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.: 158311

Court of Appeals Docket No. 338972

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

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SUPPLEMENTAL BRIEF OF APPELLANT TOWNSHIP OF BYRON

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE BASIS OF JURISDICTION

Appellant Township of Byron ("Byron Township" or "Township") appeals 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.

On August 27, 2018, Byron Township filed its Application for Leave to Appeal before this Court.

On January 23, 2019, this Court ordered that the Application for Leave to Appeal will be considered and that Byron Township file a supplemental brief addressing the issue of "whether the defendant's zoning ordinance pertaining to the location of registered medical marijuana caregivers is preempted by the Michigan Medical Marihuana Act, MCL 333.26421 *et seq*." This is the issue being addressed by Byron Township. Accordingly, the Michigan Supreme Court has jurisdiction pursuant to MCR 7.305(B)(1), (2), (3) and (5).

QUESTION PRESENTED

WHETHER THE BYRON TOWNSHIP ZONING ORDINANCE PERTAINING TO THE LOCATION OF REGISTERED MEDICAL MARIJUANA CAREGIVERS IS PREEMPTED BY THE MICHIGAN MEDICAL MARIHUANA ACT.

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

INTRODUCTION

This case involves the interplay between the Michigan Medical Marihuana Act, MCL 333.26421 *et seq*. ("MMMA"), designed to protect the beneficial use of medical marijuana for debilitating medical conditions, and the authority of local governments to regulate land uses within their borders under the Michigan Zoning Enabling Act, MCL 125.3101 *et seq*. ("MZEA"). The fundamental issue is whether a medical marijuana caregiver is exempt from all local zoning regulations. She is not.

Christie DeRuiter, ("DeRuiter") resides in Byron Township. DeRuiter alleges 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 majority of the Byron Township Zoning Ordinance ("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 under the MZEA, permitting—*by right*—the uses and activities of MMMA-compliant caregivers as an accessory use to *any* dwelling in *any* location within the Township. Wherever someone has a home, in whatever zoning district, that person may have a home occupation, including as a MMMA-compliant caregiver.

Nonetheless, DeRuiter chose to ignore the Zoning Ordinance and lease a commercial building to engage in caregiver activities. As with all zoning enforcement, Byron Township notified the owner of the commercial building that the operations/activities taking place did not comply with the Zoning Ordinance and that the property owner must "cease and desist" the improper land use.

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.

The only issue raised and decided by the lower courts—and presently before this Court—is whether the Zoning Ordinance provisions pertaining to the geographical location of caregiver activities directly conflicts with the MMMA. They do not.

Contrary to the decision of the Court of Appeals, enforcing a universally-applicable zoning ordinance is not penalizing "the medical use of marihuana" under the MMMA. Moreover, a plain reading of both the MMMA and the Zoning Ordinance demonstrates the two can logically and effectively coexist; caregiver grow operations can take place within an "enclosed, locked facility" under the MMMA, while also as a home occupation under the Zoning Ordinance.

The only "conflict" alleged by DeRuiter and addressed by the lower courts arises from the fact that DeRuiter chose to grow marijuana in a commercial building. Had DeRuiter chosen to grow her marijuana as a home occupation, DeRuiter would have been entitled to a permit under the Zoning Ordinance and would have had every right and full opportunity to engage in her caregiver activities under the MMMA.

Under the decision of the Court of Appeals, a medical marijuana caregiver is given preferential status, having the unfettered right to engage in caregiver activities exempt from all local regulation as to basic public health, safety, and welfare. This is unsupported by the language of the MMMA, this Court's holding in *Ter Beek v City of Wyoming*, 495 Mich 1, 8; 846 NW2d 531 (2014), and long standing case law governing preemption. It presents a possibly dangerous situation and cannot have been what Michigan voters intended in the simple language in Proposition 1 of 2008. Accordingly, this Court should reverse the decision of the Court of Appeals and direct the Circuit Court to enter judgment in favor of Byron Township.

STATEMENT OF FACTS

I. STATEMENT OF FACTS

A. Nature of the Action

The issue in this case is whether the Michigan Medical Marihuana Act, MCL 333.26421 *et seq*., 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 that the Byron Township Zoning Ordinance is preempted by the MMMA, and thus could not be enforced.

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

B. The Michigan Medical Marihuana Act

On November 4, 2008, the MMMA was passed by voter initiative. As presented to the voters of this State as Proposition 1 of 2008, the MMMA was designed to:

- Permit physician-approved use of marijuana by registered patients with debilitating medical conditions including cancer, glaucoma, HIV, Aids, Hepatitis C, MS and other conditions as may be approved by the Department of Community Health.

- Permit registered individuals to grow limited amounts of marijuana for qualifying patients in an enclosed locked facility.

- Require Department of Community Health to establish an identification card system for patients qualified to use marijuana and individuals qualified to grow marijuana.

- Permit registered and unregistered patients and primary caregivers to assert medical reasons for using marijuana as a defense to any prosecution involving marijuana.

Proposal 08-1. Nothing in Proposition 1 of 2008 discussed land use or zoning.

The "findings and declaration" section of the MMMA, the implementing legislation for Proposition 1, 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 for caregiver operations.

The MMMA offers protections to qualifying patients and primary caregivers. MCL 333.26424 provides:

> (a) A qualifying patient who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act.
>
> (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 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.

MCL 333.26424(a)-(b).

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…".

C. The Michigan Zoning Enabling Act

The Michigan Zoning Enabling Act, MCL 125.3101 *et seq*., comprehensively addresses local land use regulation, codifying 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 in any way.

As the Michigan Constitution provides:

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

CONST Art. 7, § 34.

D. The Byron Township Zoning Ordinance

Byron Township adopted its Zoning Ordinance in accordance with the provisions of the MZEA. MCL 125.3101, *et seq.* 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.

The Township's Zoning Ordinance does not touch on or attempt to regulate any of the subjects covered within the MMMA. Specifically, Section 3.2.H of the Township's 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.

Relevant Provisions of Zoning Ordinance, Twp. Appx. 00001(a)-00005(a).

The Zoning Ordinance also does not apply to the personal use or possession of marijuana in compliance with the MMMA. Specifically, Section 3.3.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.

Twp. Appx. 00005(a).

Given that the MMMA is silent on zoning for the location of caregiver activities, Byron Township exercised its authority under the MZEA, MCL 125.3201, and determined that a registered primary caregiver shall be permitted by right as a "home occupation". Zoning Ordinance, Section 3.2.G and H. Twp. Appx. 00001(a)-00003(a).

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.

Twp. Appx. 00001(a).

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. Twp. Appx. 00002(a).

The Zoning Ordinance specifically recognizes that the MMMA creates a general right for individuals to use, possess or deliver marijuana in Michigan. Subsection 1 confirms that a caregiver operating in compliance with the MMMA and the requirements of the Zoning Ordinance shall be permitted as a home occupation. Twp. Appx. 00002(a).

Subsection 2 addresses the "standards and requirements" which apply to "the location in which medical use of marijuana is conducted by a primary caregiver". Twp. Appx. 00003(a)-00004(a). The "standards and requirements" applicable to primary caregivers are patterned after the provisions of the MMMA and are consistent with the MMMA. At no time did DeRuiter allege that any of the standards and requirements provided in the Zoning Ordinance prevent her from operating as an MMMA compliant primary caregiver.

If any particular standard or requirement was 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 3.2.H.3 provides that the operations of a registered primary caregiver shall be permitted with the issuance of a zoning permit. Twp. Appx. 00004(a). 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. [1]

E. Summary of Proceedings

1. Background of dispute

On March 22, 2016, the Township Supervisor wrote a letter to the owner of certain commercial property in the Township (i.e., the "Subject Property," where DeRuiter's caregiver operations are located) giving notice to the owner that the Subject Property was 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, Twp. Appx. 00006(a). 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 Subject Property.

2. Complaint and Counter-Claim

On May 10, 2016, DeRuiter filed a Complaint for "Declaratory Relief", and "Injunctive Relief". Twp. Appx. 00007(a)-00013(a). DeRuiter alleges that she is a "marijuana –patient and caregiver, duly registered with the State of Michigan, pursuant to MMMA." Complaint ¶ 10 Twp. Appx. 00009(a). 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, Twp. Appx. 00008(a)-00009(a).

In reference to the Township's letter to the owner of the Subject Property, DeRuiter's Complaint alleges that the Zoning Ordinance, "is in direct conflict with the MMMA when it limits

[1] The Court of Appeals was wrong when it said the Township charges a permit "fee". COA Opinion at 1, 6, Twp. Appx. 00067(a) and 00072(a). The Ordinance allows for a home occupation fee, but the Township has not adopted one and there is currently no fee.

the location where activities, otherwise legal under the MMMA, can be conducted." Complaint ¶ 29, Twp. Appx. 00011(a). Notably, the Complaint does not allege that any "standards or requirements" under Section 3.2.H prevent her from serving as an MMMA-compliant caregiver. Moreover, the Complaint does not allege that any particular standard or regulation directly conflicts with the MMMA.

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, Twp. Appx. 00011(a). 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.

Twp. Appx. 00013(a).

The Township timely answered the Complaint on June 6, 2016, by denying that the Township Zoning Ordinance is preempted by the MMMA. Answer and Affirmative Defenses, Twp. Appx. 00014(a)-00026(a). 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 on the Subject Property because those operations were being conducted within a commercial building, and not as a permitted home occupation (Count II). Counter-Complaint,

Twp. Appx. 00027(a)-00032(a).

Later, on September 20, 2016, the Township filed an Amended Answer and Affirmative Defenses. Twp. Appx. 00033(a)-00044(a). The only material difference between the Township's original Answer and its Amended 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. Def's Amended Ans at ¶16, Twp. Appx. 00036(a). The Township's amended medical marijuana regulations continued to permit the activities of registered primary caregivers only as a home occupation.

3. 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. Circuit Court Order, Twp. Appx. 00045(a)-00052(a). 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.

Circuit Court Opinion at 2, Twp. Appx. 00046(a).

Judge Sullivan reviewed the Zoning Ordinance, observing that a primary caregiver is permitted to operate as a "home occupation," but that, "[a]fter 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," Circuit Court Opinion at 3-4, Twp. Appx. 00047(a)-00048(a).

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).

Circuit Court Opinion at 5-6, Twp. App. 00049(a)-00050(a).

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)." Twp. Appx. 00050(a).

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." Circuit Court Opinion at 7, Twp. Appx. 00051(a).

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.

Circuit Court Opinion at 8, Twp. Appx. 00052(a).

4. Byron Township's Appeal to the Michigan Court of Appeals

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. Claim of Appeal (I), Twp. Appx. 00053(a)-00063(a). 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. Claim of Appeal (II), Twp. 00064(a)-00065(a).

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. Twp. Appx. 00066(a). 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.

5. 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. COA Opinion, Twp. Appx. 00067(a)-00073(a). 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.

COA Opinion at 5, Twp. Appx. 00071(a) (emphasis added).

The Court rejected the Township's argument that the circuit court's decision tacitly imposed an unsupportable finding of field preemption by the MMMA:

> 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.

COA Opinion at 6, Twp. Appx. 00072(a).

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.

COA Opinion at 7, Twp. Appx. 00072(a).

6. Application for Leave to Appeal before the Michigan Supreme Court.

On August 24, 2018, Byron Township filed a timely Application for Leave to Appeal before this Court.

On January 23, 2019, this Court ordered that the Application for Leave to Appeal will be considered and that Byron Township file a supplemental brief addressing the issue of "whether the defendant's zoning ordinance pertaining to the location of registered medical marijuana caregivers is preempted by the Michigan Medical Marihuana Act, MCL 333.26421 *et seq*." Twp. Appx. 00074(a).

ARGUMENT

I. THE BYRON TOWNSHIP ZONING ORDINANCE PERTAINING TO THE LOCATION OF REGISTERED MEDICAL MARIJUANA CAREGIVERS IS NOT PREEMPTED BY THE MICHIGAN MEDICAL MARIHUANA ACT.

A. Introduction

The Michigan Medical Marihuana Act, MCL 333.26421, *et seq.* ("MMMA") provides that "[a]ll other acts and parts of acts inconsistent with [the MMMA] do not apply to the medical use of marihuana," MCL 333.26427(e). *Ter Beek*, 495 Mich at 22. "[I]nconsistent with" and applying to "the medical use of marihuana" are key phrases for purposes of this preemption analysis. The Byron Township Zoning Ordinance as it pertains to the location of registered medical marijuana caregiver activities is not "inconsistent with" any portion of the MMMA, and the Township's efforts to enforce that Zoning Ordinance is not a penalty for "the medical use of marihuana".

In *Ter Beek*, this Court reassured local governments that the MMMA and this Court's holding did 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 ..." 495 Mich at 23 n 9. Yet, that is precisely what the Court of Appeals has done here.

The Court of Appeals has either engaged in a misguided field-preemption analysis under the guise of direct conflict preemption or incorrectly framed a zoning ordinance, regulating land use, as penalizing "the medical use of marihuana." Regardless of the nature of the error, under the holding of the Court of Appeals, medical marijuana grow operations, unlike any other type of permissible or even protected land use, can pop up absolutely anywhere, operating with no local regulation.

The MMMA, a voter initiated law designed to create an exception to the prohibition on the use of medical marijuana, regulates activity, the "medical use of marihuana." MCL 333.26423(h). Nothing in the MMMA purports to regulate land use.

In contrast, the Byron Township Zoning Ordinance governs land use, regulating "the use of land and buildings according to districts, areas, or locations." *Square Lake Hills Condo Ass'n v Bloomfield Tp*, 437 Mich 310, 323; 471 NW2d 321, 326 (1991). The purpose of zoning is not to outlaw activities and Byron Township has not done so here. Zoning, by its very nature, proscribes the location of lawful and often legally protected uses.

Enforcing a zoning ordinance is not penalizing the medical use of marijuana and a plain reading of both the MMMA and the Byron Township Zoning Ordinance dictate that medical marijuana grow operations can easily take place in an enclosed, locked facility as required by the MMMA, while also occurring as an accessory to any dwelling within the Township. In other

words, the MMMA and the Zoning Ordinance can logically and effectively coexist, meaning that there is no conflict.

At the center of this case is the fundamental question: is a medical marijuana caregiver exempt from all local regulation? Unless this Court reverses the decision of the Court of Appeals, the answer will be yes. After all, if (as the Court of Appeals held) any local regulation is found to conflict with the MMMA simply because the local regulation is not expressly authorized by the MMMA, how would local governments apply ordinances related to basic public health, safety, and welfare such as building codes, setback requirements, or lighting regulations? So long as caregivers are even tangentially involved in the "medical use of marihuana" they will be exempt. This is both an absurd and dangerous result.

The decision of the Court of Appeals represents a vast departure from long-standing case law defining preemption and cannot have been what was intended by the Michigan voters in approving Proposition 08-1 "…to permit the use and cultivation of medical marihuana for specific medical conditions." Accordingly, this Court should reverse the decision of the Court of Appeals and enter judgment in favor of Byron Township.

B. Standard Of Review

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). It is therefore subject to this Court's de novo review, examined independently, with no deference to the lower courts. *Michigan Gun Owners, Inc v Ann Arbor Pub Sch*, 502 Mich 695, 702; 918 NW2d 756, 760, reh den sub nom. *Michigan Open Carry, Inc v Clio Area Sch Dist*, 920 NW2d 372 (Mich 2018).

Consideration of the MMMA and the Byron Township Zoning Ordinance is "guided by traditional principals of statutory construction." *People v Kolanek*, 491 Mich 382, 397; 817 NW2d 528, 537 (2012); *Gora v City of Ferndale*, 456 Mich 704, 711; 576 NW2d 141, 145 (1998).

> Generally, the primary objective in construing a statute is to ascertain and give effect to the Legislature's intent. *People v Williams*, 475 Mich 245, 250, 716 NW2d 208 (2006). However, because the MMMA was the result of a voter initiative, [the] goal is to ascertain and give effect to the intent of the electorate, rather than the Legislature, as reflected in the language of the law itself. [This Court] must give the words of the MMMA their ordinary and plain meaning as would have been understood by the electorate.

People v Redden, 290 Mich App 65, 76; 799 NW2d 184, 191 (2010); see also *State v McQueen*, 493 Mich 135, 147; 828 NW2d 644, 650 (2013) ("'[T]he intent of the electors governs' the interpretation of voter-initiated statutes, just as the intent of the Legislature governs the interpretation of legislatively enacted statutes.") (citation omitted). Beyond that, it remains that a court is to avoid construction that would render any part of the statute surplusage or nugatory, *Redden*, 290 Mich App at 76, and read the statute as a whole, in context with the entire act, *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710, 713 (2003).

C. This Court Should Apply A "Direct Conflict Preemption" Analysis; No Other Form of Preemption Is At Issue.

In its Opinion, the Court of Appeals purported to engage in a direct conflict preemption analysis; however, given the reasoning that followed—most specifically, the conclusion that preemption occurred simply because the Byron Township Zoning Ordinance "add[ed] a layer of restrictions and regulations"—some clarification is necessary.

In *People v Llewellyn*, 401 Mich 314, 322; 257 NW2d 902, 904 (1977), this Court outlined the contours of preemption generally, describing three types of preemption: (1) express preemption, (2) field preemption, and (3) direct conflict preemption. Only direct conflict preemption is at issue here.

First, "express" preemption exists "where the state law expressly provides that the state's authority to regulate a specified area of the law is to be exclusive." *Id*. Express preemption is not at issue. There is nothing in the MMMA that expressly prohibits the local regulation of medical marijuana, nor has DeRuiter or any court contended otherwise.

Second, 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. In the context of enforcement of a criminal "anti-obscenity ordinance," the *Llewellyn* Court set forth the requisite guidelines to establish "field preemption":

> [P]reemption 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).
>
> [T]he 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.
>
> [T]he nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest.
>
> 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).

Again, nothing in the language or legislative history of the MMMA suggests an attempt to occupy the field of zoning or prohibit local units of government from placing restrictions on the

location of caregiver activities compliant with the MMMA. Indeed, to the final point in *Llewellyn*, while recognizing medical marijuana use as permissible may call for a consistent state regulatory scheme, the locational element of zoning, contained within the Byron Township Zoning Ordinance, does not.

No court has suggested that the MMMA occupies the field of zoning in land use regulation. In fact, it is quite the opposite.

As this Court has already recognized in *Ter Beek*, the MMMA does *not* occupy the entire field of regulation to the exclusion of local government regulations, noting that the MMMA and this Court's holding did 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." 495 Mich at 23 n 9. This is not surprising. By its very nature, zoning pertains to the location of lawful and permissible uses.

The Michigan Supreme Court has consistently recognized the broad authority of local governments 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 which included consideration of constitutional requirements, and the doctrine of separation of powers" and rejecting any notion of "preferred" zoning uses). In addressing questions of field preemption specifically, 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 Orchard, Inc v Dayton Tp Bd*, 253 Mich App 129, 136; 654 NW2d 346 (2002).

Accordingly, only the question of direct conflict preemption remains.

D. A Direct Conflict Requires a Showing That The MMMA Prohibits What The Zoning Ordinance Permits Or Permits What The Zoning Ordinance Prohibits, Which Has Not Occurred Here.

"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 *Llewellyn,* 401 Mich at 322 n 4. Contrary to the confusion of both the Circuit Court and the Court of Appeals, "[a]s a general rule, additional regulation to that of a state law *does not* constitute a conflict therewith." *Walsh,* 385 Mich at 635–36 (emphasis added). As this Court explained in *Walsh*:

> In order that there be a conflict between a state enactment and a municipal regulation both must contain either express 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. (emphasis added). Put another way in *Rental Prop Owners Ass'n of Kent Cty v City of Grand Rapids,* 455 Mich 246, 262 (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.*

Id. at 262, quoting 56 Am Jur 2d, Municipal Corporations, § 374 (emphasis in original).

E. In *Ter Beek,* This Court Acknowledged The Ability Of A Local Government To Regulate Land Use In The Face Of The MMMA.

The ability of a local entity to regulate land use in the face of the MMMA is well-supported by this Court's decision in *Ter Beek,* the seminal case on MMMA preemption. 495 Mich 1. The

issue in *Ter Beek* was limited to the enforcement of an ordinance which completely prohibited the use of medical marijuana, which this Court held was preempted by the MMMA. *Id*. at 5. The *Ter Beek* Court expressly left open the possibility for valid local zoning regulation. *Id*. at 456, n 4. The Byron Township Zoning Ordinance is an example of that valid local zoning regulation. It expressly permits the medical use of marijuana in all zoning districts as an accessory to a dwelling and seeks only to regulate land uses within its borders.

In *Ter Beek*, the City enacted a zoning ordinance which provided a city-wide blanket prohibition of all uses "contrary to federal law ..." *Ter Beek v City of Wyoming*, 297 Mich App 446, 450; 823 NW2d 864, 866 (2012), aff'd 495 Mich 1; 846 NW2d 531 (2014) ("*Ter Beek II*"). The defendant, City of Wyoming, acknowledged "[t]hat 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" *Id.* at 453. Significantly, the City candidly acknowledged 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*. As specifically noted by this Court:

> Defendant'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. Thus, any sanction imposed pursuant to the Ordinance rests on the premise that the statutorily allowed medical use of marijuana constitutes criminal activity, a proposition that is in direct conflict with the MMMA.

Id. at 456.

Critically for the present case, the court in *Ter Beek* distinguished the case before it, which demonstrated direct conflict preemption, from a situation similar to the case at bar, involving only the regulation of lawful land use. It explained: "defendant'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.

Ter Beek II, 297 Mich App at 456, n 4.

This Court went on to confirm:

> 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 regulations.

Ter Beek, 495 Mich at 23, n 9. Thus, though the *Ter Beek* Court did not reach the issue, it nonetheless implied in dicta that, had it been presented with a zoning ordinance similar to that of Byron Township, it would have reached a different result.

This is not a new or novel concept. The ability of a local entity to regulate lawful uses, even those that are constitutionally protected from any penalty, was earlier demonstrated in *Great Lakes Society v Georgetown Charter Twp*, 281 Mich App 396; 761 NW2d 371 (2008). There, the plaintiff was denied its request to construct a religious school at a particular location based upon the township's zoning ordinance. Upon denial, the plaintiff filed a multi-count complaint asserting First Amendment constitutional violations, as well as violation of the Religious Land Use and Institutionalized Person Act, 42 U.S.C. 2000cc, *et seq.* The plaintiff argued that "the township had violated the RLUIPA in applying its ordinance to prevent the location of the proposed building at the location where GLS wanted to build it." *Id*. at 423. The Court disagreed.

The Court in *Great Lakes Society* importantly found that the zoning requirement did not regulate the plaintiff's religious activity, but only set a location of the building in which that

activity would take place. Simply put, the "plaintiff may operate a faith-based school, but it must do so on property zoned for schools." *Id*. at 454-55. Here too, the Zoning Ordinance does not prohibit or penalize DeRuiter from engaging in caregiver activities; the Zoning Ordinance simply sets a location for the building in which or property on which her activity must take place.

Likewise, in *Frens Orchard,* the circuit court held that the township's zoning ordinance, which regulated the location of migrant worker housing, was not preempted by the Public Health Code, Occupation Safety and Health Act, (MIOSHA). *Frens Orchard*, 253 Mich App 129. The township zoning ordinance permitted migrant labor housing in the agricultural district only if the applicant obtained a "special exemption use permit". The plaintiff operated a farm requiring harvesting of fruits and vegetables by hand. To facilitate the harvest, the plaintiff employed migrant agricultural workers during the harvest season, and built housing units to accommodate the workers. Although the plaintiff obtained authorization from the Michigan Department of Agriculture, as required to construct the additional housing, the plaintiff did not seek a special exemption use permit. Instead, the plaintiff sought a declaration that MIOSHA and the related administrative rules pertaining to agricultural camps preempted the township's zoning ordinance which restricted the location of migrant housing.

On appeal, the *Frens Orchard* plaintiff argued that the zoning ordinance was preempted because the state law "completely occupies the field", and that the zoning ordinance "directly conflicts" with the state statute. Both arguments were soundly rejected. Specifically, the court determined that the location of agricultural "labor camps" was not "pervasively regulated by the Public Health Code or its associated administrative rules." *Frens Orchard,* 253 Mich App at 134. In rejecting the "direct conflict" claim, the court concluded:

> We find that no conflict exists here because the state regulations do not address the subject of the zoning ordinance – the location of a use of land within the township.

Id. at 137. The same analysis applies and controls the outcome in this case.

Finally, 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).

In summary, case law has consistently made clear that zoning is historically permitted, regardless of the level of protection due to any particular use.

F. There Is No Direct Conflict Between The Provisions Of The MMMA And The Byron Township Zoning Ordinance That Regulates The Location Of Lawful Caregiver Activities.

Unlike in *Ter Beek*, Byron Township has made no effort to prohibit the medical use of marijuana. The Byron Township Zoning Ordinance recognizes the intent and purpose of the MMMA and permits the activities of primary caregivers *by right* as a home occupation. And, as provided in Section 3.2.G "Home occupations are permitted in *all* zoning districts as an accessory use to a dwelling unit", Section 3.2.G (emphasis added).

Simply put, Byron Township, through its Zoning Ordinance, has acted to "regulate in which areas of the city the medical use of marijuana as permitted by the MMMA may be carried out." *Ter Beek II*, 297 Mich App at 23 n 9. It has spoken only in a place where the MMMA is

silent, *Walsh*, 385 Mich at 635–36, and there is no reason that the two laws cannot effectively coexist, *Rental Prop Owners*, 455 Mich at 262. Accordingly, there is no direct conflict.

1. Enforcement of a zoning ordinance is not a penalty for the medical use of marijuana.

The Court of Appeals first appeared to find that the Byron Township Zoning Ordinance was preempted under the "immunity from penalty" provision, MCL 333.26424(b). COA Opinion at 6, Twp. Appx. 00072(a). It framed the issue as follows: "if another law is inconsistent with the MMMA such that it punishes MMMA-compliant medical use of marijuana[,] the MMMA controls, and the person is immune from punishment." The Court of Appeals presumably relied upon MCL 333.26424(b), which provides in relevant portion:

> A primary caregiver … is not subject to arrest, prosecution, or penalty in any manner … for assisting a qualifying patient … with the medical use of marihuana in accordance with this act.

However, the leap between this statutory provision and a finding preemption rests on a seriously flawed foundation. Finding a conflict between the MMMA's immunity provision and the Byron Township Zoning Ordinance's locational requirement would require finding that the imposition of zoning ordinance pertaining to land use is a penalty for "the medical use of marihuana in accordance with [the MMMA]." MCL 333.26424(b). This is nonsensical. The essence of land use zoning is to regulate the location and placement of lawful and even constitutionally protected land uses. As the Court in *Great Lakes Society* recognized, Byron Township is not punishing DeRuiter for performing medical marijuana caregiver activities; it is only regulating the location of the building in which those activity would take place. 281 Mich App at 454-55.

The requirement to comply with zoning ordinance provisions does not constitute a punishment for compliance with the MMMA. Under Section 4(b) of the MMMA, a caregiver is

immune from any civil penalty for assisting a qualifying patient. Quoting Section 4(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 ..." The Township did none of these things and certainly did not punish DeRuiter for "assisting a qualifying patient."

Instead, the commercial property owner was notified to cease and desist the land use which was not in compliance with the Zoning Ordinance. *Any* land use not in compliance with the Zoning Ordinance, regardless of its nature, would have been subject to the same action. In other words, this was not, as the Court of Appeals and Circuit Court concluded, a penalty taken against DeRuiter for her *caregiver activities*, but a zoning enforcement action regarding land use.

The Township's efforts to enforce its Zoning Ordinance is not a punishment for the underlying land use just as enforcing zoning provisions that pertain to churches or places of worship does not constitute a punishment for the exercise of religion. See *Great Lakes Society*, 281 Mich App 396. In the vast majority of the Township, land may be used for qualifying caregiver activities; there is no claim that the Township's zoning scheme effectively prevents DeRuiter from carrying out the same. It is simply inaccurate to suggest that the enforcement of a zoning ordinance constitutes a punishment to citizens who have the opportunity and ability to fully comply, but decide they are exempt.

The distinction can be illustrated through an examination of *People v Latz,* 318 Mich App 380; 898 NW2d 229 (2016), which addressed the interplay of a criminal statute, MCL 750.474, making the transportation of marijuana illegal, in conflict with the MMMA's explicit immunity

from punishment for the "transportation of marihuana," MCL 333.26423(h). *Latz*, 318 Mich App at 386. The Court of Appeals concluded that there was an irreconcilable conflict. *Id*. at 387.

However, just as the holding of *Ter Beek* cannot be read to preclude the enforcement of zoning, *Latz* cannot possibly be read to prohibit the enforcement of speeding laws simply because the offender also happened to be transporting marijuana. Enforcing the speed limit while a person is transporting medical marijuana, or enforcing zoning and the location of land uses while a person engaged in caregiver activities, cannot logically be said to be a penalty for "the medical use of marijuana," nor can that have been what the voters intended by the simple and plain language of Proposition 1.

2. The MMMA's "enclosed, locked facility" requirement does not conflict with the Byron Township Zoning Ordinance.

In addition to focusing on the immunity-from-penalty element of the MMMA, the Court of Appeals erred in finding that the locational element of the Byron Township Zoning Ordinance conflicted with the "enclosed, locked facility" language of the MMMA.

The Court of Appeals specifically stated that the immunity section provides a medical marijuana caregiver with the "right" to cultivate marijuana and perform caregiver activities with "12 marihuana plants … in an enclosed, locked facility," going on to rule that the locational elements of the Byron Township Zoning Ordinance was "inconsistent" with this portion of the MMMA. COA Opinion at 3-4, Twp. Appx. 00069(a)-00070(a).

> 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 333.26427(b)'s location prohibitions, such conduct complies with the MMMA and cannot be restricted or penalized.

COA Opinion at 5, Twp. Appx. 00071(a). This amounts to a finding that any regulation in addition to the MMMA that affects caregiver activities is preempted. This Court has already rejected such a proposition. See *Walsh*, 385 Mich at 635–36; *Rental Prop Owners*, 455 Mich at 262.

a. The MMMA does not regulate where caregivers may operate. The enclosed, locked facility requirement speaks to the manner in which medical marijuana plants are cultivated and kept.

Given that the Court of Appeals purports to employ a "direct conflict" preemption analysis, it appears to have taken 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)[2] is preemptively regulating the "where" aspect of a primary 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." This is not supported by the MMMA or the law governing direct conflict preemption.

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

[2] 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 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).

how an "activity" may be performed is one that has long been recognized under Michigan law. *See*, e.g., *Square Lake Hills*, 437 Mich at 323-325; *Natural Aggregates Corp v Brighton Twp*, 213 Mich App 287, 300-302; 539 NW2d 761 (1995). 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."Enclosed, locked facility" is defined as "a closet, room, or other comparable, stationary, and fully enclosed area equipped with secured locks or other functioning security devices ..." MCL 333.26423. The MMMA does not discuss commercial buildings and does not provide any geographic authorizations or parameters on where an enclosed, locked facility may be placed.

The definition of enclosed, locked facility pertains to the type of protected confinement, completely divorced from a zoning regulation[3]. This Court has indicated that the "focus" of this

[3]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

requirement is "whether the *security device* functions 'to permit access only by a registered primary caregiver or registered qualifying patient.'" *Kolanek*, 491 Mich at 404 n 45 (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.

b. The Byron Township Zoning Ordinance speaks to the geographical location of caregiver activities.

Unlike in *Ter Beek*, Byron Township has not attempted to prohibit medical marijuana grow operations. The Byron Township Zoning Ordinance, as zoning ordinances are intended to do, addresses and provides for the location of this permissible land use, permitting, as of right, the use of land for primary caregiver activities as a "home occupation" in all zoning districts, wherever a residence exists.

The Court of Appeals has taken the position that, so long as plants as kept in an "enclosed, locked facility," an MMMA-compliant caregiver can operate anywhere without any additional and universally-applicable zoning or local safety regulations. However, as a matter of law and of common sense, this cannot be the case.

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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.

This Court has long made clear that "additional regulation to that of a state law *does not* constitute a conflict therewith." *Walsh*, 385 Mich at 635–36 (emphasis added). Put clearly by the Court in *Rental Prop Owners*:

> 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.

455 Mich at 262, 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.").

Under the Byron Township Zoning Ordinance, a caregiver is able to store his or her marijuana plants in a physical structure that constitutes an "enclosed, locked facility" in compliance with the MMMA 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 between the MMMA and Section 3.2.H of the Township Zoning Ordinance, 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,* 495 Mich at 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).

In short, the Court of Appeals failed to point to any provision of the Township's Zoning Ordinance that "permits what the statute prohibits or [] what the statute permits" as is required for a direct conflict. *Ter Beek*, 495 Mich at 19–20. Accordingly, no conflict exists, and the Byron Township Zoning Ordinance is not preempted by the MMMA.

RELIEF REQUESTED

Appellant Township of Byron respectfully requests that this Court reverse the decision of the Michigan Court of Appeals and direct the Circuit Court to enter an Order denying DeRuiter's motion for summary disposition and granting the Township's motion for summary disposition.

Dated: March 6, 2019

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