PO BOX 201706
Helena, MT 59620-1706
(406) 444-3064
FAX (406) 444-3036

Education and Local Government Interim Committee

61st Montana Legislature

To: Education and Local Government Committee

From: Helen Thigpen, Staff Attorney

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Re: Local regulation of medical marijuana.

The purpose of this memorandum is to provide background information to the Education and Local Government Committee on the local regulation of medical marijuana. The memorandum provides: (I) a brief overview of the Montana Medical Marijuana Act; (II) a description of some of the challenges facing local governments following the legalization of medical marijuana; and (III) an analysis of the current statutory framework for the local regulation of medical marijuana. The memorandum concludes with a few options the committee may want to consider during the next Legislative session. While the following discussion is limited to an analysis of the local regulation of medical marijuana and does not address health or law enforcement concerns, the committee should note that the Children, Families, Health, and Human Services (CFHHS) interim committee is also investigating medical marijuana. The next CFHHS meeting is scheduled for June 28, 2010.

I. Montana Medical Marijuana Act

The use of marijuana for medical purposes in Montana was approved by 62% of voters in 2004 through the passage of Ballot Initiative No. 148. The Medical Marijuana Act (MMA), codified at §§ 50-46-101 through 50-46-210, MCA, allows a "qualifying patient" to use marijuana for certain medical conditions with the authorization of a physician. A “qualifying patient” is a person who has been diagnosed by a physician as having a debilitating medical condition such as cancer, glaucoma, human immunodeficiency virus (HIV), or acquired immune deficiency syndrome (AIDS). Section 50-46-102(8). A debilitating medical condition also includes a disease or condition that produces severe or chronic pain, seizures, severe nausea, or severe or persistent muscle spasms caused by conditions such as multiple sclerosis. Section 50-46-102, MCA.

A person who has a registration card from the Department of Public Health and Human Services (DPHHS) may not be "arrested, prosecuted, or penalized" if he or she does not possess more than six plants and one ounce of usable marijuana or uses marijuana for medical use. Section 50-46-201(1), MCA. The MMA also provides certain affirmative defenses to individuals who do not possess a registration card. For example, under § 50-46-206, MCA, it is an affirmative defense to any criminal offense involving medical marijuana that the person charged has a

physician who states or has medical records that indicate that "the potential benefits of medical marijuana would likely outweigh the health risks for the person". Section 50-46-206(1)(a), MCA.

The MMA allows a patient to grow marijuana for personal use or to designate another person to serve as a "caregiver." A caregiver is someone, other than the patient's physician, who is 18 years of age or older and who has agreed to take on the responsibility of managing the well-being of the patient with respect to the use of medical marijuana. Section 50-46-102(1), MCA. A caregiver may not have a previous felony drug conviction or possess more than six marijuana plants and one ounce of usable marijuana for each patient. Section 50-46-201(2), MCA. There is no restriction on the number of patients a caregiver may serve.

There are several additional limitations on the use and possession of marijuana for medical purposes. Section 50-46-205, MCA. The MMA does not allow (1) any person to operate a motorized vehicle while under the influence of marijuana; (2) a caregiver to use marijuana; or (3) a patient to smoke marijuana on a school bus, in any form of public transportation, on school grounds, in a correctional facility, or in public parks, beaches, or recreation or youth centers. In addition, the MMA does not require an employer to accommodate medical marijuana in the workplace or require a government medical assistance program or health insurer to reimburse costs associated with the use of medical marijuana. Section 50-46-205(2), MCA.

II. Challenges

Over the past year there has been a significant increase in the number of Montanans who have obtained identification cards for medical marijuana. In 2005, DPHHS issued approximately 180 registration cards. By March 2010, DPHHS issued over 12,000 registration cards.[1] This growth has raised several concerns for local governments. A primary concern is the relationship between state and federal law. Currently it is unlawful under federal law to manufacture, distribute, or possess a controlled substance except in accordance with the Controlled Substances Act (CSA).[2] Under the CSA, substances are classified into five different "schedules" based upon various factors such as their potential for abuse, medical use, and physical and psychological effects. Marijuana is classified as a Schedule I substance under federal law, meaning that it has: (1) a high potential for abuse; (2) no accepted medical use for treatment; and (3) a lack of accepted safety for use under medical supervision.[3]

Because marijuana is classified as a Schedule I substance, the federal government has the authority to investigate and prosecute the illegal use or distribution of marijuana. In 2009, the United States Department of Justice (Department) issued a guidance document to federal

[1] Department of Public Health and Human Services, *History of Qualifying Patients, Caregivers, and Doctors*, http://www.dphhs.mt.gov/medicalmarijuana/mmphistoricaldata.shtml (last accessed May 31, 2010).

[2] 21 U.S.C. §§ 841(a)(1) through 844(a).

[3] 21 U.S.C. § 812(b)(1).

prosecutors clarifying its position on the prosecution of medical marijuana. The document stated:

> The [Department] is committed to the enforcement of the [CSA] in all States. Congress has determined that marijuana is a dangerous drug, and the illegal distribution and sale of marijuana is a serious crime and provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels.

However, the Department also stated that federal resources should not be focused on "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." The practical result of this document is that the federal Drug Enforcement Administration ended its raids on operations that cultivate or distribute marijuana for medical purposes in states that have authorized its use. The Department reiterated that it remains committed to prosecuting "significant traffickers of illegal drugs, including marijuana."

While the guidance document provided some clarification on the federal investigation and prosecution of marijuana for medical use, many questions remain unanswered at the state and local level. For example, the MMA does not address whether local governments are authorized to regulate the use and distribution of medical marijuana. The MMA also does not provide whether medical marijuana may be distributed commercially through stores or "dispensaries" to qualifying patients. Some states provide specific regulations relating to how medical marijuana may be distributed.[4] In California, for example, dispensaries are allowed but are prohibited from cultivating or distributing marijuana for profit.[5] In addition, while the MMA prohibits a caregiver from possessing more than a specified amount of marijuana for medical use, there is no limitation on the number of patients each caregiver may serve.

Communities have also raised concerns about whether schools would be required to accommodate the use of medical marijuana by students who obtained a valid identification card with the consent of a parent or guardian. The MMA specifically prohibits smoking marijuana on school property, but it is silent on whether a student may ingest marijuana in another form. Concerns have also been raised about the proximity of commercial operations to educational facilities. The MMA does not specify whether a commercial operation for medical marijuana could be established within a certain distance of a school. However, Montana's criminal code does currently prohibit the distribution of dangerous drugs, including Schedule I substances, on or within 1,000 feet of school property. Section 45-9-109, MCA.

III. Analysis

Many Montana communities have recently moved to regulate medical marijuana. Most of these communities have adopted interim ordinances that temporarily ban commercial establishments

[4] National Conference of State Legislatures, *State Medical Marijuana Laws*, http://www.ncsl.org/default.aspx?tabid=19587 (Updated April 2010).

[5] Cal. Health and Safety Code, § 11362.765.

that grow or sell marijuana to registered patients. Billings, for example, recently adopted an interim ordinance that prohibits new commercial establishments that cultivate or distribute medical marijuana to registered patients from opening within the city. However, the ordinance does not apply to a qualifying patient who does not possess more than the statutory limit of marijuana for personal use or to a caregiver that obtained a license to operate from the city before the ordinance took effect. In contrast, Columbia Falls has stated that it will regulate medical marijuana businesses in accordance with its existing zoning laws, whereas Helena has determined that it is prohibited from issuing a license to an establishment that is illegal under federal law. The following section describes the authority of local governments to enact ordinances such as these to regulate the use or distribution of medical marijuana. It also describes the existing framework for the adoption of regulations related to land use and zoning.

A. General Powers v. Self-Governing Powers

The authority of local governments to regulate is derived from state law. Traditionally local governments could exercise only those powers expressed or implied by law. Article XI, section 4, of the Montana Constitution provides that local governments without self-governing powers have the powers provided or implied by law. Generally this means that governments with general powers must receive a legislative grant of authority before they can take a particular action. Under § 7-1-4124, MCA, municipalities with general powers are vested with a number of specific powers, including the power to enact ordinances and resolutions and "to exercise powers not inconsistent with law necessary for effective administration of authorized services and functions." County powers are more limited. These powers are set forth in § 7-1-2103, MCA. The majority of Montana's local governments are organized as general powers governments.

With the adoption of a new constitution in 1972, local governments gained the ability to organize as self-governing units. Article XI, section 6, of the Montana Constitution states that local governments with a self-governing charter "may exercise any power not prohibited by [the] constitution, law, or charter." Courts are required by statute to construe self-governing powers liberally and to resolve doubts regarding these powers in favor of self-governing authority. Section 7-1-106, MCA. However, the power of self-governing units is not unlimited.

Governments with self-governing powers may not exercise certain powers related to the public school system, any power that affects professional occupation standards, or "any power that defines as an offense conduct made criminal by state statute . . . ." See § 7-1-111(3), (8), (11), MCA. There are also certain powers that cannot be exercised without express delegation from the state. These limitations are set forth in § 7-1-112, MCA. In addition, while state statutes apply to local governments with self-governing powers until they have been superseded, a self-governing unit may not "exercise any power in a manner inconsistent with state law or administrative regulation in any area affirmatively subjected by law to state regulation or control." Section 7-1-113, MCA. A power is inconsistent with state law if it "establishes standards or requirements which are lower or less stringent than those imposed by state law or regulation." Section 7-1-113(2). Under § 7-1-113(3), "An area is affirmatively subjected to

state control if a state agency or officer is directed to establish administrative rules governing the matter or if enforcement of standards or requirements established by statute is vested in a state officer or agency."

The Montana Supreme Court addressed the prohibition on self-governing units regulating in a manner that is inconsistent with state law in a 1998 decision regarding the local regulation of alcoholic beverages. See *Town Pump, Inc. v. Bd. of Adjustment of Red Lodge*, 1998 MT 294, 292 Mont. 6, 971 P.2d 349 (1998). At issue in this case was a local regulation that required a conditional use permit for the on-premise consumption of alcohol instead of a special exception. *Town Pump*, ¶ 11. The regulation was challenged on various grounds, including preemption by state law. The Court held that the state's regulation of alcoholic beverages did not preempt the city's regulation of the sale of alcohol because the regulation was "consistent with but more stringent than Montana's regulation of alcohol." *Town Pump*, ¶ 40. The Court relied on a statute stating that Montana could consider whether a proposed retail location for alcohol was consistent with local zoning. According to the Court, Montana law clearly contemplated that cities would impose local zoning to regulate the sale of alcohol.

B. Zoning

Zoning is a specific method a local government may use to regulate land use within its jurisdiction and involves the separation of uses that are determined to be incompatible with each other. Through the zoning process, a community is divided into districts that have been designated for certain uses such as residential, commercial, industrial, or agricultural. The procedures and requirements for zoning in Montana are set forth in Title 76, chapter 2, MCA. County and municipal zoning is authorized for the purpose of promoting the public's health, safety, morals, and general welfare. Zoning at either level can be designated to (1) secure safety from fire and other dangers; (2) promote public health, public safety, and general welfare; and (3) facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Sections 76-2-203, 76-2-304, MCA.

The procedures and requirements for zoning in unincorporated areas are set forth in Title 76, chapter 2, part 1, MCA. Under § 76-2-101, MCA, "whenever the public interest or convenience may require and upon petition of 60% of the affected real property owners in the proposed district," the board of county commissioners may create a planning and zoning district. The board may not create a zoning district that is smaller than 40 acres or if 50% of the real property owners in the district protest the establishment of the district within 30 days of its creation. Section 76-2-101(3),(5), MCA. Once established, the planning and zoning commission is required to adopt a "development pattern for the physical and economic development of the planning and zoning district." Section 76-2-104, MCA. The development pattern, which may be accompanied by corresponding maps and charts, must show the commission's recommendations for the development of the districts. Section 76-2-104(2), MCA. The county may take appropriate actions to enforce these zoning provisions.

C. Interim Ordinances

Interim ordinances are also authorized by Montana law. As an emergency measure, counties may establish an interim zoning district or an interim regulation to promote the public's health, safety, morals, and general welfare if the purpose of the ordinance is to regulate those uses that constitute an emergency and the county is conducting or intends to conduct a study within a reasonable time or is holding a hearing to consider the following: (1) a growth policy; (2) a zoning regulation; or (3) a revision to a growth policy, master plan, or zoning regulation. Section 76-2-206, MCA. Any interim regulation must be limited to one (1) year but may be extended for an additional year with the approval of the board. Section 76-2-206(2), MCA. A municipality may also adopt an interim ordinance "as an urgency measure" that prohibits "any uses which may be in conflict with a contemplated zoning proposal which the legislative body is considering or studying or intends to study within a reasonable time." Section 76-2-306(1), MCA. A municipal interim ordinance is effective within the city limits and up to one (1) mile beyond the boundaries of the city. Unlike county interim ordinances, a municipal interim ordinance is effective for six (6) months from the date of adoption and may be extended, following notice and hearing, for one (1) year. No more than two extensions may be granted. Section 76-2-306(3), MCA.

D. Regulating Medical Marijuana

Local regulations, including zoning regulations, must be justified by a valid exercise of a government's police powers. The police power is a sovereign's inherent authority to establish regulations to protect the public's health, safety, and welfare. The state can exercise its police powers by enacting legislation or by delegating that power to local governments. Local governments may exercise their police powers in a variety of ways, so long as they have the authority to act as provided by law. An example of an ordinance that regulates for the public's health, safety, and welfare is a prohibition on the possession of wild or vicious animals within city limits. The adoption of a zoning ordinance is another example of an exercise of a local government's police powers.

Any regulation enacted pursuant to a government's police powers must also be in accordance with procedural and substantive due process requirements. The 14th Amendment of the United States Constitution and Article II, section 17, of the Montana Constitution prohibit the government from denying a person life, liberty, or property without due process of law. Due process encompasses both procedural and substantive requirements. Procedural due process addresses the process by which an individual's rights are protected and usually requires the government to provide adequate notice and an opportunity for a hearing. Substantive due process requires the government to have an adequate justification for its actions and asks whether the government had a reasonable justification for the interference. Under a substantive due process analysis, the goal pursued by the government must be a valid state interest and there must be a sufficient relationship between the means being used to achieve that goal and the goal itself. The Montana Supreme Court has stated that a zoning ordinance is a constitutional exercise of a government's police power "if it has a substantial bearing upon the public health, safety, morals or general welfare of the community." *Yurczyk v. Yellowstone County*, 2004 MT 3, ¶ 28, 319 Mont. 169, 83 P.3d 266 (2004).

The local regulation of medical marijuana is not expressly mentioned in or prohibited by the MMA. Further, Title 7 of the MCA (Local Government) does not expressly limit local governments from regulating the use or distribution of marijuana for medical purposes through land use and zoning regulations. Whether a particular regulation related to medical marijuana is inconsistent with state law depends on whether: (1) the specific regulatory area is affirmatively subjected to state regulation; and (2) the standards or requirements are lower or less stringent than imposed by state law. Section 7-1-105, 7-1-113(2), MCA. As noted above, "An area is affirmatively subjected to state control if a state agency or officer is directed to establish administrative rules governing the matter or if enforcement of standards or requirements established by statute is vested in a state officer or agency." Section 7-1-113(3), MCA.

It is unclear whether the regulation of medical marijuana is affirmatively subjected to state control. DPHHS is authorized to adopt rules to administer the MMA. The rules "must address the manner in which the department will consider application for and renewals of registry identification cards for qualifying patients and caregivers." Section 50-46-210, MCA. However, while the MMA requires DPHHS to promulgate rules to administer the Act, the rules appear to be limited to the licensing of patients and caregivers. This question would have to be clarified either through the Legislature during the next session or by the courts. However, because local governments cannot establish "standards or requirements which are lower or less stringent than those imposed by state law or regulation," a local regulation that is at least as stringent as or stricter than state law would likely be upheld. This determination would also have to be made on a case-by-case basis. However, as in the *Town Pump* decision, a local government would likely be allowed to enact medical marijuana regulations that are more stringent than those provided by state law.

Overall, there have been very few cases in Montana that have addressed the MMA, and no cases have directly addressed a local ordinance or regulation that restricts medical marijuana. As noted above, a local government has the authority to regulate for the health, safety, and welfare of the public. However, any local restriction on medical marijuana must be reasonably related to a legitimate governmental purpose. While Montana courts have not addressed the application of a local government's police powers to medical marijuana, courts in other states with medical marijuana laws have provided some guidance. In California, for example, a court held that a city could lawfully place restrictions on business licenses for medical marijuana dispensaries in part because nothing in California's medical marijuana law prohibited such restrictions and because the restrictions were consistent with the city's land use, zoning, and business laws. See *City of Claremont v. Kruse*, 177 Cal. App. 4th 1153 (Cal. 2009).

No community in Montana appears to have enacted a ban on the personal use or consumption of marijuana for medical purposes. Because the MMA specifically allows qualifying patients to use marijuana for certain medical conditions with the authorization of a physician, a local ban on personal use would likely be inconsistent with state law. A more uncertain question is related to whether a community may ban commercial establishments that cultivate, grow, sell, or dispense medical marijuana. The MMA is silent on whether commercial establishments may cultivate or distribute marijuana for medical purposes to registered patients.

Some communities, including Kalispell and Helena, have ordinances that require consideration of federal law. Kalispell recently amended its zoning regulations to prohibit the permitting or conditional permitting of any use of land that is violation of federal state, or local law.[6] The ordinance does not specifically address medical marijuana. Similarly, but with respect to business licensing, Helena does not allow the licensing of "any trade, business, occupation, vocation, pursuit, profession or entertainment" that is prohibited by federal law.[7] Because any possession or use of marijuana remains illegal at the federal level, these communities could argue that prohibiting an establishment that violates federal law is reasonably related to a legitimate governmental purpose.

State law authorizes cities or towns to require business licenses. Section 7-21-4101, MCA, provides that cities or towns have the power "to license by ordinance all industries, pursuits, professions, and occupations and to impose penalties for failure to comply with such license requirements." Under this authority, a city council may refuse to issue a license if it is best for the public's interest. Section 7-2-4101(2), MCA. Counties, however, are more limited in terms of business licensing. Section 7-21-2101, MCA, provides that, "The board of county commissioners has jurisdiction and power, under such limitations and restrictions as are prescribed by law, to grant such licenses as are provided by law." Because a license for a commercial medical marijuana establishment is not specifically provided by law, it is not clear whether a county would have the authority to grant such a license.[8]

E. Options

The Legislature could consider any number of options to clarify the local regulation of medical marijuana. These options range from repealing the MMA entirely, and thereby prohibiting the use of marijuana for any purpose, to revising the MMA to address specific concerns regarding the cultivation or commercial distribution of medical marijuana. Specific revisions to the MMA could include a combination of any of the following:

- Specifically authorize or ban commercial establishments that distribute medical marijuana to registered patients.
- Establish a centralized method of providing medical marijuana to registered patients.
- Restrict the number of registered patients a caregiver may serve.
- Reduce the number of plants or the amount of usable marijuana a caregiver or patient may possess.
- Provide that nothing in the MMA prohibits a local government (including a county) from regulating medical marijuana through local regulations, including

[6] City of Kalispell, Ordinance No. 1674, http://www.kalispell.com/mayor/ordinances.cfm (last accessed June 7, 2010).
[7] City of Helena Code §4-1-11 (1926).
[8] The Montana Association of Counties raised this concern in a memo regarding the Medical Marijuana Act from May 20, 2010.

business licensing or zoning.

- Clarify that local governments may not ban the personal use of marijuana for medical purposes.
- Clarify whether commercial establishments, if authorized, would be allowed to operate as for-profit entities.
- Restrict commercial establishments from operating within a certain distance of educational facilities or other areas such as parks.
- Require commercial establishments to maintain permanent locations.
- Prohibit the commercial cultivation of marijuana for medical purposes within city limits or separate cultivation from commercial distribution.
- Provide minimum safety, fire, or security standards for commercial establishments.
- Clarify the manner by which commercial establishments could advertise.
- Clarify the use of medical marijuana by students on school property.

Committee members may request a more in-depth analysis of a specific option or proposal. Unless or until the Legislature or the courts clarify the scope of the MMA in more detail, local regulations will have to be addressed within the current framework outlined above for compliance with state law.

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