

Entering the Marijuana Industry in Michigan

An Overview of the Issues Facing Real Estate Professionals Interested in Commercial Cannabis

Carina Kraatz, JD

Carina.kraatz@kitch.com

Kaitlyn Carr, JD

Kaitlyn.carr@kitch.com



OVERVIEW

1. Michigan's Marijuana Laws
2. The Licensing Process
3. Suitable Commercial Property
4. Contract Language
5. Finance Issues
6. Insurance Recommendations
7. Trademarks
8. Questions

Michigan's Marijuana Laws

2016: Michigan Marijuana Facilities and Licensing Act (MMFLA)

- Formalized system for licensing, regulation and tracking of medical marijuana
- Created five (5) licensed medical marijuana businesses:
 - grower, processor, provisioning center, secure transporter, safety compliance facility

2018: Michigan Regulation and Taxation of Marijuana Act (MRTMA)

- Legalized adult recreational use
- Added microbusiness license and increased grower license to up to 2,000 plants

The Licensing Process

- Marijuana entities need a **state license** AND a **local permit**.
- State licensing process is extensive and can take months for approval.
- Approximately 900 municipalities passed ordinances opting out of recreational marijuana sales.
- Within those participating municipalities, the number of available local permits is limited by:
 - Police Power Ordinances which directly limit the number of allowable facilities; and/or
 - Zoning Ordinances implicitly limiting the number of compliant locations through zoning restrictions and setback requirements.

Suitable Commercial Property

- Factors limiting compliant locations: (1) “Sick Buildings”; (2) utility access and capacity limitations; (3) distance from retail outlets; or (4) for retail facilities, distance from an adequate customer base.
- The purchase prices for *regulatory compliant, structurally sufficient and commercially viable properties* is **several times greater** than would otherwise be the case for non-cannabis uses (e.g., abandon gas station sells for \$3.5M). Property values surrounding cannabis businesses tend to rise.
- For buyers, the goal is to secure suitable property without having to close the transaction until after local permits and State Phase-I prequalification approvals are obtained.
- For sellers, the goal is to ensure the property is purchased contingency free or, alternatively, by a buyer who is likely to secure local permit and State approval and close the transaction at the inflated purchase price.

Contract Language

Initial Disclaimer: This agreement is subject to strict requirements for ongoing regulatory compliance by the parties hereto, including, without limitation, requirements that the parties take no action in violation of the MMFLA, MRTMA (collectively, the “Act”) or the guidance or instruction of the Michigan Marijuana Regulatory Agency (including any successor governmental authority) (the “Regulator”). Section [___] of this Agreement contains specific requirements and commitments by the parties to fully maintain their respective compliance with the Act and the Regulator.

Contract Language

Follow Up Clause: The parties acknowledge and understand that the Act and/or the requirements of the Regulator are subject to change and are evolving as the marketplace for state-compliant cannabis businesses continues to evolve. If necessary or desirable to comply with the requirements of the Act and/or the Regulator, the parties hereby agree to use their respective commercially reasonable efforts to take all actions reasonably requested to ensure compliance with the Act and/or the Regulator, including, without limitation, *negotiating in good faith to amend, restate, supplement or otherwise modify this Agreement* to reflect terms that most closely approximate the parties original intentions but are responsive to and compliant with the requirements of the Act and/or the Regulator.

Contract Language - Leases

Under the MMFLA and MRTMA, a landlord is NOT considered a “true party in interest” if it is “receiving **reasonable** payment for rent on a **fixed basis** under **a bona fide lease** or rental obligation.” Medical FAQs; MRTMA Rule 1(c)(ii)(C).

What is “reasonable”? Market + 25%

Include “escape clauses” that specifically list out federal intervention, changes in federal enforcement policy, forfeiture threats, and federal enforcement actions (such as DEA raids or DOJ criminal charges or administrative actions) as defaults that constitute lease violations. This sort of provision will give the landlord fodder for appealing the Feds.

Contract Language - Leases

Include provisions relating to **hours of operation**, how the tenant treats its **neighbors**, **odors**, **loitering**, use of **hazardous substances**, the **number of people permitted** on the property, and **compliance** with state and local regulatory rules.

Provide for a **strict code of conduct for property use**.
If the tenant is a marijuana retailer, the permitted use provision should explicitly permit “retail sale of marijuana.”
Forbid only those actions that violate **state law** — not federal law.

Finance Issues

- As long as cannabis is illegal federally, it will remain a cash industry (which brings its own security concerns).
- Not all title companies will hold the deposit for cannabis property (check with the law firm to hold).
- Some state credit unions are participating in the cannabis commercial industry, but fees are high.
- **No commingling of funds** attributable to cannabis entities (keep separate for tax purposes).
- Most mortgages require compliance with federal law.
- **No public subsidies!**

Insurance Recommendations

- MMFLA requires medical marijuana businesses have a minimum \$100,000 Cannabis insurance policy, which largely covers bodily injuries.
- Additional coverage to consider: business' general liability, the building, **equipment break down**, business property, loss of income, money and securities, **directors & officers (D&O)**, **cyber & privacy liability**, **employee dishonesty**, **glass coverage**, computer equipment, **finished stock**, **crops**, **spoilage**, **product recall**, **in-transit cargo**, business auto coverage, worker's compensation, professional liability, **pollution**, and **special events**.

Trademarks

- The USPTO refuses to register marks where the goods or services **clearly violate federal law**, such as marks used in the sale of marijuana or drug paraphernalia.
 - Some wiggle room developing.
- Registering trademarks with the **state**, however, is possible because they don't have the same restrictions.



Carina Kraatz, JD

Carina.kraatz@kitch.com

Kaitlyn Carr, JD

Kaitlyn.carr@kitch.com

Kitch Drutchas Wagner Valitutti & Sherbrook
One Woodward Avenue, Suite 2400
Detroit, MI 48226-5485
313.965.7647
www.kitch.com