MEMORANDUM

TO: East Lansing City Council
FROM: Thomas M. Yeadon, City Attorney
RE: Kent County Pros Atty v City of Grand Rapids
DATE: January 14, 2015

I have been asked by Mayor Triplett to advise Council of whether the recent Court of Appeals decision concerning a 2012 City of Grand Rapids charter amendment which decriminalized marijuana has any effect on the current Charter amendment pending in the city of East Lansing. For the reasons stated below, it does not.

The Grand Rapids Charter amendment is distinctly different from the proposed East Lansing amendment. The proposed East Lansing amendment would simply preclude East Lansing from having or enforcing certain ordinances restricting the use, possession, or transfer of less than one ounce of marijuana. The Grand Rapids Charter provision goes well beyond that in that it makes the possession, control, use, and giving away of marijuana a civil infraction and sets fines of $25, $50, and $100 for first, second, and third offenses, respectively. It requires that all fines and costs be waived upon proof that defendant is recommended by a physician to use or provide the marijuana for medical treatment and allows a court to waive the fine if the defendant offers proof that he or she attended a substance abuse program. It also creates an affirmative defense to any prosecution under the Charter that the use or intended use relieves or has the potential to relieve pain, disability, discomfort, or any other adverse symptoms of illness or a medical treatment or restores, maintains or improves, or has the potential to restore, maintain or improve the health or medical quality of life of the user or intended user or users of the marijuana. This broad affirmative defense to the violation would make any prosecution impractical.

Further, the Charter provision prohibits Grand Rapids police officers from bringing any marijuana cases to anyone but the Grand Rapids City Attorney and prohibits the Grand Rapids City Attorney from referring any complaint of a marijuana violation to any other authority for prosecution.

Finally, the Grand Rapids Charter provision also prohibits Grand Rapids police officers and the City Attorney from prosecuting any complaint for the possession, control, use, giving away, or cultivation of marijuana upon proof that the defendant is recommended by a physician, practitioner, or other qualified health professional to use or provide the marijuana or cannabis for medical
treatment. As you can see, the Grand Rapids Charter provision, instead of just precluding prosecutions under local ordinances, mandates they be prosecuted under the local charter provision, and then makes the actual prosecution of them impractical.

The Kent County Prosecuting Attorney challenged the Charter provision on a number of grounds and the Court of Appeals, in an unpublished decision, upheld the Charter provision. See *Kent County Pros Atty v City of Grand Rapids and DecriminalizeGR*, an unpublished per curiam opinion of the Court of Appeals issued January 8, 2015 (Docket No. 316442).

The fact that the decision is “unpublished” is of significance because it means that the decision does not bind lower courts and does not bind anyone but the parties in that case. Even if the case were published, however, the Grand Rapids Charter amendment is so different from the proposed East Lansing amendment that none of the issues raised by the Kent County Prosecutor are applicable to the proposed East Lansing provision. As a result, the decision of the Court of Appeals has no bearing on the City of East Lansing’s proposed Charter amendment.

There are, however, a couple of aspects of the case that are noteworthy. The Court of Appeals analyzed the case by application of the preemption doctrine, noting that a state statute preempts regulation by an inferior government when the local regulation directly conflicts with the statute or when the statute completely occupies the regulatory field. In this case, the Kent County Prosecutor argued that the civil infraction decriminalization of marijuana conflicted with the felony and misdemeanor provisions of marijuana laws under state law. The Court held, however, that “nothing in the civil infraction aspect of the charter amendment purports to prevent the application of state law as it relates to marijuana offenses and therefore it is not a case where the Charter amendment permits what state law prohibits or prohibits what state law permits as required to show a direct conflict to the purposes of preemption.” From my perspective, this is somewhat of a strained interpretation since the Court focused on only two subsections of the Charter provision and ignored the clear overall intent of the Charter amendment to preclude application of the state laws to offenses discovered by Grand Rapids police.

Also noteworthy is the fact that the Court upheld a Charter provision where state law clearly would prohibit an ordinance doing the same thing. MCL 117.4l(3) prohibits a city from making an ordinance that would make possession of marijuana, or any law of this state under which the commission of the offense is punishable by imprisonment for more than 90 days, a civil infraction. The Court held that because the state law referred to ordinances only, the Charter amendment does not conflict with and is not preempted by state law.

Finally, the Court seems to condone the Charter’s restriction on the ability of the local police department to prosecute state violations. There is a published opinion in *Joslin v Fourteenth District Judge*, 76 Mich App 90 (1977) in which the Court held that, to the extent the provision limited the authority of police to enforce state law, it was void. This Court held, however, that the *Joslin*
decision should not apply in this case because it conflicts with the generally-recognized principle that “there is no doubt that control of a city police department is a function of local municipal government.” The Court held that, “thus, we see no conflict with the state law when the city exercises its authority over its police department by limiting when its police force should exercise that discretion.” I don’t believe that would be the ruling if an ordinance was used to try to limit the discretion of the police department, however. As previously mentioned, state law prohibits ordinances that make marijuana offenses a civil infraction. I think an ordinance that, for instance, made it impermissible for officers to bring a complaint for a marijuana violation would be in direct conflict with state law.

In any event, I am concerned with this aspect of the decision because I don’t think it has been thoroughly thought through. Looking at it from the other perspective, I see no ability to take any disciplinary against a police officer who brings charges through the prosecutor’s office to enforce state law in violation of an ordinance attempting to limit their discretion. I think such an ordinance would be very difficult to enforce even if it were upheld. Likewise, such a provision may lead to a false sense of security for the users in other circumstances as well. For instance, if the marijuana charges are brought by other officers that have jurisdiction in East Lansing that would clearly not be bound by an ordinance’s attempt to limit a police officer’s discretion, such as the State Police, the County Sheriff and, in certain instances, MSUPD.

Since our Charter does not apply on MSU’s campus, Council was concerned enough with the possible misinterpretation of the ballot language that it addressed that in the explanatory caption. I think an ordinance attempting to limit enforcement of existing state laws (which also would not be applicable to campus) would exacerbate that problem. As such, from my perspective, I would not recommend that attempts be made to limit the enforcement capabilities of our police officers in any area of the law.

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