – and in that latter case either because the local regulation directly conflicts with state law or because the state has occupied the entire field of regulation in a certain area – is a question of statutory interpretation that we review de novo. *Detroit v. Ambassador Bridge Co,* 481 Mich 29, 35; 748 NW2d 221 (2008); *Ter Beek v. City of Wyoming,* 495 Mich 1, 8; 846 NW2d 531 (2014). That means that we review it independently, with no required deference to the trial court. *Millar v. Constr Code Auth,* 501 Mich 233, 237; 912 NW2d 521 (2018).

(Opinion pp. 3-4)

VI. SUMMARY OF GROUNDS FOR APPEAL AND RELIEF SOUGHT

The published decision of the Michigan Court of Appeals is clearly erroneous and will cause a material injustice. The decision involves a substantial question about the validity of zoning ordinance provisions throughout the state, adopted in compliance with the Michigan Zoning Enabling Act ("MZEA"), MCL 125.3101, *et seq.* The issues decided by the Court of Appeals dramatically impact and compromise significant public interests.

A. The Decision of the Court of Appeals is Clearly Erroneous. MCR 7.305(B)(5)

The Zoning Ordinance permits, by right, caregiver grow operations as an accessory use to a dwelling unit throughout the township. The Zoning Ordinance does not conflict with the MMMA, and is not inconsistent with the MMMA. DeRuiter could comply with both the Zoning Ordinance and the MMMA. The decision of the Court of Appeals that there was a direct "conflict" was clearly in err.

The Township's interest in enforcing its land use Zoning Ordinance by seeking the equitable relief of injunction did not constitute a "penalty" under the MMMA. The Court of Appeals' decision, to the contrary, is clearly erroneous.

The Court of Appeals employed a field preemption analysis, concluding that caregiver grow operations are completely exempt from local zoning. This is a fundamental error that will have a serious impact throughout the state.

B. The Issues Raised in this Application have Significant Public Interest. MCR 7.305(B)(1)(2) and (3)

If left undisturbed, the Opinion of the Court of Appeals essentially renders all land use regulations addressing caregiver grow operations unenforceable. Given the historic recognition that municipalities have a compelling interest in enforcing land use regulations, this Court should grant the Township's Application for Leave to Appeal.

This case involves a substantial question as to the validity and scope of a local government's authority under the MZEA to enforce land use regulations. MCR 7.305(B)(1). There is significant public interest in the outcome of this issue as the decision will not only impact the parties, but municipalities throughout the state. MCR 7.305(B)(2). A review of the interplay between the MMMA and the authority of municipalities to enforce local zoning regulations involve legal principles of major significance to governmental agencies and the State's juris prudence. MCR 7.305(B)(3).

C. Requested Relief

The Township respectfully requests that its Application for Leave to Appeal be granted. Alternatively, the Township requests that the Court issue a preemptory Order reversing the decision of the Court of Appeals for the reasons stated in this Application pursuant to MCR 7.305(H)(1).

VII. SUMMARY OF MATERIAL PROCEEDINGS AND FACTS

A. Nature Of The Action

The principal issue in this case is whether the MMMA prevents a municipality from enforcing its zoning ordinance; specifically, whether the Township's Zoning Ordinance which permits, by right, the activities an MMMA-compliant primary caregiver as a home occupation, is preempted by the MMMA.

DeRuiter sought and obtained a declaratory ruling in the Kent County Circuit Court that the Byron Township Zoning Ordinance is preempted by the MMMA, and thus could not be enforced. The decision was affirmed by the Michigan Court of Appeals.

The controlling issues in this case are primarily legal in nature, and the pertinent portions of the MMMA and the Zoning Ordinance are summarized below.

B. The Michigan Medical Marihuana Act

The "findings and declaration" section of the MMMA identifies the beneficial uses of marijuana for treating and alleviating debilitating medical conditions. 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 marijuana." MCL 333.26422(b).

The MMMA addresses the amounts that may be possessed, MCL 333.26424(a)-(c); custody of minor children, MCL 333.26424(d); presumptions applicable for determining if caregivers or patients are engaged in the medical use of marihuana under the act, MCL 333.26424(e); protections for physicians, MCL 333.26424(g); protections related to paraphernalia and other illicit property, MCL 333.26424(h),(i); protections for being in the presence of medical marihuana use, MCL 333.26424(j); use by visitors to the State, MCL 333.26424(k); punishment for illegal sales of medical marihuana, MCL 333.26424(l), and protections for manufacturing

marihuana-infused products, MCL 333.26424(m). Notably absent from that list and the act is any mention of zoning or locations of medical marijuana facilities or operations.

As it pertains to the cultivation of medical marijuana, the Act requires that the marijuana plants be kept "in an enclosed, locked facility." MCL 333.26424(b)(2).

The MMMA provides immunity from arrest, prosecution, or penalty to qualifying patients and primary caregivers. MCL 333.26424. As it pertains to caregivers, Section 333.26424(b) provides, in pertinent part:

> (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 use of marijuana 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.

In Section 8, the MMMA provides that under appropriate circumstances a patient and a patient's primary caregiver may assert "the medical purpose for using marijuana as a defense to any prosecution involving marijuana…". MCL 333.26428.

C. The Michigan Zoning Enabling Act

The MZEA comprehensively addresses local land use regulation. The Act codifies the general power of local governmental units to regulate land use. Section 201 of the MZEA specifically provides that local government units may establish zoning districts within its zoning jurisdiction:

> A local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of one or more districts within its zoning jurisdiction which regulate the use of land and structures…

MCL 125.3201.

There is no claim that the Byron Township Zoning Ordinance fails to comply with the MZEA. There is no claim that the Zoning Ordinance is exclusionary or that it has the practical effect of compromising any rights under the MMMA.

D. The Byron Township Zoning Ordinance

Byron Township adopted its Zoning Ordinance in accordance with the provisions of the MZEA. The Zoning Ordinance provides for the lawful uses of all types which are permitted either by right, or as a special land use, in designated zoning districts. See Exhibit D, cited provisions of the Zoning Ordinance.

The Zoning Ordinance does not attempt to regulate any of the subjects covered within the MMMA. Specifically, Section 3.2.H of the Zoning Ordinance, "Medical Use of Marijuana," provides:

> The acquisition, cultivation, use, delivery or distribution of marijuana to treat or alleviate a debilitating medical condition is prohibited except in compliance with the Michigan Medical Marijuana Act ("MMMA") of 2008 and applicable provisions of the township zoning ordinance.

The Zoning Ordinance also does not regulate or otherwise apply to the personal use or possession of marijuana in compliance with the MMMA. Specifically, Section 3.2.H.6 provides:

> The provisions of this subsection do not apply to the personal use and/or internal possession of marijuana by qualifying patients in accordance with the MMMA, for which a permit is not required.

Given that the MMMA is silent on location of caregiver activities for zoning purposes, Byron Township exercised its authority under the MZEA and determined that a registered primary caregiver shall be permitted by right as a "home occupation". Sections 3.2.G and H.

Under the Zoning Ordinance, primary caregiver activities compliant with the MMMA are permitted by right in all of the Township zoning districts as an accessory use to a dwelling unit. Section 3.2.G provides:

> Home occupations are permitted in all zoning districts as an accessory use to a dwelling unit.

Section 3.2.H permits – by right – the "acquisition, possession, cultivation, use, delivery or distribution of marijuana to treat or alleviate a debilitating medical condition" in compliance with the MMMA.

The Zoning Ordinance specifically recognizes that the MMMA creates a general right for individuals to use, possess or deliver marijuana in Michigan. Subsection 1 summarizes legislative findings and confirms that a caregiver operating in compliance with the MMMA and the requirements of the Zoning Ordinance shall be permitted as a home occupation. Section 3.2.H.1.

Subsection 2 provides the "standards and requirements" applicable to primary caregivers. These are patterned after the provisions of the MMMA and are consistent with the MMMA. Section 3.2.H.2.

At no time did DeRuiter ever allege that any of the standards and requirements provided in the Zoning Ordinance prevent her from operating as an MMMA-compliant primary caregiver. There is no claim that any of the standards and requirements are inconsistent with the MMMA.

If any particular standard or requirement had been challenged and determined to directly conflict with the MMMA, the severability clause of the Zoning Ordinance would apply. Section 14.13 of the Zoning Ordinance states:

> Should any section or provision of this Ordinance be declared by a court of competent jurisdiction to be unconstitutional or invalid, such decision shall not affect the validity of the Ordinance as a whole, or any part thereof other than the part so declared to be unconstitutional or invalid. Section 14.13

Subsection 3 provides that an MMMA-compliant caregiver shall be granted a zoning permit. The Subsection 3.2.H.3 permit application process is tailored to ensure compliance with the MMMA. The permitting process is ministerial, and the applicable provisions do not conflict

with the MMMA. There is no claim that the permitting process would preclude any primary caregiver from the right to engage in all permissible activities under the MMMA.[2]

E. Summary of Proceedings

1. Complaint and Counter-Claim

On May 10, 2016, DeRuiter filed a Complaint for "Declaratory Relief", and "Injunctive Relief". DeRuiter alleges that she is a "marijuana–patient and caregiver, duly registered with the State of Michigan, pursuant to MMMA." Complaint ¶ 10. DeRuiter alleges that she resides in Byron Township; and that she grows marijuana in a separate location in the Township for her own use as a qualified patient, and for the use of her registered patients. Complaint ¶ 5.

On March 22, 2016, the Township Supervisor wrote a letter to the commercial property owner giving notice that the property at issue is being used for "the acquisition, possession, cultivation, manufacturing and possibly the use, delivery or distribution of marijuana." Letter from Township Supervisor, dated March 22, 2016. See Exhibit C. The property owner was informed that the activities are not being conducted as a home occupation. The Township directed that the owner cease and desist this inappropriate use of the commercial property.

In reference to the Township's letter to the commercial property owner, DeRuiter alleges that the Zoning Ordinance, "is in direct conflict with the MMMA when it limits the location where activities, otherwise legal under the MMMA, can be conducted." Complaint ¶ 29. Notably, the Complaint does not allege that any "standards or requirements" under Section 3.2.H.2 prevent her

[2] The Court of Appeals was wrong when it said the Township charges a permit "fee". Opinion at p. 1, 6. The Ordinance allows for a home occupation fee, but the Township has not adopted one, and there is currently no fee.

from serving as an MMMA-compliant caregiver. Moreover, the Complaint does not allege that any particular standard or regulation directly conflicts with the MMMA.[3]

The Complaint suggests a "field preemption" claim by alleging that the Zoning Ordinance, "is otherwise in direct conflict with the MMMA when it contains restrictions of any sort that are not contained in the MMMA." Complaint ¶ 30. However, DeRuiter does not request a judicial declaration that the MMMA occupies the field of local zoning.

Instead, DeRuiter requests the following "relief":

A. A declaratory judgment that Byron Township Ordinance Section 3.2(H) is void and unenforceable against the Plaintiff to the extent that it prohibits, restrains, or is in direct conflict with the Michigan Medical Marijuana Act.

B. Such injunctive and/or other relief as may be necessary and appropriate to protect Plaintiff's rights to use or cultivate medical marijuana or to act as a caregiver as permitted by the Michigan Medical Marijuana Act.

The Township timely answered the Complaint on June 6, 2016, by denying that the Township Zoning Ordinance is preempted by the MMMA. The Township contemporaneously filed a two-count Counter-Complaint for the purpose of seeking, (a) a declaration that the provisions of the Township Zoning Ordinance permitting the activities of registered primary caregivers as a home occupation are not preempted by the MMMA and are otherwise valid and enforceable (Count I), and (b) an injunction requiring that DeRuiter permanently cease and desist her operations as a registered primary caregiver within the Township because those operations are being conducted within a commercial building, and not as a permitted home occupation (Count II).

Later, on September 20, 2016, the Township filed an Amended Answer and Affirmative Defenses. The only material difference between the Township's original Answer and its Amended

[3] If any particular standards or requirements were identified by Plaintiff, and if the Court concluded that any such standards or requirements directly conflicted with the MMMA, the particular standard or requirement could be severed without a blanket declaration that the Zoning Ordinance is preempted.

Answer is that the Township thereby gave notice that the medical marijuana provisions of its Zoning Ordinance, as codified in Section 3.2.H, had been amended on July 11, 2016. Amended Answer at ¶16. The Township's amended medical marijuana regulations continued to permit the activities of registered primary caregivers only as a home occupation.

2. Circuit Court Opinion and Order dated June 9, 2017

Following cross motions for summary judgment, on June 9, 2017, Kent Circuit Court Judge Paul J. Sullivan entered an Opinion and Order granting DeRuiter's motion for summary disposition, and denying the Township's motions for summary disposition. See Exhibit B. Judge Sullivan summarized the "facts and background" as follows:

> Ms. DeRuiter is a registered qualifying patient and primary caregiver under the Michigan Medical Marihuana Act, MCL 333.26421 *et seq.* ("the MMMA"). She is a resident of the Township and also owns commercially-zoned property in the Township which she uses for growing marijuana for her own medical use as well as that of her registered patients. She alleges her cultivation on this property is in full compliance with the restrictions in the MMMA.
>
> The Township was informed about this use of the property and sent a notice to Ms. DeRuiter in March of 2016, alleging she was in violation of the Township's zoning ordinance regulating the medical use of marijuana ("the ordinance"). The ordinance prohibited the use and cultivation of marijuana other than as a "home occupation" on residential property, subject to a permit approval process and various restrictions. Because Ms. DeRuiter's growing was done on commercially-zoned property, there was no way she could get a permit or otherwise comply with the ordinance. The Township demanded Ms. DeRuiter cease her growing operation and remove all of the marijuana from the property or else face legal action.
>
> Ms. DeRuiter filed the underlying complaint on May 10, 2016, seeking declaratory and injunctive relief to allow her continued use of the property for cultivation of marijuana consistent with the MMMA. She claims the ordinance conflicts with the MMMA, and this conflict means the ordinance is preempted and unenforceable. On June 8, 2016, the Township filed an answer and counter-complaint. The Township claims there is no conflict with the MMMA because it is merely "designating the locations" of lawful use. The counter-complaint requests a declaratory judgment stating that the ordinance is enforceable and a declaratory judgment and injunction essentially enforcing the ordinance against Ms. DeRuiter.

Opinion at 2.

Judge Sullivan reviewed the Zoning Ordinance, observing that a primary caregiver is permitted to operate as a "home occupation". Opinion at 3. Judge Sullivan further noted that a primary caregiver is required to submit "a permit application and application fee,"[4] Opinion at 3, and, "After receiving the permit, the caregiver then must comply not only with the restrictions and terms of the MMMA, but also various other restrictions and terms of the Ordinance," Opinion at 4.

Judge Sullivan concluded that the Zoning Ordinance is preempted by the MMMA, stating, in part:

> In this case, the ordinance explicitly subjects caregivers to penalties for the medical use of marijuana and assistance of qualifying patients with the medical use of marijuana, even when done fully in accordance with the MMMA. Despite a caregiver's compliance with the MMMA, there would still be penalties if the assistance with a patient's medical use is done without first getting a permit, which is only available for residential property and then subject to numerous restrictions in addition to those set forth in the MMMA. Respectfully, this creates a clear conflict with the MMMA, which both prohibits such penalties for MMMA-compliant activity, *see* MCL 333.26424(a)-(b), and explicitly authorizes medical marijuana use "to the extent that it is carried out in accordance with the provisions of this act." MCL 333.26427(a).

Opinion at 5-6.

Judge Sullivan concluded that the enforcement of the Zoning Ordinance in this case "subjects Ms. DeRuiter to punishment for MMMA-compliant medical marijuana use and assistance of qualifying patients with medical marijuana use contrary to MCL 333.26424 (a)-(b)." Opinion at 6.

Judge Sullivan further concluded that, "The present case does not require any ruling on field preemption", adding that, "It is still possible there could be some valid local restrictions related to medical marijuana."

[4] This conclusion is incorrect. The Township has not adopted a fee for a home occupation.

Opinion at 7.

The Court's "Order" states:

> For the reasons set forth above, Christie DeRuiter's motion for summary disposition is GRANTED, Byron Township's motions for summary disposition are DENIED, and Byron Township's counter-complaint is respectfully DISMISSED.
>
> Section 3.2(H) of Byron Township's Zoning Ordinance is preempted by the Michigan Medical Marihuana Act and unenforceable.

This is a final order which closes the case.

Opinion at 8.

3. Byron Township's appeal

On June 27, 2017, Byron Township filed a Claim of Appeal relating to the Circuit Court's Opinion and Order granting summary disposition in favor of Plaintiff on her Counter-Complaint. Dkt #338972. On June 27, 2017, Byron Township separately filed a Claim of Appeal relating to the Circuit Court's decision denying its motion for summary disposition of Plaintiff's Complaint. Dkt #338977.

On July 5, 2017, the Court entered an Order in Docket #338997 dismissing the appeal, noting that the Court lacks jurisdiction over the second Claim of Appeal. The Order further provided that "Appellant is free to raise issues related to both the complaint and counter-complaint in the appeal in Docket Number 338972 which remains pending in this Court."

On January 24, 2018, the Court further entered an Order allowing the Michigan Township Association and the Michigan Municipal League to file an amicus curiae brief.

4. Decision of the Michigan Court of Appeals

On July 17, 2018, the Court of Appeals issued a published Opinion affirming the decision of the Circuit Court. The Court suggested a field preemption analysis by noting that the MMMA did not expressly authorize municipalities to adopt zoning ordinances. As the Court explained:

> We believe that the plain language of the MMMA lacks any ambiguity that would necessitate judicial construction to decipher its meaning. When the statute is read as a whole, no irreconcilable conflict results that makes the statutory provisions susceptible to more than one meaning. We conclude that the MMMA permits medical use of marijuana, particularly the cultivation of marijuana by registered caregivers, at locations regardless of land use zoning designations as long as the activity occurs within the statutorily specified enclosed, locked facility. No provision in the MMMA authorizes municipalities to restrict the location of MMMA-compliant medical use of marijuana by caregivers. Neither does the MMMA authorize municipalities to adopt ordinances restricting MMMA-compliant conduct to home occupations in residential locations. So long as caregivers conduct their medical marijuana activities in compliance with the MMMA and cultivate medical marijuana in an "enclosed, locked facility" as defined by MCL 333.26423(d) and do not violate MCL 33.26427(b)'s location prohibitions, such conduct complies with the MMMA and cannot be restricted or penalized.

Opinion at 5.

The Court rejected the Township's field preemption argument, stating:

> Defendant's argument that the MMMA does not preempt its ordinance because the MMMA does not occupy the field of zoning fails; the trial court never based its ruling upon field preemption of zoning nor did the trial court need to consider the field preemption doctrine. Rather, the trial court correctly determined that doctrine inapplicable to this case because the ordinance directly conflicted with the MMMA and was preempted for that reason alone.

Opinion at 6.

The Court held that the Township's Zoning Ordinance conflicted with the MMMA, and thus was preempted by the MMMA, stating:

> Therefore, we hold that the trial court properly analyzed the interplay between defendant's zoning ordinance and the MMMA and correctly held as a matter of law that the MMMA preempted defendant's home occupation zoning ordinance because the ordinance directly conflicted with the MMMA by prohibiting what the MMMA permitted, and it improperly imposed regulations and penalties upon persons who engage in MMMA-compliant medical use of marijuana.

Opinion at 7.

VIII. LEGAL ARGUMENT

A. The Zoning Ordinance Permits – By Right – MMMA-Compliant Grow Operations as an Accessory Use to a Dwelling Unit Throughout the Entire Township.

Before addressing the important issue of whether the MMMA preempts any land use zoning regulation, it is important to recognize what the Zoning Ordinance permits and what this case is not about.

1. The Zoning Ordinance does not regulate personal use or internal possession of marijuana.

Nothing in the Zoning Ordinance attempts to regulate the personal possession or consumption of medical marijuana by a qualifying patient under the MMMA. Zoning Ordinance, Section 3.2.H.6 ("The provisions of this subsection *do not apply* to the personal use and/or internal possession of marijuana by qualifying patients in accordance with the MMMA, for which a permit is not required.") (Emphasis added).

2. The Zoning Ordinance provides that MMMA-compliant caregivers shall be granted permits. This does not conflict with the MMMA.

The only "conflict" alleged by DeRuiter and addressed by the Court of Appeals arises from the fact that DeRuiter chose to grow marijuana in a commercial building and not as a home occupation. Had DeRuiter chosen to grow her marijuana as a home occupation, she could not be denied a permit. DeRuiter would have had every right and the full opportunity to engage in her caregiver activities under the MMMA.

The Circuit Court and the Court of Appeals took issue[5] with the Township's "permit requirement". However, the permitting process does not create a "conflict" of any kind.

[5]The Circuit Court Opinion observes that the home occupation is only allowed after going "through a permit process requiring submission of an application and the payment of a fee" (Opinion at 4). As previously noted, a fee is not currently applied. Likewise, the Court of Appeals in its Opinion

The Zoning Ordinance permits, as of right, the use of land for primary caregiver activities as a "home occupation." To "demonstrate compliance with all requirements" of the MMMA and the land use specifications, the Township then requires a permit which *shall* be granted where compliance exists; the zoning administrator has no discretion in issuing the Township permit.

The application process is ministerial. There are no discretionary standards to apply. Upon submission of a permit application demonstrating compliance, the Township has no discretion[6] whether to issue the permit; the compliant caregiver is entitled to the same. Section 3.2.H.3.b.

3. The Zoning Ordinance standards and requirements are consistent with the MMMA, do not create a conflict with the MMMA, and are not otherwise at issue.

The only issue raised and decided by the lower Courts is whether the Zoning Ordinance provisions pertaining to the geographical location of caregiver activities directly conflicts with the MMMA's requirement that medical marijuana plants be kept in an enclosed, locked facility. DeRuiter too has conceded, "All that is at issue" is whether the Township could enforce its Zoning Ordinance when DeRuiter chose to locate her "grow operation" in a "commercial building... Other parts of the ordinance are not at issue." Response brief filed in the Court of Appeals at 12.

The Circuit Court and the Court of Appeals criticized the Zoning Ordinance as "targeting" and restricting MMMA-compliant use by adding a layer of restrictions and limitations. However,

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notes that the Zoning Ordinance imposes a "permit requirement" that "Defendant could revoke without regard to Plaintiff's MMMA-compliant conduct" (Opinion at 6).

[6]Discretionary acts "require personal deliberation, decision and judgment," while ministerial acts are those "which constitute merely an obedience to orders or the performance of a duty in which the individual has little or no choice." *Joplin v. Univ of Michigan Bd of Regents*, 173 Mich App 149, 152; 433 NW2d 830, 832 (1988), quoting *Ross v. Consumers Power Co* (on rehearing), 420 Mich 567, 634-45; NW2d 641 (1984). If DeRuiter chose to locate her grow operation as an accessory use to a dwelling unit, the Zoning Administrator would have no discretion over whether to issue her permit; she would be entitled to the same. Zoning Ordinance, Section 3.2.H.3.b.

none of the standards and restrictions provided in Subsection 2 were found to be inconsistent with the MMMA.

The Zoning Ordinance requires that primary caregivers comply with the MMMA. See Sections 3.2.H.2.a, f, k, n; 3.2.H.3.c. This does not create a conflict. Further, the provisions prohibiting a primary caregiver from possessing marijuana in a school bus or near a school or correctional facility, Section 3.2.H.2.b; requiring marijuana to be stored in an "enclosed, locked facility," Section 3.2.H.2.d; prohibiting anyone under the age of 18 from having access to marijuana for caregiver purposes, Section 3.2.H.2.i; and prohibiting anyone other than the qualified caregiver from delivering marijuana to the patient, Section 3.2.H.2.h, mirror the requirements and limitations already contained within the MMMA; specifically, MCL 333.26427(b)(2), MCL 333.26424(a)-(b), and MCL 333.26423.

The Zoning Ordinance goes on to allow up to two primary caregivers at any one dwelling, Section 3.2.H.2.c, which has no corresponding prohibition within the MMMA. The Zoning Ordinance also addresses signage, Section 3.2.H.2.e, and visibility of marijuana growing activities from the outside of the dwelling, Section 3.2.H.2.m, which the Circuit Court correctly noted was simply a matter of signage, "not interfering with the MMMA-compliant activity," Opinion at 7, n.1, otherwise taking place within the dwelling.

Clearly, if the Circuit Court or the Court of Appeals had found any subpart of the Section 3.2.H in conflict with the MMMA, the offending provision could have been severed in accordance with the Township's express intent for severance in Section 14.13, leaving the remaining provisions intact.[7]

[7]If any requirement contained in the Zoning Ordinance was found to be inconsistent or otherwise in conflict with the MMMA, the offending provision could be severed in accordance with Section 14.13 of the Township Zoning Ordinance without rendering the entire Section void. *Jott, Inc. v.*

4. The appropriateness or legislative wisdom of providing for caregiver grow operations in a non-commercial setting consistent with the MMMA was not an issue before the Court.

DeRuiter's Complaint requests only a declaratory judgment that the Zoning Ordinance is "void and unenforceable against Plaintiff to the extent that it prohibits, restrains, or is in direct conflict with the [MMMA]" and injunctive relief necessary to protect her rights under the MMMA. Compl., ¶ 7. There is no claim that the Zoning Ordinance itself is "arbitrary or capricious" or unenforceable for any reason other than preemption. *See Kropf v. City of Sterling Heights,* 391 Mich 139, 162; 215 NW2d 179 (1974), quoting *Brae Burn, Inc v. Bloomfield Hills,* 350 Mich 425, 430-431; 86 NW2d 166 (1957) ("[I]t is not for the Court to second-guess the local governing bodies in the absence of a showing that the body was arbitrary or capricious …This Court does not sit as a super zoning commission. Our laws have wisely committed to the people of the community themselves the determination of their municipal destiny…with the wisdom or lack of wisdom of that determination we are not concerned."). In reviewing the issue of preemption, the wisdom of fairness of the underlying ordinance is not a material consideration.[8]

The MMMA creates a close, confidential relationship between caregivers and patients, whereby a single primary caregiver is able to provide medical marijuana to no more than five qualifying patients "to whom he or she is connected through the department's registration process." MCL 333.26424(b). *See* also MCL 333.26426(d) ("[A] primary caregiver may assist no

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Charter Township of Clinton, 244 Mich App 513; 625 NW2d 429 (2001); *Pletz v. Secretary of State,* 125 Mich App 335; 336 NW2d 789 (1983).

[8]During oral argument on the cross motions for summary disposition, Circuit Court Judge Sullivan questioned the reasoning behind the Township's decision to treat caregiver land use activities as a home occupation and whether any type of noncommercial activity is allowed in a commercial district. Judge Sullivan also questioned why caregiver activities could not be included in the commercial zone (see Opinion at 7) perhaps inappropriately coloring the Court's decision on whether the actual language of the MMMA and the Zoning Ordinance "directly conflict". (See Opinion at 8.)

more than 5 qualifying patients with their medical use of marijuana."). Given the five-patient limitation, the MMMA was clearly not intended to foster commercial enterprises. The Township's decision to allow primary caregivers to operate only as a permitted home occupation is wholly consistent with MMMA's underlying purpose and objective of fostering confidential relationships between a caregiver and a very small number of qualifying patients in a residential setting.

Section 3.2.H.1 recognizes the scope and limited purpose of the MMMA in facilitating a private and noncommercial relationship between a primary caregiver and a medical marijuana user. These legislative findings[9] are consistent with the MMMA.

The noncommercial focus of the MMMA is in contrast with the more recent legislation which allows *commercial* medical marijuana sales operations, which are not referred to as "provisioning centers". *See* Public Act 281 of 2016 ("Act 281"), §§ 102I, 401(1), and 504. Importantly, Act 281's definition of "provisioning center" makes clear that caregiver/patient relationships under the MMMA are *not* intended to be commercial in nature. Act 281 does this by expressly defining "provisioning centers" as being "commercial," while referring to caregiver/patient relationships under the MMMA as being "noncommercial." Specifically, Act 281 provides:

> "Provisioning center" means a licensee that is a *commercial entity* located in this state that purchases marihuana from a grower or processor and sells, supplies, or provides marihuana to registered qualifying patients, directly or through the patients' registered primary caregivers. Provisioning center includes any

[9]The legislative findings include:

> Section 3.2.H.1.e. The MMMA does not, therefore, create a new vocation for entrepreneurs or others who wish to engage in the sale of marijuana to more than five persons in a commercial setting. Instead, the MMMA is directed at improving the health and welfare of qualifying patients.
>
> Section 3.2.H.1.g. By permitting the operation of registered primary caregivers as a home occupation, rather than in a commercial setting, this promotes the MMMA's purpose of ensuring that (i) a registered primary caregiver is not assisting more than five qualifying patients with their medical use of marijuana, and (ii) a registered primary caregiver does not unlawfully expand its operations beyond five qualifying patients, so as to become an illegal commercial operation, in the nature of a marijuana collective, cooperative or dispensary.

> *commercial property* where marihuana is sold at retail to registered qualifying patients or registered primary caregivers. *A noncommercial location used by a primary caregiver to assist a qualifying patient connected to the caregiver through the department's marihuana registration process in accordance with the Michigan medical marihuana act is not a provisioning center for purposes of this act.*

Id., §102I (emphasis added).

It is also legally significant that Act 281 was enacted to be an "opt in" law, meaning that commercial provisioning centers are *prohibited* in all municipalities, unless a municipality has "opted-in" by adopting an ordinance expressly allowing them. *Id*., §205(1). Byron Township has not opted-in, and so commercial provisioning centers are illegal in the Township. The Township lawfully provides only for the specific noncommercial caregiver/patient relationships that are envisioned by the MMMA, and only in a home occupation setting. This is strictly consistent with the intent and objectives of the MMMA.

B. The Zoning Ordinance which Permits By Right the Cultivation of Medical Marijuana as an Accessory Use to a Dwelling Unit Throughout the Township Does Not Conflict with the MMMA Provision which Requires that Medical Marijuana Be Kept in an Enclosed, Locked Facility.

DeRuiter could have very easily complied with both the MMMA and the Zoning Ordinance. She chose not to. The only "conflict" presented in this case arose from the fact she chose to locate her grow operations in a commercial building.

In support of her preemption arguments, DeRuiter took the position that the MMMA, by requiring that a primary caregiver keep his or her medical marijuana plants in "an enclosed, locked facility," MCL 333.26424(b)(2)[10] is preemptively regulating the "where" aspect of a primary

[10] The MMMA defines an "enclosed, locked facility," in relevant part, as "a closet, room, or other comparable, stationary, and fully enclosed area equipped with secured locks or other functioning security devices that permit access only by a registered primary caregiver or registered qualifying patient. Marihuana plants grown outdoors are considered to be in an enclosed, locked facility if they are not visible to the unaided eye from an adjacent property when viewed by an individual at ground level or from a permanent structure and are grown within a stationary structure that is enclosed on all sides, except for the base, by chain-link fencing, wooden slats, or a similar material

caregiver's operations, such that municipalities allegedly cannot exercise their zoning authority over where primary caregivers may operate as long as their marijuana is stored in "an enclosed, locked facility." That position is incorrect.

A caregiver is able to store his or her marijuana plants in a physical structure that constitutes an "enclosed, locked facility," no matter the zoning district in which a municipality might require that facility to exist. For example, even though DeRuiter might have a *personal preference* for operating in a commercial district, there is nothing that prohibits DeRuiter from having "an enclosed, locked facility" on the residential premises of a home occupation, rather than in a commercial district. She is clearly able to comply with both laws at the same time. Compliance with both laws is possible because the MMMA only regulates the "how" (in an "enclosed locked facility"), whereas the Zoning Ordinance instead regulates the "where" (i.e., on the residential premises of a home occupation). Thus, under well-established preemption principles, there is no conflict because it is possible for a primary caregiver to comply with Section 3.2.H and the MMMA at the same time. *See Ter Beek, supra* at 495 Mich 12-14 (holding that conflict preemption exists when it is impossible to comply with two laws at the same time, and rejecting a claim that the federal Controlled Substances Act preempted the MMMA because it is possible to comply with both laws).

1. The Zoning Ordinance restriction on the location of lawful land use does not create a conflict with the MMMA.

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that prevents access by the general public and that is anchored, attached, or affixed to the ground; located on land that is owned, leased, or rented by either the registered qualifying patient or a person designated through the departmental registration process as the primary caregiver for the registered qualifying patient or patients for whom the marihuana plants are grown; and equipped with functioning locks or other security devices that restrict access to only the registered qualifying patient or the registered primary caregiver who owns, leases, or rents the property on which the structure is located." MCL 333.26423(d).

"For purposes of preemption, a direct conflict exists between a local regulation and a state statute when the local regulation permits what the statute prohibits, or prohibits what the statute permits." *McNeil v. Charlevoix County,* 275 Mich App 686, 697; 741 NW2d 27 (2007), citing *People v. Llewellyn,* 401 Mich 314, 322 n. 4; 257 NW2d 902 (1997).

The MMMA does not speak to geographical zoning requirements, and the Township's Zoning Ordinance does not permit marijuana plants to be kept in unenclosed, unsecured facilities. The two provisions can logically and effectively coexist, meaning there is no direct conflict.

This Court has long made clear that additional regulations to a state law *does not* constitute a conflict. *Walsh v. City of River Rouge,* 385 Mich 623, 635-36; 189 NW2d 318 (1971) (emphasis added). As the Court explained:

> In order that there be a conflict between a state enactment and a municipal regulation both must contain either expressed or implied conditions which are inconsistent and irreconcilable with each other. Mere differences in detail do not render them conflicting. If either is silent where the other speaks, there can be no conflict between them. Where no conflict exists, both laws stand.

Id. at 635.

This important point was echoed in *Rental Property Owners Association of Kent County v. City of Grand Rapids,* 455 Mich 246, 262; 566 NW2d 514 (1997):

> The mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two, and the requirements of the municipal ordinance are not in themselves pernicious, as being unreasonable or discriminatory, both will stand. *The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith unless the statute limits the requirement for all cases to its own prescription.* Thus, where both an ordinance and a statute are prohibitory, and the only difference between them is that the ordinance goes further in its prohibition but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot coexist and be

> effective. Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not deemed inconsistent because of mere lack of uniformity in detail.

Quoting *Detroit v. Qualls*, 434 Mich 340, 362; 454 NW2d 374 (1990) and *Miller v. Fabius Twp Bd*, 366 Mich 250, 256-257; 114 NW2d 205 (1962) (which quoted approvingly, 56 Am Jur 2d, Municipal Corporations, § 374) (emphasis in *Rental Prop Owners*); see also *Llewellyn*, 401 Mich at 324-25 ("examination of relevant Michigan cases indicates that where the nature of the regulated subject matter calls for regulation adapted to local conditions, and the local regulation does not interfere with the state regulatory scheme, supplementary local regulation has generally been upheld.").

The MMMA requires that grow operations be conducted in an enclosed, locked facility. The Township's enclosed, locked facility definition tracks the MMMA.[11] The Township permits – by right – grow operations as an accessory use to a dwelling unit throughout the township. DeRuiter can certainly comply with both provisions. Therefore, there is no direct conflict preventing the Township from enforcing its Zoning Ordinance.

2. The enclosed, locked facility requirement does not speak to zoning, but the manner in which medical marijuana plants are cultivated.

The MMMA is not a zoning law that specifies the locations *where* a land use may occur; it is a regulatory law that specifies *how* caregiver activities must be performed (in an enclosed, locked facility). This distinction between regulating the location of a land "use" versus regulating how an "activity" may be performed is one that has long been recognized under Michigan law. *See*, e.g., *Square Lake Hills Condo Ass'n v. Bloomfield Twp*, 437 Mich 310, 323-325; 471 NW2d

[11]In pertinent part, the Zoning Ordinance provides that "a registered primary caregiver may keep and cultivate in an "enclosed, locked facility" (as that phrase is defined by the MMMA) up to 12 marijuana plants for each registered qualifying patient…" Section 3.2.H.2.d.

321 (1991); *Natural Aggregates Corp v. Brighton Twp*, 213 Mich App 287, 300-302; 539 NW2d 761 (1995).[12] And because the MMMA is plainly in the latter category (a law that regulates only *how* an activity may be performed), it is not a zoning law, and therefore cannot conflict with a provision of a zoning ordinance that specifies only the "where," while leaving the "how" to the MMMA.

The MMMA, through its "enclosed, locked facility" requirement, places an important restriction on grow activity. While DeRuiter and the lower courts characterize this restriction as a blanket authorization, the statute does not state that qualifying caregivers should be permitted to cultivate plants wherever there is an enclosed, locked facility. Instead, it is a restriction; protections of the MMMA will apply "only if the primary caregiver possesses marihuana in forms and amounts that do not exceed the following," including that he or she not exceed 2.5 ounces of marihuana for each patient, not possess more than an incidental amount of seeds and stems, and not keep plants outside the "enclosed, locked facility." MCL 333.26424.

The definition of enclosed, locked facility pertains to the type of protected confinement, completely divorced from a zoning regulation[13]. This Court has indicated that the "focus" of this requirement is "whether the *security device* functions 'to permit access only by a registered primary caregiver or registered qualifying patient.'" *People v. Kolanek*, 491 Mich 382, 404 n. 45;

[12]"A zoning ordinance . . . regulates the use of land and buildings according to districts, areas, or locations" (*Square Lake Hills*, *supra* at 323), whereas a regulatory law specifies how an "activity must be conducted pursuant to certain regulations" (*Natural Aggregates, supra* at 301).

[13]State law, requiring "security devices," or protective confinement of certain items, is not unique to medical marijuana and has long existed in concert with local zoning regulation. For example, the Public Health Code requires that "a person who possesses ephedrine or pseudoephedrine for retail sale" store the ephedrine or pseudoephedrine in a "locked case." MCL 333.17766e. Medical waste also must be stored in a "secured or locked" container. MCL 333.13809. Explosives must be stored in a locked building. MCL 29.53. It defies logic to contend that these storage requirements alone preclude a local entity from enforcing its zoning ordinance.

817 NW2d 528 (2012) (emphasis added); see also *People v. Manuel*, 319 Mich App 291; 901 NW2d 118 (2017) (finding that the criminal defendant had met the requirement that "plants must be 'kept in an enclosed, locked facility'" based upon the presence of two padlocks). While it is possible to create an enclosed, locked facility inside or outdoors, there is nothing in the MMMA that prescribes the location of the real property, only the necessity of a security measure that is otherwise "*located on land . . .*" MCL 333.26423. In contrast, the Zoning Ordinance only speaks to the location of the particular "land," not to the presence or absence of any security measures.

3. Zoning provisions which regulate the location of lawful uses do not conflict with state statutory restrictions.

The essence of land use zoning is to regulate the location and placement of lawful and even constitutionally protected land uses. The published decision of the Court of Appeals in this case turns the law of zoning completely on its head.

The only difference between the MMMA's "enclosed, locked facility" requirement and the Township's zoning regulation is that the Zoning Ordinance "goes further," restricting the geographical location of the "enclosed, locked facility" to any dwelling place. There is nothing contradictory about the two provisions.

State statutes regulating certain activities generally do not preempt independent land use zoning provisions. See e.g., *Frens Orchards, Inc v. Dayton Tp Bd*, 253 Mich App 129, 136; 654 NW2d 346, 351 (2002) (the state statute regulating the standards of suitability for migrant worker camps, including, *inter alia*, construction of buildings and operation of camps, did not pose a direct conflict with the local zoning ordinance which addressed "the location of a use of land within the township."); *Oshtemo Charter Tp v. Cent Adver Co*, 125 Mich App 538, 542; 336 NW2d 823, 825 (1983) (holding that the State's Highway Advertising Act, governing spacing, lighting and size of

billboards did not preempt the township's zoning ordinance that prohibited billboards in land zoned "C" Local Business District).

In *Maple BPA, Inc v. Bloomfield Charter Township,* 302 Mich App 505; 838 NW2d 915 (2013), the Court also rejected the plaintiff's request for a declaratory judgment that state law (the Michigan Liquor Control Commission) preempted a zoning ordinance which addressed the location of fuel pumps and cash registers. As summarized by the Court:

> Maple BPA contends that the state statute and the ordinance directly conflict because the zoning ordinance is more strict than the state's statutory requirements. We disagree.

Id. at 515; *see also McNeil*, 275 Mich App 686, (rejecting the claim of direct conflict and allowing a local regulation which restricted the area where smoking in the workplace may be allowed in the face of the Michigan Clean Indoor Act); *USA Cash #1, Inc, v. City of Saginaw*, 285 Mich App 262; 776 NW2d 346 (2009).

4. In *Ter Beek v. City of Wyoming,* this Court did not address or preclude zoning land use regulations pertaining to the cultivation of medical marijuana.

The issue in *Ter Beek* was limited to the enforcement of an ordinance which completely prohibited the use of medical marijuana throughout the city. In *Ter Beek*, the City enacted a zoning ordinance which provided a city-wide blanket prohibition of all uses contrary to federal law.

In the Court of Appeals, the City of Wyoming acknowledged that, "the purpose of the ordinance is to regulate the growth, cultivation and distribution of medical marijuana in the city of Wyoming by reference to the federal prohibitions regarding manufacturing and distribution of marijuana." *Ter Beek v. City of Wyoming*, 297 Mich App 446, 453; 823 NW2d 864 (2012). The City candidly admitted that its ordinance attempted to impose a complete ban on the personal use of medical marijuana, with sanctions premised on the fact that the use of medical marijuana constitutes a criminal activity under federal law. *Id.*

Critically, the Court distinguished the case before it, which demonstrated direct conflict preemption, from the present case involving only the regulation of lawful land use, explaining:

> [D]efendant's ordinance does not attempt to regulate lawful conduct, but attempts to completely ban the medical use of marijuana on the basis of the authority of the CSA, a federal criminal statute.

Id. at 456.

> We note that this is not a case in which zoning laws are enacted to regulate in which areas of the city the medical use of marijuana as permitted by the MMMA may be carried out.

Id. at 456, n. 4.

Upon further appeal, this Court summarized the issue and its decision as follows:

> Under the Michigan Constitution, the City's "power to adopt resolutions and ordinances relating to its municipal concerns" is "subject to the constitution and the law." Const. 1963, art. 7 § 22. As this Court has previously noted, "[w]hile prescribing broad powers, this provision specifically provides that ordinances are subject to the laws of this state, i.e., statutes." *AFSCME v. Detroit*, 468 Mich 388, 410, 662 NW2d 695 (2003). The City, therefore, "is precluded from enacting an ordinance, if … the ordinance is in direct conflict with the state statutory scheme, or … 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." *People v. Llewellyn*, 401 Mich 314, 322, 257 NW2d 902 (1977) (footnotes omitted). A direct conflict exists when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits." *Id.* at 322 n. 4, 257 NW2d 902. Here, the Ordinance 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.

495 Mich App at 5.

This Court concluded that the City's zoning ordinance imposed a penalty for personal use, which directly conflicted with the MMMA's prohibition of such penalties. However, the Court went on to confirm that it was not foreclosing land use regulations, stating:

> [C]ontrary to the City's concern, this outcome does not "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." 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 regulations.

Id. at 23 n. 9.

The published Court of Appeals decision in this case erroneously "creates a situation" where medical marijuana caregivers are completely exempt from local land use zoning regulation.

C. The Township's Enforcement of the Zoning Ordinance Pertaining to the Location of Caregiver Grow Operations Does Not Constitute a Penalty "for Assisting a Qualifying Patient".

The essence of land use regulation is to designate the location of lawful and even constitutionally-protected land uses. Enforcement of a zoning ordinance is intended to maintain the integrity of the ordinance. In other words, an unenforced ordinance would be meaningless. Enforcement cannot logically or plausibly be considered punishment for the underlying use.

Under Section 4(b) of the MMMA, a caregiver who complies with certain conditions is not subject to a civil penalty "for assisting a qualifying patient". MCL 333.26424(b). Specifically, Section 4(b) provides:

> 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…

In this case the Township has done none of these things, and has not punished DeRuiter for "assisting a qualifying patient".

The Township is not subjecting DeRuiter to arrest or prosecution as that term is used in Section 4(b). Nor does the Township's effort to enforce its Zoning Ordinance by requesting injunctive relief implicate any affirmative defense for "prosecution involving marijuana" under Section 8 of the MMMA. MCL 333.26428.

The Township's only interest is in enforcing the provisions pertaining to the location of lawful land use. It initiated its effort to enforce the Zoning Ordinance by sending a letter to the commercial property owner. See Exhibit C. The letter advised that the property is being used for the acquisition, possession, cultivation, manufacturing and possible use, delivery or distribution of marijuana. The letter further advised that this use is not being conducted as a home occupation as required under the Zoning Ordinance. For that reason – a violation of the Zoning Ordinance – the *property owner* was directed to cease and desist *the land use*. The Township never required DeRuiter to cease assisting her patients; she simply needed to carry out her operations as provided under the home occupation provisions.

1. The immunity under Section 4(b) is limited to a civil penalty imposed "for assisting a qualifying patient".

In its Opinion, the Circuit Court acknowledged that whether a conflict exists is a matter of statutory interpretation. The Court determined that the "first step" is to examine the plain language of the MMMA. (Opinion at 5). Likewise, the Court of Appeals acknowledged that the interpretation of the MMMA requires that the words be given their ordinary and customary meaning. (Opinion at 3).

Under Section 4(b), the plain language of the immunity concerns penalties "for assisting a qualifying patient". That is a critical limitation. The enforcement of a zoning land use provision does not constitute a penalty for assisting a qualifying patient. The decision of the Court of Appeals to the contrary is clearly erroneous.

2. Enforcement of a zoning land use regulation through the equitable remedy of injunction is limited to maintaining the integrity of the Ordinance itself and is not punishment for the underlying use.

The equitable remedy of an injunction is a necessary enforcement tool without which the Zoning Ordinance becomes nothing more than a suggestion. Land use zoning pertains to locations

where lawful land uses are conducted. The enforcement of independent land use regulations does not – by its very nature – constitute a penalty "for" engaging in the underlying activity. Without a means of enforcement, there effectively is no ordinance at all.

Zoning land use considerations concern matters that are separate from and not addressed by the MMMA. These considerations go well beyond what is required or considered under the MMMA and, in the context of this case, are not concerned with the legality of the underlying activity. This fundamental point was completely overlooked by the Court of Appeals.

The characterization of the Township's interest in enforcing its land use zoning provisions as constituting a "penalty" leads to absurd results. The fundamental flaw in the Court's analysis can be illustrated by the following examples.

Many zoning ordinances, including the Byron Township Zoning Ordinance, include land use provisions pertaining to the location of churches, as well as other lawful uses. Enforcing such land use provisions does not amount to a penalty for the underlying use.

This Court has recognized that independent zoning interests may properly be applied to religious institutions. The application and enforcement of such zoning provisions does not penalize the free exercise of religion. Indeed, in this context, the Court has specifically recognized the "compelling interest" in enforcing local zoning regulations. *Greater Bible Way Temple of Jackson v. City of Jackson*, 478 Mich 373, 303; 733 NW2d 734 (2007) (citing multiple cases recognizing that local governments have a compelling interest in protecting health and safety by enforcing their zoning ordinance regulations). Likewise, even fundamental rights under the First Amendment are subject to time and location regulations. See *Young v. American Mini Theaters, Inc.*, 427 US 50 (1976).

In *Great Lakes Society v. Georgetown Township*, 281 Mich App 396; 761 NW2d 371 (2008), the plaintiff (church) claimed that the zoning ordinance land use requirements violated provisions of the Religious Land Use and Institutionalized Persons Act, 32 U.S.C. 2000cc, *et seq.*, and the free exercise clause of the Michigan and the United States Constitutions, among other things. The Court concluded that enforcing the zoning ordinance road frontage requirements did not violate any statutory or constitutional rights. The enforcement is for the purpose of maintaining the township's zoning interests. *Id*., citing *Village of Euclid v. Amber Realty Company*, 272 US 365, 47 S.Ct 114, 71 L.Ed 303 (1926).

Beyond land use zoning requirements, which is a central consideration in this case, the suggestion that MMMA-compliant caregivers are immune from other local regulations is absurd. An MMMA caregiver cannot plausibly claim "immunity" from the enforcement of local building codes simply by arguing that such enforcement constitutes a "penalty" for assisting qualifying patients. Nor could it be argued that a caregiver transporting medical marijuana in compliance with the MMMA enjoys immunity from traffic ordinances simply by arguing he or she is being penalized "for assisting a qualifying patient". [14] The absurdity of such an argument is no different as it relates to the Township's independent land use regulations.

3. Michigan law required the Circuit Court to enter an injunction to abate the violation of the Zoning Ordinance; *Ter Beek* did not hold otherwise.

In *Ter Beek*, the Court of Appeals concluded that, in the context of that case, "any sanction" under the zoning ordinance including an injunction "rests on the premise" that the statutory allowed medical use of marijuana constitutes criminal activity…" 297 Mich App at 456-57.

[14] The MMMA defines medical use of marijuana as the "acquisition, possession, … use, … delivery, transfer, or transportation of marihuana … relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or" "associated" "symptoms." MCL 333.26423(h).

Indeed, the ordinance at issue attempted to completely ban the medical use of marijuana based on a federal criminal statute. *Id.* at 456.

This Court agreed that under the specific facts presented, an injunction amounted to a civil punishment for engaging in the medical use of marijuana. However, this Court specifically did not address or rule out the enforcement of land use regulations, stating:

> 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 and 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.

Ter Beek, 495 Mich 23 n. 9.

In this case, there is no factual dispute about DeRuiter being in violation of Section 3.2.H of the Zoning Ordinance. DeRuiter admits that she is not conducting her primary caregiver activities as a permitted home occupation, but is instead conducting those activities within a commercial building located within a commercial zoning district within the Township. Her only proffered defense is that Section 3.2.H of the zoning ordinance is allegedly preempted, which is a legally incorrect position.

In this context, Michigan law required the Circuit Court to enter an injunction to abate DeRuiter's violation of Section 3.2.H of the Zoning Ordinance. This outcome was compelled by §407 of the MZEA, which states, in pertinent part, as follows:

> [A] use of land or a dwelling, building, or structure, including a tent or recreational vehicle, used, erected, altered, razed, or converted in violation of a zoning ordinance or regulation adopted under this act *is a nuisance per se. The court shall order the nuisance abated*, and the owner or agent in charge of the dwelling, building, structure, tent, recreational vehicle, or land is liable for maintaining a nuisance per se.

MCL 125.3407 (emphasis added).

Under the language of MCL 125.3407, a showing of irreparable and immediate harm is not required before a zoning violation may be enjoined. *Independence Twp v. Skibowski*, 136 Mich

App 178, 184; 355 NW2d 903 (1984), *app den*, 422 Mich 853 (1985).[15] "A violation of the zoning ordinance is a nuisance per se," and Section 407 of the MZEA "eliminates the necessity that plaintiff establish a nuisance in fact before being entitled to [injunctive] relief." *Id.* at 184-85. *See also Twp of Farmington v. Scott*, 374 Mich 536, 540; 132 NW2d 607 (1965).

Based on this controlling law, and based on the undisputed facts showing that DeRuiter is violating Section 3.2.H of the Zoning Ordinance, the Township is legally entitled to an order abating this nuisance per se.

D. The MMMA Does Not Occupy the Field of Land Use Zoning. Thus, Field Preemption Does Not Apply.

As summarized by this Court in *People v. Llewellyn*, *supra*, there are two types of 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's 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. [Footnotes omitted]

401 Mich at 322.

1. The Circuit Court and the Court of Appeals improperly employed a field preemption analysis to conclude that the Township could not enforce its land use Zoning Ordinance.

Both the Circuit Court and the Court of Appeals indicated that the doctrine of field preemption need not be addressed. However, both lower courts clearly employed a field preemption analysis by concluding that any land use requirement not included in the MMMA is preempted, and thus unenforceable. More specifically, both Courts concluded that regulating the location of lawful uses – the essence of land use zoning provisions – was completely off limits.

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[15] *Independence Twp* was actually decided under §24 of the Township Rural Zoning Act ("TRZA"), MCL 125.294, which was the now-repealed predecessor to §407 of the MZEA. However, the exact same language that formerly appeared in §24 of the TRZA now appears in §407 of the MZEA, and so *Independence Twp* continues to be good law.

In this case, the Court of Appeals did not identify a specific prohibition in the MMMA against local zoning regulation. However, the Court essentially concluded that the MMMA occupies the field of zoning by noting that the MMMA does not specifically authorize municipalities to restrict the location of MMMA-compliant use. The Court concluded that the MMMA occupies the field of zoning, stating:

> We conclude that the MMMA permits medical use of marijuana, particularly the cultivation of marijuana by registered caregivers, at locations regardless of land use zoning designations as long as the activity occurs within the statutorily specified enclosed, locked facility. No provision in the MMMA authorizes municipalities to restrict the location of MMMA-compliant medical use of marijuana by caregivers. Neither does the MMMA authorize municipalities to adopt ordinances restricting MMMA-compliant conduct to home occupations in residential locations. So long as caregivers conduct their medical marijuana activities in compliance with the MMMA and cultivate medical marijuana in an "enclosed, locked facility" as defined by MCL 333.26423(d) and do not violate MCL 33.26427(b)'s location prohibitions, such conduct complies with the MMMA and cannot be restricted or penalized.

Opinion at 5.

The analysis of the Court of Appeals is seriously flawed, and the decision is clearly erroneous. Unfortunately, unless the decision is reviewed and corrected by this Court, the impact will be felt throughout the State of Michigan.

2. There is no express field preemption.

In *Llewellyn,* this Court observed that field preemption applies 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." *Llewellyn,* 401 Mich at 322. The analysis begins with a determination of whether state law "expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive…" *Id.* at 323.

There is no claim in this case that the MMMA explicitly occupies the field of zoning and specifically land use zoning regulation. This is not surprising. Fundamentally, zoning pertains to the location of lawful uses. Courts have historically and consistently recognized the broad authority of local zoning officials to determine the location of land uses, and there is no indication within the MMMA, or the legislative history, to suggest otherwise.

3. The doctrine of field preemption does not apply.

This Court has consistently recognized the broad authority of local governmental agencies to regulate the location of permissible uses within their borders. *E.g., Burt Township v. DNR*, 459 Mich 659; 593 NW2d 534 (1999) (observing that state agencies are not inherently immune from local zoning requirements); *Kyser v. Kasson Twp,* 486 Mich 514; 786 NW2d 543 (2010) (engaging in a comprehensive analysis of the "judicial review of zoning including consideration of constitutional requirements, the doctrine of separation of powers" and rejecting any notion of "preferred" zoning uses); *Square Lake Hills Condominium Association v. Bloomfield Twp,* 437 Mich 310, 323; 47 NW2d 321 (1991) ("Generally a zoning ordinance is one that regulates the use of land and buildings according to district, locations or areas."). Other Courts have noted that there is no need for a uniform system within the state for the location of lawful uses; "unlike statewide regulations," "[z]oning ordinances can address the unique residential, commercial, and agricultural needs of each township." *Frens Orchards, Inc.*, 253 Mich App at 136.

While addressing the enforcement of a criminal "anti-obscenity ordinance," this Court in *Llewellyn* set forth the requisite guidelines to establish "field preemption":

> First, where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is preempted. *Noey v. City of Saginaw*, 271 Mich, 595, 261 NW 88 (1935).

> Second, preemption of a field of regulation may be implied upon an examination of legislative history. *Walsh v. City of River Rouge*, 385 Mich 623; 189 NW2d 318 (1971).
>
> Third, the pervasiveness of the state regulatory scheme may support a finding of preemption. *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 P.2d 897 (1962); *Montgomery County Council v. Montgomery Ass'n, Inc.*, 23 Md.App. 9, 325 A.2d 112, 274 Md. 52, 333 A.2d 596 (1975). While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer preemption, it is a factor which should be considered as evidence of preemption.
>
> Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest.
>
> 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 local regulation does not interfere with the state regulatory scheme, supplementary local regulation has generally been upheld.

401 Mich at 323-324 (footnotes omitted).

Here, there is nothing in the language or legislative history of the MMMA suggesting an attempt to occupy the field of zoning or prohibiting local units of government from placing restrictions on the location of caregiver activities compliant with the MMMA.

Moreover, no previous Court has suggested the MMMA occupies the field of zoning in land use regulation. Fundamentally, zoning pertains to the location of lawful uses. Courts have historically and consistently recognized the broad authority of local zoning officials to determine the location of lawful land uses.

Llewellyn illustrates the difference between an ordinance that invades the province of a state statute, as in *Ter Beek*, and a zoning statute that simply prescribes the location for that use, at issue here. 401 Mich at 320. In *Llewellyn*, the criminal defendant was convicted under a city anti-obscenity ordinance. The defendant argued and this Court agreed that the definition of what

constituted obscene materials was regulated by state law, therefore preempting any local attempt to also do so. Even while applying field preemption as it relates to the definition of obscenity, the Court did not preclude local regulation pertaining to the location of "adult establishments", stating:

> We do not mean to suggest in this opinion that a municipality is preempted from enacting ordinances outside the field of regulation occupied by the state statutory scheme governing criminal obscenity. For example, there is not the slightest indication that the state Legislature acted in M.C.L.A. s 750.343a et seq.; M.S.A. s 28.575(1) et seq. to preclude local zoning ordinances governing the location of establishments featuring "adult entertainment" such as that recently approved by the United States Supreme Court in *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976).
>
> The Detroit ordinance challenged in *Young* involved zoning, not criminal prohibition, and "adult establishments" featuring erotica not defined in terms of obscenity. Clearly, then, such municipal regulation is outside of the state's present statutory scheme governing criminal obscenity. In addition, the need for uniformity which has been in part the foundation of our opinion today has little relevance to such zoning ordinances, which speak to a significant local need to regulate the location of "adult establishments" and which are primarily local in their effect.

Id. at 330–31. Here too, there is nothing to indicate that the State, in enacting the MMMA, sought to preclude local zoning ordinances from regulating the location of medical grow operations.

Likewise, in *Morgan v. US Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives*, 473 F Supp 2d 756, 771 (ED Mich), aff'd in part sub nom. *Morgan v. Fed Bureau of Alcohol, Tobacco & Firearms*, 509 F3d 273 (CA6 2007), the Court held that MCL 123.1102, which limits the ability of local governments to regulate the ownership, sale, or possession of firearms, did not preempt a local zoning ordinance that did not prohibit firearm possession, ownership, purchase, sale, or any other form of firearms regulation, but merely limited firearm businesses to certain portions of the township, excluding them from others. *Id.* at 771.

> [A]s the Michigan Supreme Court has repeatedly recognized, zoning ordinances of general application which merely regulate the *location* of certain categories of businesses, activities, or dwellings are not properly viewed as "entering into" an underlying substantive field of regulation governing a particular type of

> business, activity, or dwelling—*e.g.*, adult entertainment (in *Llewellyn*), trailer parks (in *Kaal*), or mobile homes (in *Gackler Land Co*.)

Id. at 770 (emphasis in original); *see also Frens Orchards*, 253 Mich App at 130-32 (holding that, despite the fact that the State Department performed inspections and issued licenses for the lawful operation of farm migrant worker camps following detailed standards, "[b]oth the statutes and rules, however, regulate 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;" thus, the location of labor camps was not so pervasively regulated so as to preempt local zoning ordinances.); *City of Howell v. Kaal*, 341 Mich 585; 67 NW2d 704 (1954) (rejecting the contention by property owners that the city's zoning ordinance precluding the operation of trailer parks in residential-agriculturally zoned areas was preempted by a state statutory scheme providing for the licensing and regulation of trailer parks. "The zoning ordinance here in question does not undertake to license, regulate or prohibit trailer coach parks. They are permitted in three zones in the city. . . . The zoning ordinance, and its provisions zoning defendants' property as R–A, are not in conflict with the statute and do not invade an area occupied by it.").

Here, the Zoning Ordinance places no restrictions on medical marijuana possession or use, and permits qualifying caregivers, by right, to operate in all districts, wherever they reside. There is simply no indication, whether in the language of the statute, its legislative history, or the interpreting case law, that the MMMA sought to preclude this type of land use regulation.

IX. RELIEF REQUESTED

Defendant/Appellant Township of Byron, respectfully requests that this Court grant its Application for Leave to Appeal. The Township requests that the separate issues raised in its Application be reviewed by this Court.

The Township separately requests that the Court enter a preemptory Order reversing the decision of the Michigan Court of Appeals. The only issue of conflict raised and decided by the Court of Appeals concern the Township's enforcement of the land use ordinance pertaining to the location of grow operations. Given the absence of any material factual disputes, the decision of the Court of Appeal should be reversed. The Circuit Court should further be directed to enter an Order denying DeRuiter's motion for summary disposition, and granting the Township's motion for summary disposition.

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