

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



MIKE COX
ATTORNEY GENERAL

P.O. Box 30212
LANSING, MICHIGAN 48909

October 7, 2009

Mr. Kurt Krause
Chief Deputy Director
Department of Community Health
201 Townsend St.
Lansing, MI 48913

RE: Michigan Medical Marihuana Act

Dear Mr. Krause:

I am writing to recommend that the Department of Community Health (DCH) address issues that have arisen during the implementation of the Michigan Medical Marihuana Act, Initiated Law 1 of 2008, MCL 333.26421 *et seq* (the Act). As you are aware, the Act was passed by Michigan citizens on November 4, 2008, pursuant to Mich Const 1963 art 2, § 9, which grants the power to propose, enact or reject laws by citizen initiative and referendum. The Act allows individuals with debilitating medical conditions and written certification from a physician to use and possess limited amounts of marijuana to alleviate their condition.

Although the Legislature can amend the Act, any amendment will require a vote of the electors or three-fourths of the members elected to and serving in each house of the legislature, because the Act was passed under the initiative provisions of Const 1963 art 2, § 9.

As your staff has acknowledged, DCH is charged with implementation of the Act, and has the authority to promulgate administrative rules pursuant to MCL 333.26425. Consistent with this obligation, DCH held a public hearing on January 5, 2009 seeking comment on its proposed administrative rules, and subsequently issued final administrative rules on April 4, 2009.

Since then, Michigan citizens and legislators have expressed concern and confusion about numerous issues, including whether local zoning ordinances can regulate the production of medical marijuana or the sale of paraphernalia; what constitutes "a public place" where a qualified patient is prohibited from smoking marijuana; how should local law enforcement agencies handle Freedom of Information Act requests involving information in their police reports about registered patients; whether one qualifying patient can give unused marijuana to another qualifying patient; whether a local unit of government can ban non-profit medical marijuana compassion clubs or co-ops; whether DCH can take away a registry identification card

for prior marijuana convictions; and what constitutes an "enclosed locked facility" for purposes of cultivating marijuana plants.

The DCH and the Legislature have the authority-indeed the duty-to provide guidance in its implementation of the Act, either through the administrative rulemaking or the legislative amendment processes. Should litigation arise over the interpretation of definitions and requirements in the Act, "The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled by the courts without cogent reasons." *Boyer-Campbell v Fry*, 271 Mich 282; 260 NW 165 (1935). This standard requires reviewing Courts to give "respectful consideration" and "cogent reasons" for overruling an agency's interpretation. Furthermore, when the law is "doubtful or obscure," the agency's interpretation is an aid for discerning the Legislature's intent. *SBC Mich v PSC (In re Complaint of Rovas)*, 482 Mich 90, 103; 754 NW2d 759 (2008).

Alternatively, DCH may issue a declaratory ruling to interested persons as to the applicability of the Act or the administrative rules to an actual state of facts. MCL 24.263 provides:

On request of an interested person, an agency may issue a declaratory ruling as to the applicability to an actual state of facts of a statute administered by the agency or of a rule or order of the agency. . . . A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by any court. An agency may not retroactively change a declaratory ruling, but nothing in this subsection prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case.

The Act contemplates DCH taking action through the administrative rule process to provide substantive and detailed definitions of the Act's terms, and we are requesting that DCH amend its rules to address the issues described above. We understand the tremendous effort involved in the implementation of new laws, and as always, the Attorney General is prepared to provide legal advice and assistance upon request.

Sincerely yours,

Carol L. Isaacs
Chief Deputy Attorney General