

STATE OF MICHIGAN	Circuit Court for the County of Washtenaw	CASE NO. 11-18202
Court address		Court telephone no.

Tony Keene
Plaintiff

Petition for Preliminary Injunction against City of Ann Arbor Chapter 71

vs.

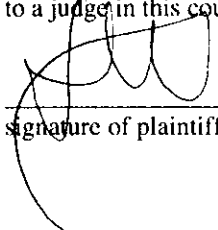
City of Ann Arbor
Defendant

COPY

Tony Keene
240 Crest Ave
Ann Arbor, MI 48103

City of Ann Arbor
Ann Arbor, MI

There is no other civil action between these parties arising out of the same transaction or occurrence as alleged in this complaint pending in this court, nor has any such action been previously filed and dismissed or transferred after having been assigned to a judge, nor do I know of any other civil action, not between these parties, arising out of the same transaction or occurrence as alleged in this complaint that is either pending or was previously filed and dismissed, transferred, or otherwise disclosed of after having been assigned to a judge in this court.

 2/17/2011 734-678-1850
signature of plaintiff date

→ date of hearing 3/2/11 3pm

The plaintiff, Tony Keene, resident of Ann Arbor, Michigan, registered Michigan Medical Marihuana patient and caregiver, is requesting a preliminary injunction preventing the City of Ann Arbor from further readings of the proposed new ordinance Chapter 71 to Title VI of the Code of the City of Ann Arbor. Until the following terms "dispensary" and "cultivation facility" are defined resulting in definitions that are in accordance with the clarity of terms such as "caregiver" and "patient" as stated in the Michigan Medical Marihuana Act (MMMA) and a detailed licensing administrative and enforcement budget. Furthermore the plaintiff request Court oversight until said terms and budget are submitted.

The purpose of this action and its urgency is to stop any further deliberations by Ann Arbor City Council of Chapter 71 for the following reasons:

1. Until comprehensive definitions are in place, no City of Ann Arbor resident or Council member can determine what is being licensed and regulated under the current definitions assigned to "dispensary" and "cultivation facility".

For example, as of the writing of this brief, the definition for "cultivation facility" is different in the proposed zoning ordinance than as defined in the proposed licensing ordinance.

Zoning Ordinance - "(2) d) Medical marijuana cultivation facility. A single facility where more than 72 marijuana plants are being grown."

Licensing Ordinance - "**6:414. Definitions.** (b) *Medical marijuana cultivation facility* means a structure or each space in a structure that is separately owned or leased by a person other than the owner of the structure, in which marijuana plants are being cultivated other than as a medical marijuana home occupation."

This discrepancy is indicative of all revisions and readings so far related to Chapter 71. The Court must intervene and instruct the City Council to clarify their terms and definitions before the first reading is complete and the second reading and public hearing can take place.

Furthermore, the current opinion and order by Hon. Paul H. Chamberlain (State of Michigan v. McQueen, Taylor d/b/a Compassionate Apothecary, L.L.C. case number 10-8488-CZ Isabella County Trial Court), though not applicable statewide, does construe and effectively offers an opinion on what is and is not a "dispensary". Therefore, there are at least guidelines offering reasonable interpretation for terms such as "dispensary" and "cultivation facility". At the very least, the Court could base reasonable expectations of defining these terms ("dispensary" and "cultivation facility") based on current rulings without having to further construe the MMMA.

2/17/2011

2. City Council has not outlined any detailed operational procedures or enforcement logistics, and therefore has no estimate on what the cost of any proposed licensing scenario would be. The plaintiff asks the Court to ensure that no further readings of Chapter 71 take place until City Council clarifies an administrative and enforcement operations budget. The urgency of this is outlined in the fact that licensing is based on a fixed annual fee and the cost of managing and enforcing, as well as litigating, medical marijuana licensing is a complete unknown.

At this point the plaintiff is requesting an immediate 7 day Temporary Restraining Order with a preliminary injunction hearing to follow, where upon the City Council could present clear definitions and then rewrite Chapter 71 with the Court supervised definitions.

STATE OF MICHIGAN
IN THE ISABELLA COUNTY TRIAL COURT

STATE OF MICHIGAN,

Plaintiff,

Case No.
10-8488-CZ

v

Hon. Paul H. Chamberlain

BRANDON MCQUEEN, MATTHEW
TAYLOR, d/b/a COMPASSIONATE
APOTHECARY, I.L.C.

FILED

Defendants.

DEC 16 2010

COUNTY CLERK
ISABELLA COUNTY
MT. PLEASANT, MICH.

**OPINION AND ORDER
ON PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER,
SHOW-CAUSE ORDER, AND PRELIMINARY INJUNCTION**

I. FINDINGS OF FACT

On May 1, 2010, defendants started a business through which they claim they engage in lawful, medical marijuana related conduct pursuant to the Michigan Medical Marijuana Act (MMMA), MCL 333.26421, *et. seq.* The MMMA defines the protections available for individuals who apply to Michigan's Department of Community Health (MDCH) to engage in medical marijuana related conduct, which includes registered qualifying patients and registered primary caregivers. Defendant McQueen is a registered qualifying patient, as well as a registered primary caregiver. Defendant Taylor is a registered primary caregiver. Defendants lease lockers on their premises to other registered qualifying patients and registered primary caregivers, who become "members" of defendants' business upon approved application, within which to store medical marijuana. Defendants only approve an applicant for membership if the applicant is a registered qualifying patient or registered primary caregiver with the MDCH. Once an applicant becomes a member, he or she pays a membership fee, receives a membership number, may lease a locker, and may store medical marijuana in such locker. The members then purchase or sell the medical marijuana among other members. Frequently, a registered primary caregiver member receives permission from his or her registered qualifying patient to store such patient's marijuana at defendants' business and to sell such marijuana to other members. Thus, the registered qualifying patient owns the medical marijuana at all times. The members determine the price of the marijuana. Defendants' business does not own, purchase, or sell any marijuana; however, defendants collect locker rental fees, membership fees, and receive 20% of the sales price per transfer. The business also pays a sales tax to the State of Michigan for each transfer.

Because the MMMA permits a specific amount of medical marijuana a registered qualifying patient or registered primary caregiver may possess, defendants keep records of the

amount of marijuana in each of their 27 lockers. Defendants prohibit any growing or smoking of the marijuana on their premises. Defendants also refuse to allow any transfer of marijuana into their lockers from anyone who is not a member, or transfers from the lockers to non-members.

On July 22, 2010, plaintiff filed a complaint where it requested that this court enter a temporary restraining order to enjoin defendants from allegedly violating the MMMA, and requested a preliminary injunction to enjoin defendants from operating their business in this community. This court denied plaintiff's request for a temporary restraining order, and scheduled an evidentiary hearing to determine whether it should issue a preliminary injunction. Following such hearing on August 18-19, 2010, this court denies plaintiff's request for a preliminary injunction.

II. ANALYSIS

Plaintiff claims a preliminary injunction is warranted because defendants operate their business contrary to the MMMA and thus, their conduct constitutes a nuisance per se and a public nuisance. This court finds otherwise. The decision to issue a preliminary injunction is within the discretion of the trial court. *Michigan Coalition of State Employee Unions v Civil Service Comm.*, 465 Mich 212, 217; 634 NW2d 692 (2001). " 'Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury.' " *Kernen v Homestead Dev Co.*, 232 Mich App 503, 509; 591 NW2d 369 (1998), quoting *Jeffrey v Clinton Twp.*, 195 Mich App 260, 263-264; 489 NW2d 211 (1992). When making the decision to issue a preliminary injunction, the court should consider the following factors:

(a) the nature of the interest to be protected, (b) the relative adequacy to the plaintiff of injunction and of other remedies, (c) any unreasonable delay by the plaintiff in bringing suit, (d) any related misconduct on the part of the plaintiff, (e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied, (f) the interests of third persons and of the public, and (g) the practicability of framing and enforcing the order or judgment. [*Kernen supra* at 514.]

Further, the court must base a need for a preliminary injunction on a particularized showing of irreparable harm, not a mere apprehension of future injury or damage. *Michigan Coalition, supra* at 225-226; *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 9; 753 NW2d 595, 600 (2008).

Moreover, a nuisance per se is "an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings." *Ypsilanti Charter Twp v Kircher* 281 Mich App 251, 269 n 4; 761 NW2d 761 (2008). A public nuisance is defined as an "unreasonable interference with a common right enjoyed by the general public." *Cloverleaf Car Co v Phillips Petroleum Co.*, 213 Mich App 186, 190; 540 NW2d 297 (1995). In *Cloverleaf*, the Court held:

The term 'unreasonable interference' includes conduct that (1)

significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on those rights. A private citizen may file an action for a public nuisance against an actor where the individual can show he suffered a type of harm different from that of the general public. [*Id.*; *Capitol Properties Group, LLC, v 1247 Ctr Street, LLC*, 283 Mich App 422, 427-428; 770 NW2d 105 (2009).]

Further, in order to properly analyze plaintiff's two nuisance claims, this court must construe the MMMA. "Generally, the primary objective in construing a statute is to ascertain and give effect to the Legislature's intent." *People v Radde*, ___ Mich App ___, ___ NW2d ___ 2010 WL 3611716. The intent of the Legislature is most reliably evidenced through the words used in the statute. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). If the language in the statute is unambiguous, judicial construction is neither required nor permitted. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005). However, if a statute is ambiguous, judicial construction is appropriate. *Adrian School Dist v Michigan Pub School Employees Retirement Sys*, 458 Mich 326, 332; 582 NW2d 767 (1998). A statute is ambiguous "only if it 'irreconcilably conflict(s)' with another provision or when it is equally susceptible to more than a single meaning." *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 177-178 n 3; 730 NW2d 722 (2007) (emphasis in original), quoting *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004).

MCL 333.26424 states in pertinent part:

(a) A qualifying patient who has been issued and possesses a registry identification card shall not be 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, provided that the qualifying patient possesses an amount of marihuana that does not exceed 2.5 ounces of usable marihuana, and, if the qualifying patient has not specified that a primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility. Any incidental amount of seeds, stalks, and unusable roots shall also be allowed under state law and shall not be included in this amount.

(b) A primary caregiver who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for assisting a qualifying patient to whom he or she is connected through the department's registration process with the medical use of marihuana in accordance with this act, provided that the primary caregiver possesses an amount of marihuana that does not exceed:

(1) 2.5 ounces of usable marihuana for each qualifying patient to whom he or she is connected through the department's registration process; and

(2) for each registered qualifying patient who has specified that the primary caregiver will be allowed under state law to cultivate marihuana for the qualifying patient, 12 marihuana plants kept in an enclosed, locked facility; and

(3) any incidental amount of seeds, stalks, and unusable roots.

(d) There shall be a presumption that a qualifying patient or primary caregiver is engaged in the medical use of marihuana in accordance with this act if the qualifying patient or primary caregiver:

(1) is in possession of a registry identification card; and

(2) is in possession of an amount of marihuana that does not exceed the amount allowed under this act. The presumption may be rebutted by evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act.

(e) A registered primary caregiver may receive compensation for costs associated with assisting a registered qualifying patient in the medical use of marihuana. Any such compensation shall not constitute the sale of controlled substances.

• • •

(h) Any marihuana, marihuana paraphernalia, or licit property that is possessed, owned, or used in connection with the medical use of marihuana, as allowed under this act, or acts incidental to such use, shall not be seized or forfeited.

(i) A person shall not be 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, solely for being in the presence or vicinity of the medical use of marihuana in accordance with this act, or for assisting a registered qualifying patient with using or administering marihuana.

MCL 333.26424(a) and (b) define the protections enjoyed by a qualifying patient and primary caregiver for the "medical use" of marihuana. MCL 333.26423(e) provides a broad

definition of "medical use" of marihuana as follows.

'Medical use' means the acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana or paraphernalia relating to the administration of marihuana to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition.

MCL 333.26424(a) and (b) also limit the permissible amounts of marihuana a registered qualifying patient or a registered primary caregiver may possess. The registered primary caregiver's permissible amount to possess is further limited to an amount he or she possesses for "assisting a qualifying patient to whom he or she is connected . . ." MCL 333.26424(b). Moreover, a registered primary caregiver may receive compensation for costs he or she incurs "with assisting a registered qualifying patient in the medical use of marihuana." MCL 333.26424(e). Additionally, the Legislature created a presumption that a registered qualifying patient or registered primary caregiver is engaged in the medical use of marihuana pursuant to the MMMA. MCL 333.26424(d). In order to rebut such presumption, a party must present "evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act." MCL 333.26424(d)(2). Finally, MCL 333.26424(i) protects a "person" from penalty in any manner "for assisting a registered qualifying patient with using or administering marihuana."

In this case, defendants claim they lawfully operate their business pursuant to the MMMA. This court agrees. The parties do not dispute that both defendants properly acquired registry identification cards as caregivers, or that defendant McQueen properly acquired his registry card as a qualifying patient. Therefore, defendant Taylor may possess 2.5 ounces of useable marihuana and 12 enclosed and locked marihuana plants for each qualifying patient to whom he is connected through the department's registration process. MCL 333.26424(b). Likewise, defendant McQueen may possess amounts of marihuana as a primary caregiver, but may also personally possess 2.5 ounces of useable marihuana and if he chooses not to designate a primary caregiver, 12 enclosed and locked marihuana plants, because he is a registered qualifying patient. MCL 333.26424(a) and (b). The record reveals that defendants, through their business, allow only registered qualifying patients and registered primary caregivers to lease lockers within their premises. The registered qualifying patients and registered primary caregivers possess marihuana within such lockers and only in amounts permissible under the MMMA. While defendants own the premises, defendants do not own, purchase, or sell the marihuana. Therefore, this court finds that defendants do not possess amounts of marihuana prohibited by the MMMA.

Further, the registered qualifying patients and registered caregivers perform medical use of the marihuana by transferring the marihuana within the lockers to other registered qualifying patients and registered primary caregivers. Though the MMMA states that a primary caregiver may only assist a qualifying patient "to whom he or she is connected through the department's registration process with the medical use of marihuana," the MMMA further allows a registered primary caregiver to receive compensation for costs incurred to assist "a registered qualifying patient in the medical use of marihuana." MCL 333.26424(b) and (e). Thus, this court finds that

an ambiguity exists between subsection (b) and (e) because on the one hand, a primary caregiver may only assist a qualifying patient who registered such caregiver, and on the other, the same primary caregiver seemingly may receive compensation for costs for assisting any qualifying patient because the Legislature failed to direct that the compensation may only come from the qualifying patient who registered such caregiver. Thus, when defendants collect locker rental fees, membership fees, and receive 20% of the sale price per transfer between members, they actually receive "compensation for costs associated with assisting a registered qualifying patient in the medical use of marihuana" because their members are solely registered qualifying patients. MCL 333.26424(e). Even more ambiguous, "a person" is not subject to any penalty for assisting a registered qualifying patient with "using or administering marihuana." MCL 333.26424(i). The Legislature did not provide definitions of "using" or "administering" marihuana, but did place such terms within the definition of permissible "medical use" of marihuana. MCL 333.26423(e). Further, the MMMA is absolutely silent as to patient-to-patient transfers or deliveries between registered qualifying patients of medical marihuana, as in this case. The MMMA does not mandate or provide a process by which registered qualifying patients may acquire marihuana, nor does it prohibit any medical use of marihuana between registered qualifying patients, aside from the prohibitions set forth in MCL 333.26427, which do not apply in this case. See MCL 333.26423(e); see also MCL 333.26424(k) and MCL 333.26427. Therefore, this court finds that in such ambiguity, the presumption set forth by the Legislature in MCL 333.26424(d) becomes eminently important.

As stated above, the MCL 333.26424(d) provides:

(d) There shall be a presumption that a qualifying patient or primary caregiver is engaged in the medical use of marihuana in accordance with this act if the qualifying patient or primary caregiver:

(1) is in possession of a registry identification card; and

(2) is in possession of an amount of marihuana that does not exceed the amount allowed under this act. The presumption may be rebutted by evidence that conduct related to marihuana was not for the purpose of alleviating the qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition, in accordance with this act.

Defendants presumably engage in "medical use" of marihuana because they possess the registry identification cards and because they possess an amount of marihuana that does not exceed the amount allowed under the MMMA. Following the evidentiary hearing, plaintiff failed to provide any evidence that defendants' medical marihuana related conduct was not for the purpose of alleviating any qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition. In fact, the evidence revealed that defendants not only provide services aimed at alleviating the debilitating medical conditions of registered qualifying patients, but also testimony from several registered qualifying patients, who were members of defendants' business, revealed that defendants' conduct actually assisted them with alleviating their debilitating medical conditions. Such witnesses testified that they physically could not

handle the narcotics their doctors prescribed for the pain associated with their ailments. They further described the difficulties in acquiring medical marijuana from sources besides defendants' business because often, such primary caregivers cannot be trusted and frequently possess inconsistent amounts of marijuana because it can be difficult to grow and harvest. The compensation defendants receive is the direct result of the costs associated with assisting registered qualifying patients who frequent defendants' business. The Legislature specifically stated that such compensation is not the sale of controlled substances. MCL 333.26424(e). Defendants, clearly qualify as persons under the MMMA, and are not subject to any penalty "solely for being in the presence or vicinity of the medical use of marijuana in accordance with this act, or for assisting a registered qualifying patient with using or administering marijuana." MCL 333.26424(i). Therefore, when defendants are solely in the presence or vicinity of the medical use of marijuana, as provided by the MMMA, or assist their members with the use or administration of marijuana on their premises, they are acting within the provisions of the MMMA. MCL 333.26424(i). This court also notes that plaintiff failed to provide any evidence that defendants permitted any member, or any person for that matter, to use medical marijuana as prohibited by MCL 333.26424(k) and MCL 333.26427. For example, defendants do not permit their members to sell medical marijuana to any non-registered qualifying patient on defendants' premises, or to smoke or ingest the marijuana on their premises, and then operate a vehicle under the influence.

This court acknowledges the fear that defendants operate a dispensary of marijuana, where individuals can walk in, select from a variety of marijuana purchased from any source, sample the marijuana, and leave such dispensary with medical marijuana. See *Redden supra*, (O'CONNELL, J.) This court notes that it does not find that such dispensaries are allowed pursuant to the MMMA mainly because such issue is not before the court. This court is charged with determining whether the patient-to-patient transfers in this case are considered medical use of marijuana, as permitted by the MMMA. Further, the record reveals that only registered qualified patients or registered primary caregivers make such transfers as members of defendants' business. Members place their marijuana in defendants' lockers, and the members transfer or deliver the marijuana pursuant to the MMMA. Even when a registered primary caregiver transfers medical marijuana to another member, such caregiver does so under the authorization of the patient to whom he or she is registered. The Legislature did not prohibit such transfers, and such registered primary caregiver conceivably serves as a person who assists a registered qualified patient with using or administering marijuana. MCL 333.26424(i). Therefore, the ultimate issue before this court is whether the presumption listed in MCL 333.26424(d) applies and pertains to the patient-to-patient medical use of marijuana in this case. This court finds that it does.

Accordingly, this court finds that the patient-to-patient transfers and deliveries of marijuana between registered qualifying patients fall soundly within medical use of marijuana as defined by the MMMA. This court also finds that because the Legislature provided the presumption of medical use of marijuana in MCL 333.26424(d), it intended to permit such patient-to-patient transfers and deliveries of marijuana between registered qualifying patients in order for registered qualifying patients to acquire permissible medical marijuana to alleviate their debilitating medical conditions and their respective symptoms. Essentially, defendants assist with the administration and usage of medical marijuana, which the Legislature permits under the MMMA.

Thus, this court finds that defendants' acts, occupation, or structure is not a nuisance at all times and under any circumstances. *Ypsilanti, supra*. Defendants only operate their business during designated business hours, and as decided above, perform their medical marijuana related conduct pursuant to the MMMA. Therefore, their business does not constitute a nuisance per se. Further, defendants' business is not an "unreasonable interference with a common right enjoyed by the general public." *Cloverleaf, supra*. First, defendants do not interfere with the public's health or safety because they operate their business within the provisions of the MMMA, which a majority of the Michigan public voted to enact. Additionally, the record reveals that defendants' business actually promoted the health and safety of the registered qualifying patients who frequent such business to alleviate their debilitating medical conditions and their respective symptoms. Secondly, this court found that defendants did not operate their business as proscribed by law; more specifically, defendants operate their business as permitted by the MMMA. Defendants testified, and the record confirms, that they knew of the MMMA and designed and operate their business pursuant to its provisions. Therefore, this court finds that defendants' business is not a public nuisance.

Finally, this court must determine whether to issue a preliminary injunction following its findings above. The nature of the interest in this case is statutory, promulgated in the MMMA. While an injunction may be adequate for plaintiff's requested relief, the MMMA also lists other remedies available to plaintiff pursuant to MCL 333.26424(k). This court finds that plaintiff did not unreasonably delay filing this action and did not exhibit any type of misconduct of its part. Defendants would suffer a great hardship if this court enjoined them from operating their business because not only would they lose their business and property, but they would suffer such loss despite conforming to the laws of this state. Plaintiff's hardship would be minimal if this court denied its request because this court found that defendants do not operate their business as a nuisance per se or a public nuisance. The public owns a large interest in this case because the same public voted to enact the MMMA, which lends support for its interest in providing a system by which registered qualifying patients may engage in the medical use of marijuana to alleviate their debilitating medical conditions and symptoms associated with such conditions. Accordingly, this court denies plaintiff's request for a preliminary injunction in this case.

THEREFORE IT IS ORDERED that plaintiff's request for a preliminary injunction is denied.

This order resolves the last pending claim and closes the case.

Date: December 16, 2010



Hon. Paul H. Chamberlain P31682
Chief Judge
Isabella County Trial Court