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Municipal Law News

Foster Swift Administrative & Municipal Group

What's Inside:

Recent Events Regarding the Medical Marijuana Act – A Flurry of Activity Tries to Clarify Foggy Law

by Ronald D. Richards & Nichole J. Derks

Our May 2009 Newsletter noted the passage of the new Medical Marijuana Act (Act). As you likely know, that Act provides certain people a defense against state prosecution for marijuana use for medical purposes. However, since the Act's passage, questions have arisen – in nearly every jurisdiction in Michigan – about the details of how the Act works in practice. Municipalities across the state are considering how, if at all, they can – or should – regulate marijuana use and distribution centers. Our May 2009 Newsletter article noted the controversy brewing over the Act – including whether marijuana distribution centers (so-called "dispensaries") are permitted under the Act. Over a year later, the controversy continues – to say the least. Here is a quick summary of some of the latest developments.

1. Department of Community Health Statement.

The Michigan Department of Community Health is responsible for administering the Act, including issuing patient registration cards. The Department's Public Information Officer, James McCurtis, Jr., has made a statement suggesting that the Act does not allow marijuana dispensaries.

2. House Bill 6394: It Would Prohibit Dispensaries

Perhaps consistent with Mr. McCurtis's statement, a state legislator has introduced a bill (House Bill 6394) that is still pending in the Michigan Legislature. House Bill 6394 would ban organizing or operating a marijuana bar or club. The House Bill defines those terms, in essence, as a structure on land where an individual is allowed to use marijuana under the Act if the use of the property is conditioned on paying something of value. The House Bill does exempt licensed hospices, nursing homes, and property where marijuana "is legally dispensed" under the Act. A violation of the House Bill would be a misdemeanor.

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3. Court Activity: Many Decisions, and Some Guidance.

Not surprisingly given the lack of details in the Act, many lawsuits have arisen as people and municipalities seek to take various actions they believe are consistent with the Act. By our last survey, suits relating to the Act span from Marquette County to Branch County, from Ottawa County to Alpena County, and many counties in between. Some of those decisions are making their way up the court ladder. Indeed, so far in 2010, the Michigan Court of Appeals has issued multiple decisions that implicate the Act.

One Court of Appeals decision is particularly interesting for those municipalities considering adopting a medical marijuana ordinance or prosecuting persons for marijuana charges in the face of potential medical marijuana defenses. In September 2010, the Court of Appeals reinstated drug charges against persons who, when arrested, had a doctor note that each was likely to receive benefits from marijuana use but had no patient registration card from the Department of Community Health (but did get one later). *People v Redden*, ___ Mich App ___ (published decision of September 14, 2010). *Redden* arose after the police searched the defendants' house, found 21 marijuana plants, and arrested them. When arrested, the defendants had a doctor note for marijuana use – but had no patient registration card as the Department was not yet issuing them at the time of his arrest. At the probable cause hearing, the defendants argued that the Act required dismissal of the charges because they had the doctor note. The prosecutor argued dismissal was not required since the defendants did not have the patient registration card when arrested.

The *Redden* district court judge first commented that the Act "is probably one of the worst pieces of legislation I've ever seen in my life" due to gaps perceived in the Act. But doing his best to interpret the Act, the district judge ultimately agreed with the defendants. He ruled that the charges must be dismissed since the defendants had the doctor note. The circuit court reversed and reinstated the charges against the defendant. The Court of Appeals agreed that the charges should be reinstated for various reasons, including these:

- An unregistered patient – one who does not have a Department-issued patient registration card when arrested – may still assert medical use of marijuana as a defense. But that defense doesn't require dismissal at the probable cause phase of the case if there are disputed issues on other matters relevant to the charges (such as whether the defendant exceeded the legal amount of marijuana possessed, or had a proper purpose for the marijuana in question, etc).

- To take advantage of the Act's medical marijuana used defense, defendants must show that they had a "bona fide doctor-patient relationship." That relationship is to be carefully scrutinized. The *Redden* Court ruled that a trial was required on whether the defendant had the required doctor-patient relationship with the doctor who authored the note for the defendant. There, the doctor saw the defendant only once for about 30 minutes, could not identify any debilitating condition in the defendant, and had a job whose sole duty was to review people to see if they can have marijuana under the Act. If a jury finds that the defendants did not see the doctor for good-faith medical treatment, but instead for

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- obtaining marijuana under false pretenses, then the Act's defense would not work.

The concurring judge wrote a 30-page, separate opinion. Here are some highlights from his opinion – which of course is not binding but is relevant to any municipality considering adopting a medical marijuana ordinance:

- Federal law recognizes no acceptable medical use of marijuana, and generally prohibits its possession. State medical marijuana laws do not supercede federal laws that criminalize marijuana use. So the Act "has no effect on federal prohibitions of the possession or consumption of marijuana.
- The Act does not create any right under state law to use or possess marijuana. The Act merely provides protection to certain people from prosecutions under state law.

We again encourage municipalities to carefully evaluate the enforceability of any contemplated medical marijuana ordinance before adopting it, and be fully informed as to its options to regulate medical marijuana and the risks of challenges to such ordinances and prosecutions. Foster, Swift's Municipal Team is happy to answer questions you may have about the Act and ordinances under the Act.

Municipal Prosecutions of Drunk Driving Under the New "Super Drunk" Law

by Nichole Jongsma Derks

Michigan's new "Super Drunk" law takes effect October 31, 2010. In short, the new law gives enhanced penalties for operating a vehicle while "super drunk" – defined as having a bodily alcohol content (BAC) of 0.17 or higher. The penalties for violating the new law include imprisonment for up to 180 days and fines between $200 and $700.

While we can see benefits to prosecutions under the Super Drunk law, Michigan cities, townships, and villages should note that they likely cannot prosecute persons under the new Super Drunk Law. This is because the underlying enabling statutes for cities, townships, and villages do not permit them to enforce crimes with penalties as steep as in the Super Drunk Law – imprisonment for up to 180 days in jail.

So what does the new Super Drunk Law mean for cities, townships, and villages? We see at least these two options:

1. Cities, townships, and villages are still able to prosecute persons under traditional Operating While Intoxicated charges – even if the person has a BAC of .17 or higher. But even with a conviction, they cannot pursue the additional penalties available for those convicted of being Super Drunk.

2. If a city, township, or village arrests a person with a BAC of 0.17 or higher and wants to pursue prosecution against the person under the Super Drunk Law, the city, township, or village can send the case to its respective county prosecutor for review. Unlike cities, townships, and villages, counties' enabling statutes allow them to prosecute crimes with penalties as steep as the Super Drunk law.

Should you have any questions about the Super Drunk law or municipal prosecutions, please contact Ms. Derks at 517-371-8100 or nderks@fosterswift.com.

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Janene joined Foster Swift in January 2010 and is the principal Public Finance lawyer in the Foster Swift Lansing office.

Prior to joining Foster Swift, Janene was a full-time bond lawyer with Lewis & Munday, P.C. in Lansing. Her experience includes service as: (A) bond counsel, co-note counsel or underwriters' counsel in over 30 state and local issues in Michigan aggregating over $4 billion, including State of Michigan, MMBA and MPEFA issues; and (B) sole bond counsel or co-bond counsel in several issues of the State of Connecticut and the Connecticut Health and Educational Facilities Authority aggregating another $4.2 billion.

Before her legal career, Janene was a State of Michigan employee for over 12 years – with the Michigan Municipal Bond Authority (MMBA) in the Michigan Department of Treasury (February 1995 - January 2000), and in the Michigan Department of Human Services (January 2000 - September 2007). During her employment with the MMBA, Janene served as lead liaison to authorized governmental officials, superintendants and chief financial officers interested in financing alternatives offered by the MMBA. She assisted in the coordination and monitoring of work activities pertaining to the MMBA's financing programs, and served as liaison to the MMBA's Board of Trustees.

While working for the State, Janene attended Thomas M. Cooley Law School as an honors scholarship recipient and served as an Ingham County Circuit Court judicial clerk and a legislative assistant to the Representative for the 68th District in the Michigan House of Representatives.

A strong promoter of "giving back," Janene has an enormous passion for mentoring young professionals as well as taking an active role in professional and community organizations.

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