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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REPLY BRIEF OF APPELLANT TOWNSHIP OF BYRON

ORAL ARGUMENT REQUESTED

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INTRODUCTION

DeRuiter attempts to minimize the fundamental issue in this case, arguing that the question is not "whether a medical marijuana caregiver is exempt from all local zoning regulations," but only whether "the Appellant can use its zoning power to impose restrictions that the MMMA does not." DeRuiter Br. at 3. The MMMA is not a zoning statute and does not impose zoning restrictions. Indeed, DeRuiter agrees that the MMMA "does not specify any particular location where legal activities can occur." DeRuiter Br. at 4, 29. Thus, *any* local zoning regulation would be imposing a restriction "that the MMMA does not." This Court has made clear that imposing a restriction upon which the state statute is silent does not create a direct conflict.

Moreover, DeRuiter makes no meaningful response to the argument that enforcement of the Zoning Ordinance is not a penalty for the *medical use of marijuana*, as would be prohibited by the MMMA. "It is [DeRuiter]'s position that the only restriction [on caregiver activities] is the definition of an 'enclosed locked facility,'" DeRuiter Br. at 29; beyond that, "the imposition of a penalty in any manner on an individual properly registered under the MMMA is in direct conflict with the immunity granted by section 4a of the MMMA, MCL 333.26424(a)," DeRuiter Br. at 13.

Consider the impact of this position. If the facility is enclosed and locked, would it not need to comply with setback requirements? Is a caregiver immune from a noise ordinance? If a person is transporting medical marijuana, are they exempt from traffic laws? Of course not. These regulations are not penalties for the medical use of marijuana, even if medical marijuana is involved. Likewise, enforcement of the Township's Zoning Ordinance is not penalizing DeRuiter for her medical use of marijuana but is designed "to limit the improper use of land" under the Michigan Zoning Enabling Act. MCL 125.3203.

Michigan law has long recognized the importance of allowing local governments to exercise zoning power as a way to plan development, preserve security and economic structure, stabilize property values, attract and retain citizenship, *Cady v City of Detroit*, 289 Mich 499, 513; 286 NW 805, 810 (1939), and to "protect that sometimes difficult to define concept of quality of life." *Vill of Belle Terre v Boraas*, 416 US 1, 13; 94 S Ct 1536, 1543; 39 L Ed 2d 797 (1974). The need to enforce the Zoning Ordinance exists, medical marijuana or not.

In *Ter Beek v City of Wyoming*, 495 Mich 1, 23 n 9; 846 NW2d 531 (2014), this Court reassured local governments that the MMMA 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 ..." Accordingly, this Court should reverse the decision of the Court of Appeals and direct that the Circuit Court enter judgment in favor of Byron Township.

ARGUMENT

I. THE MMMA DOES NOT REGULATE THE LOCATION OF LAND USES; IT IS SILENT. THEREFORE, BYRON TOWNSHIP IS FULLY PERMITTED TO ENFORCE ITS ZONING ORDINANCE.

"The Appellee acknowledges that the MMMA does not specifically address the zoning power of a municipality." DeRuiter Br. at 6. DeRuiter concedes: "The MMMA does not specify any particular location where legal activities can occur[1]. Rather the MMMA sets forth conditions that any chosen location must meet, e.g., a locked enclosed facility." DeRuiter Br. at 4. DeRuiter again "agrees that the MMMA does not specifically identify locations where 'enclosed locked facilities' may be located." DeRuiter Br. at 29. These concessions are fatal to DeRuiter's claim.

[1] Contrary to DeRuiter's assertion, the parties do not "agree … that the location of the Appellee's marijuana-related activity complies with the requirements of the MMMA." DeRuiter Br. at 3. Because the MMMA does not regulate location, there is nothing with which to comply. DeRuiter's argument is similar to a claim that a driver's speed complies with the MMMA—while the transportation of medical marijuana is covered by the MMMA, nothing regulates speed.

DeRuiter ignores the most basic legal premise consistently reiterated by this Court: "[a] direct conflict exists when 'the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits.'" *Ter Beek*, 495 Mich at 19-20. ***"If either is silent where the other speaks, there can be no conflict between them.*** Where no conflict exists, both laws stand." *Walsh v City of River Rouge*, 385 Mich 623, 635-36; 189 NW2d 318 (1971) (emphasis added).

DeRuiter contends that "[t]he Zoning Enabling Act would also authorize a municipality's zoning regulations as long as those regulations are consistent with the MMMA …" DeRuiter Br. at 3. This is an inaccurate statement of law. Rather, the Zoning Enabling Act authorizes a municipality's zoning regulations so long as those regulations are not "inconsistent and irreconcilable with" the MMMA. *Walsh*, 385 Mich at 635-36. Put another way, it is not necessary that the MMMA allude to or contain language that DeRuiter might deem "consistent with" the Township's Zoning Ordinance.

There is also no problem with the Zoning Ordinance "imposing regulations which are more restrictive and onerous that [sic] state law." DeRuiter Br. at 24. "[A]dditional regulation to that of a state law does not constitute a conflict therewith." *Walsh*, 385 Mich at 635-36.

Considering whether the ordinance and statute can "coexist and be effective" is not a novel concept, see DeRuiter Br. at 19, but a test used by this Court:

> "…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."

People v Llewellyn, 401 Mich 314, 335; 257 NW2d 902, 904 (1977) (internal citations omitted).

The parties agree that the MMMA does not speak to geographical zoning requirements; and the Township's Zoning Ordinance does not permit plants to be kept in unenclosed, unsecured facilities. The Zoning Ordinance and MMMA coexist and be effective; there is no conflict.

DeRuiter misconstrues the MMMA's silence, contending that, because a geographic location is not specified, "enclosed, locked facilities … can be located anywhere …" DeRuiter Br. at 23. However, nowhere does the "MMMA state[] that a caregiver can keep plants anywhere as long as the plants are in an enclosed locked facility." DeRuiter Br. at 26. It also does not "regulate[] the use of land in that it allows the land to be use [sic] by anyone who has an enclosed locked facility." DeRuiter Br. at 28.

Using this Court's rejection of a similar argument and reasoning in *Michigan Gun Owners, Inc v Ann Arbor Pub Sch*, 502 Mich 695, 716–17; 918 NW2d 756, 767, reh den sub nom. *Michigan Open Carry, Inc v Clio Area Sch Dist*, 920 NW2d 372 (Mich, 2018):

> [I]t is rather unremarkable that [the MMMA] does not prohibit [caregiver activities in certain locations]. This omission can hardly be viewed as 'expressly permitting' [caregiver activities anywhere in the Township] for purposes of a conflict-preemption analysis.

Accordingly, no conflict exists between the MMMA and the Zoning Ordinance, and the Zoning Ordinance must stand.

II. THE MICHIGAN CONSTITUTION AND THE MZEA EXPRESSLY CONFER UPON MUNICIPALITIES THE POWER TO REGULATE THE LOCATION OF PERMISSIBLE LAND USES.

DeRuiter's contention that Byron Township has no authority to regulate medical marijuana land use because the MMMA does not explicitly grant it that authority demonstrates a fundamental misunderstanding of municipal powers. See DeRuiter Br. at 7. Given that the MMMA is silent as to zoning, Byron Township lawfully exercised its authority under the Michigan Zoning Enabling Act ("MZEA") to regulate the same.

DeRuiter erroneously cites *County of Ingham v Michigan Co Rd Comm Self-Ins Pool*, 321 Mich App 574, 582; 909 NW2d 533, 538 (2017), for the statement that "local governments have only those powers expressly conferred by … statute" and incorrectly claims that "if the zoning

authority is not specifically granted by the MMMA, the municipality can not [sic] use its zoning ordinances to add requirements that the MMMA does not." DeRuiter Br. at 7. A complete recitation of the quote in *County of Ingham* demonstrates the flaw in DeRuiter's argument: "[l]ocal governments have only those powers expressly conferred by the Michigan Constitution or by statute, and they have the implicit authority to implement their express powers." *Co of Ingham*, 321 Mich App at 582. The Michigan Constitution and the MZEA expressly confer upon municipalities the authority to regulate land uses within their borders. Const 1963, art 7, § 22; MCL 125.271 *et seq*. There is no need for the MMMA, a "health and welfare" statute to allow a limited class of individuals the medical use of marijuana, to reiterate this authority.

III. ENFORCEMENT OF A ZONING ORDINANCE IS NOT A PENALTY FOR THE MEDICAL USE OF MARIJUANA.

Enforcing the Zoning Ordinance is not penalizing the "*medical use of marihuana*" or penalizing DeRuiter for engaging in the care of medical marijuana patients. If a penalty at all, the enforcement is not to penalize "the medical use of marihuana," but "to limit the improper use of land," as authorized by the MZEA[2]. MCL 125.3203.

DeRuiter misconstrues the MMMA in claiming that "the imposition of a penalty in any manner on an individual properly registered under the MMMA is in direct conflict with the immunity granted by section 4a of the MMMA, MCL 333.26424(a)." DeRuiter Br. at 13. Not only

[2] DeRuiter mischaracterizes the facts in claiming that "[t]he Township demanded that the Appellee cease her MMMA-compliant operations in the Township …" DeRuiter Br. at 4. On March 22, 2016, the Township demanded that Ms. Potgeter must cease the illegal use of her commercial property. 00006(a).

DeRuiter incorrectly contends that "there were never any allegations that Appellee's marijuana activities created any nuisance …" DeRuiter Br. at 7. "Use of land in violation of local ordinance is a nuisance per se"; there is no need to demonstrate that the use is a nuisance in fact; therefore, the issue was not developed in the Circuit Court. *High v Cascade Hills Country Club*, 173 Mich App 622, 629; 434 NW2d 199, 202 (1988).

is this illogical—granting blanket immunity from any penalty simply because a person is "properly registered under the MMMA"—but it leaves out critical language:

> A qualifying patient who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner… *for the medical use of marihuana* in accordance with this act …"

MCL 333.26424(a).

People v Latz, 318 Mich App 380; 898 NW2d 229 (2016), and *Braska v Challenge Manufacturing Co*, 307 Mich App 340; 861 NW2d 289 (2014), do nothing to support DeRuiter's position. See DeRuiter Br. at 14. In *Latz*, the criminal defendant was punished for transporting medical marijuana, where transporting is expressly included in the definition of the "use of medical marijuana" by the MMMA MCL 333.26423(h). *Latz*, 318 Mich App at 386, While in *Braska*, the plaintiffs were required to forfeit employment benefits specifically because of their marijuana use, "for the medical use of marihuana." *Braska*, 307 Mich App at 349-350. Conversely, the Zoning Ordinance in this case does not address the personal use or internal possession of medical marijuana as defined by the MMMA[3]. See also Township Br. at 27-28 (for full discussion regarding the distinction between this case and *Latz*).

Ultimately, an MMMA-compliant medical marijuana caregiver is still required to follow the law, she is simply immune from laws punishing her "for the medical use of marihuana." MCL 333.26424(a). Nothing in the MMMA provides blanket immunity simply because medical marijuana may be incidentally involved.

IV. NEITHER THE PURPOSE OF THE MMMA, NOR THE LATER MMFLA, SUPPORTS DERUITER'S POSITION.

[3] At multiple points throughout her Brief, DeRuiter alludes to a fee is imposed by the Township's Zoning Ordinance. See, e.g., DeRuiter Br. at 4, 8. While this is not within the scope of this Court's order regarding supplemental briefing, it is important to note that the Township does not actually impose a fee and DeRuiter did not prove that she would have been subject to a fee in the Circuit Court proceedings.

DeRuiter's argument that the "2016 statute and the 2018 voter initiative … arguably become the exclusive source of a municipality's authority to use zoning ordinances to regulate marijuana-related activity," DeRuiter Br. at 2, misses the mark. The "2016 statute," entitled the Medical Marihuana Facilities Licensing Act ("MMFLA"), MCL 333.27101, *et seq*., and the 2018 voter initiative legalizing recreational use of marijuana, govern separate marijuana-related activities from those governed by the MMMA.

The MMMA is actually quite limited. Passed in 2008, it provides only a "privilege" or legal "[p]rotections" to allow individuals and their assigned caregivers to grow and possess medical marijuana in limited quantities (12 plants per patient and only 2.5 ounces of flower or "usable marihuana and usable marihuana equivalents"), and only with the prescription of a doctor. MCL 333.26424. It applies throughout the state and does not allow municipalities to opt out. *Id.*

Despite DeRuiter's apparent preference for operating out of a commercial establishment, that preference runs directly contrary to the underlying purpose of the MMMA[4]. The MMMA

[4] Viewed in this correctly-framed context, 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 (i.e., not more than five) in a residential setting. Commercial operations were not intended.

Additionally, the MMFLA's definition of "provisioning center" also makes clear that caregiver/patient relationships under the MMMA are *not* intended to be commercial in nature. The MMFLA does this by expressly defining "provisioning centers" as being "commercial," while referring to caregiver/patient relationships under the MMMA as being "noncommercial." Specifically, the MMFLA 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 *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*.

MCL 333.27102(r) (emphasis added).

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 more than 5 qualifying patients with their medical use of marihuana."). Given the five-patient limitation that is expressly imposed by the MMMA, it was clearly not intended to foster commercial enterprises.

Conversely, the 2016 MMFLA was created by the legislature to be a comprehensive licensing scheme for commercial medical marijuana operations; it was designed to create a new industry. Unlike the MMMA, the MMFLA expressly allows commercial medical marijuana sales operations, which are now referred to as "provisioning centers" in the new law. See Public Act 281 of 2016 ("Act 281"), MCL 333.27101, *et seq*.; MCL 333.27102(r); MCL 333.27401(1); MCL 333.27504.

Critically, unlike the MMMA, the MMFLA is 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. MCL 333.27205(1). In order to opt in, a municipality is required to first adopt an ordinance authorizing provisioning centers and provide the State with information regarding and in connection with that ordinance, including:

> (a) An attestation that the municipality has adopted an ordinance under this subsection that authorizes the marihuana facility.
> (b) A description of any zoning regulations that apply to the proposed marihuana facility within the municipality.
> (c) The signature of the clerk of the municipality or his or her designee.
> (d) Any other information required by the department.

MCL 333.27205(1). Given that the MMFLA requires that a municipality take affirmative steps before a provisioning center is permitted within its borders, it is only logical that the MMFLA expressly describe those steps, including the ability of a municipality to include zoning regulations.

While amending the MMMA, an educated legislator would have seen no reason to take steps similar to the MMFLA and include a reminder to local governments that they were permitted

to regulate land use, even when related to medical marijuana. The *DeRuiter* decision by the Court of Appeals was fairly recent. Until this decision, no court had ever opined that municipalities were not able to use their long-standing power under the Michigan Constitution or the MZEA.

This Court's decision in *Ter Beek* certainly would not have given an informed legislator any reason to believe that the MMMA would require amendment or would otherwise restrict a municipality's zoning authority. *Ter Beek*, 495 Mich at 23 n 9 ("… 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."); see also *Ter Beek v City of Wyoming*, 297 Mich App 446, 450 n 4; 823 NW2d 864, 866 (2012), aff'd 495 Mich 1; 846 NW2d 531 (2014) ("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.").

Byron Township has not opted-in under the MMFLA, so commercial provisioning centers are illegal in the Township. The Township lawfully provides only for the specific type of 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.

As a practical matter, interpreting the MMMA in the manner in which DeRuiter advocates would nearly eviscerate the protections and the legislative intent behind the MMFLA. While the MMFLA, intended to operate on a larger, commercial scale, requires that the State's licensing board create extensive and comprehensive rules and regulations governing the commercial sale of medical marijuana, including qualifications and restrictions for persons participating in medical marijuana facilities, testing standards, procedures, and requirements for marijuana, a statewide

monitoring system, quality control standards, standards for storage, restrictions on marketing, maximum levels of tetrahydrocannabinol (THC), etc., MCL 333.27206, the MMMA does not. Nothing would prevent a group of entrepreneurs from joining together in a single location to create an MMMA grow operation even larger than the commercial operations permitted by the MMFLA. This can be done by having say, for example, 10 caregivers operating out of a partitioned building (e.g., a site condominium), each growing 72 plants, thus allowing 720 plants in one building. This would be a bigger operation than the Class A growers allowed under the MMFLA but without the comprehensive safeguards.

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 judgment in its favor.

Dated: April 8, 2019

BY: *s/ Amanda M. Zdarsky*

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