

AN ACT TO ENSURE SAFE ACCESS TO MARIJUANA

Katherine D. Laughman, Esq.
January 19, 2018

KP | LAW



THE LEADER IN PUBLIC SECTOR LAW
ATTORNEYS AT LAW

© 2017 KP LAW, P.C. | ALL RIGHTS RESERVED.

Disclaimer

This information is provided as a service by KP Law, P.C. This information is general in nature and does not, and is not intended to, constitute legal advice as to any specific issue. You are advised not to take, or to refrain from taking, any action based on this information without consulting legal counsel about the particular facts of the specific issue.

AN ACT TO ENSURE SAFE ACCESS TO MARIJUANA

- On November 8, 2016, Massachusetts voters approved (53% in favor) Question 4 legalizing the adult use of marijuana and marijuana establishments (Chapter 334 of the Acts of 2016).
- On July 28, 2017, Governor Baker signed the General Court's revised law on the subject, "An Act to Ensure Safe Access to Marijuana" (the "Act"), adopted as Chapter 55 of the Acts of 2017.
- The Act also makes changes to the Medical Use of Marijuana Program, which was established by Chapter 369 of the Acts of 2012, "An Act for the Humanitarian Medical Use of Marijuana," following the passage of Ballot Question 3 in the 2012 general election.



PERSONAL USE OF NON-MEDICAL MARIJUANA

Personal use
of marijuana
not subject to
municipal
regulation:

- **Public possession of 1 ounce or less of marijuana**
 - 21 years or older
- **Home growth**
 - Up to 10 ounces of marijuana for personal use
 - Any marijuana produced on premises by not more than 6 marijuana plants
 - Up to 12 plants if multiple growers on the premises
- **Give away/Transfer to other consumers up to 1 ounce**
 - No remuneration
 - Not advertised to public
 - 21 or older
- **Possession and manufacturing of marijuana accessories**
 - Persons 21 years of age or older may also possess or manufacture marijuana accessories or sell such accessories to a person 21 years of age or older.

PERSONAL USE OF NON-MEDICAL MARIJUANA

Limitations on personal use of marijuana:



- **Visibility**
 - Cultivation and processing marijuana plants may not be visible from a public place.
- **Security**
 - Marijuana or marijuana products exceeding 1 ounce within the person's place of residence must be secured by a lock.
- **Public Consumption**
 - No person shall consume marijuana in a public place or smoke marijuana where smoking tobacco is prohibited.
 - The term "public place" is not defined in the Act; may include areas both privately and publicly owned to which the public have rights of access by invitation, either express or implied.
- **Open Container**
 - Open containers of marijuana or marijuana products are prohibited in the passenger area of any motor vehicle.

TYPES OF LICENSED ADULT USE MARIJUANA

Types of Adult-Use Marijuana Establishments as defined in
G.L. c.94G, s.1

- "Marijuana cultivator"
- "Marijuana retailer"
- "Marijuana product manufacturer"
- "Independent testing laboratory"
- Any other type of licensed marijuana-related business



TYPES OF LICENSED ADULT USE MARIJUANA

**Additional types of
Licensed
Marijuana
Establishments
(Draft CCC Regs
935 CMR 500.005)**

- Craft Marijuana Cultivator Cooperative
- Microbusiness
- Retail (brick and mortar)
- Retail (delivery only)
- Third party transporter
- Existing Licensee Transporter
- Social Consumption – Primary Use
- Social Consumption – Mixed Use



TYPES OF LICENSED MEDICAL USE MARIJUANA

Medical Use Marijuana licensed by the Department of Public Health (105 CMR 725.00)

- Medical Marijuana Treatment Center (or RMD)
 - Each RMD is licensed (registered) to cultivate, process and retail its own marijuana under a single license
 - DPH will continue to regulate medical-use marijuana in the short-term under its existing regulatory scheme, 105 CMR 725
 - Transfer of transfer of oversight and regulation of medical-use marijuana to the Cannabis Control Commission will occur on or before December 31, 2018.



THE CANNABIS CONTROL COMMISSION

- Five member Cannabis Control Commission (“CCC”) has been given comprehensive oversight for all adult use and medical use marijuana
- CCC is charged with implementing and enforcing statewide regulations addressing the following:
 - public health issues, including product labeling, advertising and potency
 - Industry issues, including cultivation, distribution, transportation and seed-to-sale tracking
 - Market participation for communities, including women, minorities, veterans and growing cooperatives
 - Licensing
 - Inspections
 - Enforcement



CURRENT TIMELINE

August 1, 2017
– Cannabis
Advisory Board
*(Already in
place)*

- Appointment of a 25-member Cannabis Advisory Board, with members appointed by a variety of officials and organizations, charged with making recommendations on guidelines, rules and regulations for the recreational use of marijuana.

September 1,
2017 – Cannabis
Control
Commission
*(Already in
place)*

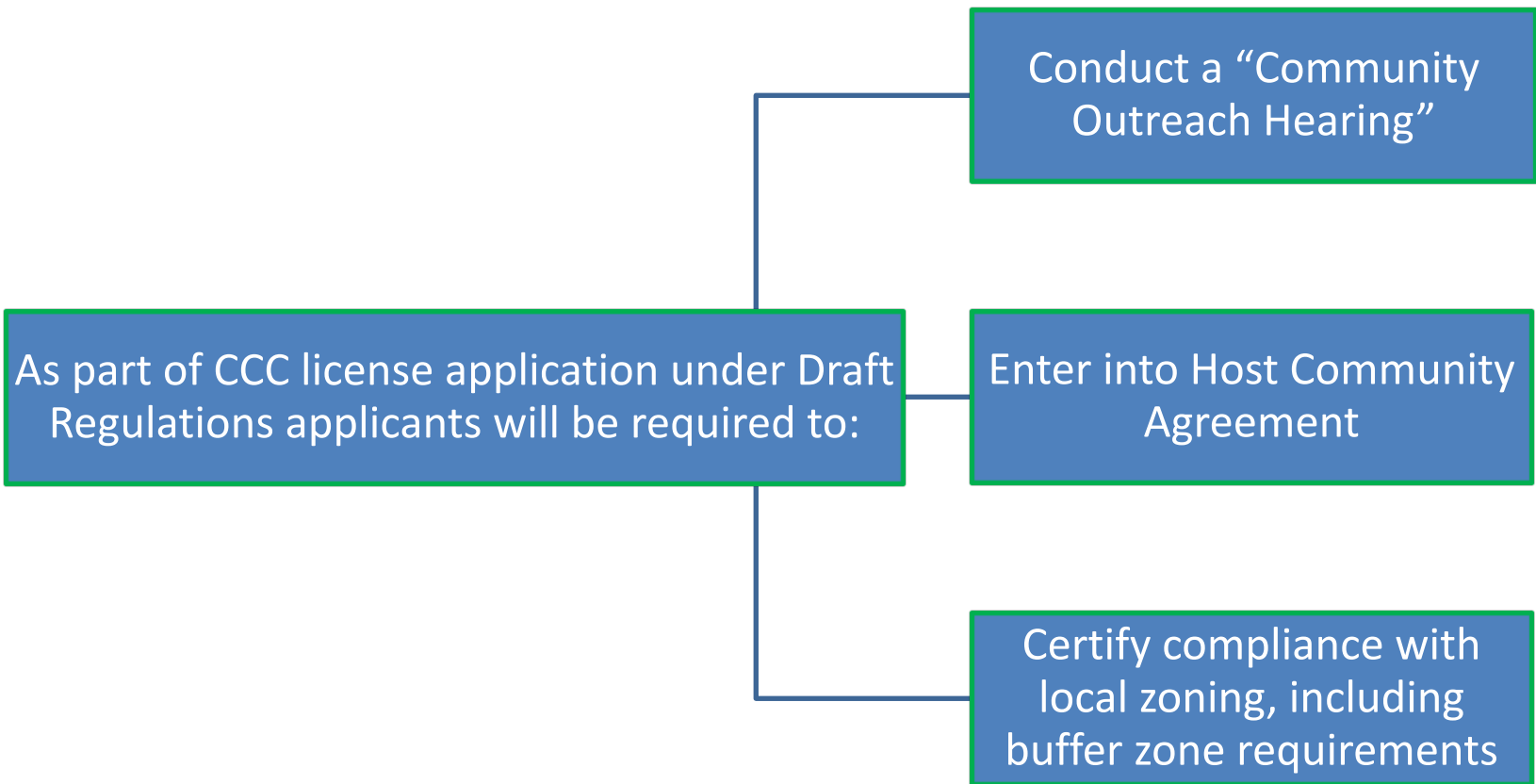
- Appointment of a five-member CCC, by the Governor, Attorney General and Treasurer.

Steven J. Hoffman, Chairman
Jennifer Flanagan
Britte McBride
Kay Doyle
Shaleen Title

CURRENT TIMELINE

-
- | | |
|---|--|
| March 15, 2018 – CCC Adoption of Regulations | <ul style="list-style-type: none">• Adoption of regulations, guidelines and protocols by the CCC for the issuance of licenses for recreational marijuana establishments.• <i>Draft regulations were approved on December 21, 2017</i> |
| April 1, 2018 – Acceptance of License Applications Begins | <ul style="list-style-type: none">• Acceptance of applications by the CCC for recreational marijuana licenses not later than April 1. |
| June 1, 2018 – License Issuance | <ul style="list-style-type: none">• The CCC may begin issuing licenses, prioritizing applications under statutory criteria. The CCC must approve or deny applications within 90 days. |
-

MUNICIPAL ROLE IN LICENSING BY THE CANNABIS CONTROL COMMISSION



COMMUNITY IMPACT MEETING

Draft CCC Regulations require an Applicant to hold a Community Outreach Meeting within six (6) months prior to submission of license application to CCC

Notice

Hearing must be advertised at least seven (7) calendar days prior to date of hearing

Copy of hearing notice filed with town or city clerk, planning board, contracting authority for the municipality, local licensing authority for adult use marijuana (if applicable)

Copy of hearing notice must be sent to abutters

Content of Hearing

Discussions of type(s) of Marijuana Establishment to be located at proposed address

Security information

Steps taken by Applicant to prevent diversion to minors

Plan for positive community impact

Information to demonstrate location will not be a nuisance

Requirement for Q&A from community members to representatives of Marijuana Establishment

HOST COMMUNITY AGREEMENTS

Host Community Agreements

The Act requires that both recreational marijuana establishments and medical marijuana treatment centers enter into a HCA with host communities and allows for a “community impact fee.”

- The community impact fee must be “reasonably related to the costs imposed upon the municipality by the operation of the marijuana establishment or medical marijuana treatment
- The community impact fee shall not amount to more than 3 per cent of the gross sales of the marijuana establishment or medical marijuana treatment center or be effective for longer than 5 years.”
- The Act does not expressly preclude renegotiation of a HCA at the end of the initial five year term.
- The municipality is required to document its costs.
- Applicant must certify to the CCC that it has entered into a HCA as part of application to CCC.

ZONING BYLAW/ORDINANCE COMPLIANCE

Applicants must submit to the CCC documentation that a proposed site is compliant with the bylaws/ordinances *in effect* at the time of the application, including compliance with buffer zone requirements



Once application filed with CCC is deemed complete, the CCC will notify the municipality



The municipality has 60 days from date of correspondence from CCC requesting municipal input to notify the CCC that the applicant is not in compliance with local ordinance/bylaw



If no communication is sent from the municipality, the Applicant will be deemed in compliance

ZONING BYLAWS/ORDINANCES

Municipalities may regulate the “time, place and manner” of marijuana establishment operations and impose reasonable safeguards

Ordinances and bylaws may not be “unreasonably impracticable.”

- *“the measures necessary to comply” may not subject licensees to “unreasonable risk or require such a high investment of risk, money, time or any other resource or asset that a reasonably prudent businessperson would not operate a marijuana establishment.” (G.L. c.94G, s.1)*

Municipalities may determine that a proposed marijuana-related use falls under an existing use authorized by its bylaws or ordinances

- *Municipalities may not interpret prohibitory bylaws/ordinances as excluding marijuana establishments*

A municipality may implement its own licensing process provided it does not conflict with state law.

ZONING BYLAWS/ORDINANCES

Ordinances and bylaws may also:

- restrict licensed cultivation, processing and manufacturing of marijuana that is a “public nuisance,”
- establish restrictions on public signs related to marijuana establishments, provided the standard is not more restrictive than those applied to retail establishments selling alcoholic beverages within a municipality
- establish a civil penalty for violation of an ordinance or bylaw.
- Establish a buffer zone

Bylaws/Ordinances may not bar the transportation of marijuana or marijuana products

Standard practices for adoption of zoning ordinances or bylaws will apply (G.L. c.40A, sec.5)

ZONING BYLAWS/ORDINANCES

Buffer Zone Requirements

Under the Act, a Marijuana Establishment may not be located within 500 feet of a pre-existing public or private school providing education in kindergarten or any of grades 1 through 12.

Municipalities may adopt an ordinance or bylaw that reduces that distance requirement

NOTE: This buffer is less restrictive than the default buffer zone imposed by DPH on medical marijuana treatment centers:

“Absent local siting requirements, MMTCs shall not be sited within a radius of five hundred feet of a school, daycare center, or any facility in which children commonly congregate.”

105 CMR 725.110(A)(14)

LIMITATION OR PROHIBITION

Pursuant to G.L. c.94G, §3, a municipality may prohibit or limit recreational marijuana establishments by bylaw or ordinance with respect to the following:

prohibit the operation of **one or more types** of marijuana establishments

limit the number of marijuana retailers **to fewer than 20 percent** of the number of retail off-premises alcoholic beverage licenses issued under G.L. c.138 by the municipality

limit the number of any type of marijuana establishment to **fewer than the number of medical marijuana treatment centers** registered to engage in the same type of activity in the municipality.

LIMITATION OR PROHIBITION - PROCESS

If a municipality voted in favor of Question 4 on November 8, 2016 [i.e., a majority of voters casting ballots voted “yes” on the question], then two votes must be taken before a prohibiting or limiting bylaw/ordinance can be effective:

- (1) it must be approved by the voters by ballot at an annual or special election, and
- (2) the ordinance or bylaw must be approved by the local legislative body.

BALLOT PROCEDURES FOR LIMITATION/PROHIBITION

Chapter 94G, §3 provides the general form for a ballot question.

- The question must include the entire proposed bylaw or ordinance
- Ballot must include brief summary prepared by City Solicitor/Town Counsel making clear the number and types of marijuana establishments that will be permitted to operate.

Pursuant to G.L. c.54, §42C, a City or Town Clerk must receive notice of the ballot question, with the full legislation text and counsel summary, no less than 35 days prior to the date of the election.

The bylaw or ordinance approved by ballot must be the same or substantially similar as that approved by the local legislative body. (See AG Decision – Milford 1/9/18)

LIMITATION OR PROHIBITION - PROCESS

If a municipality voted against Question 4, a prohibition or limitation may be adopted simply by bylaw/ordinance through vote of the local legislative body

- This special provision will expire on December 31, 2019, after which the two-step process requiring both a ballot question and legislative approval of a bylaw will apply to all municipalities.

FORM OF BYLAW TO LIMIT OR PROHIBIT

Zoning v. General Legislation



- The language in the Act is ambiguous with respect to whether a bylaw or ordinance implementing a prohibition or limitation must be zoning or general in nature.
- The Attorney General has approved both general and zoning bylaws prohibiting adult use marijuana establishments, but has advised that a zoning bylaw should be adopted.
- Given the lack of clarity on this issue, municipalities may wish to consider adopting both a general and a zoning bylaw imposing a prohibition/limitation.

CONVERSION OF MEDICAL MARIJUANA TREATMENT CENTERS

Zoning bylaws/ordinances shall not prohibit the conversion of a medical marijuana treatment center licensed or registered not later than July 1, 2017 that is engaged in the cultivation, manufacture or sale of marijuana or marijuana products to a marijuana establishment for adult use engaged in the same type of activity. G.L. 94G, s.3(a)(1)

- Questions to ask:
 - Has an applicant for a MMTC obtained a provisional or final certificate of registration no later than July 1 2017?
 - Does the municipality intend to regulate (instead of prohibit) adult use marijuana?
- If the answer is “yes” to both questions, the municipality must allow adult use of the same type in the location of the licensed MMTC.

ON-SITE SOCIAL CONSUMPTION

Petition for Question on State Ballot to Social Consumption

Requirements:

Petition of not fewer than 10 percent of the number of the voters of the city or town voting at the state election preceding the filing of the petition (G.L. c.94G, s.3(b))

- The ballot question must be presented to the voters of the city or town at the next biennial state election to allow the consumption of marijuana and marijuana products on the premises where they are sold.
- Petition must conform to provisions of General Laws relating to initiative petitions at the municipal level
- Likely requirement will be for petition to be filed with the Secretary of the Commonwealth no later than the first Wednesday in August.

ON-SITE SOCIAL CONSUMPTION



Under draft CCC regulations, on-site social consumption establishments will be licensed as a sub-category of retail use.



Two categories of social consumption licenses

- Primary use – more than 50% of proceeds from sale of marijuana
- Mixed use – less than 50% of proceeds from sale of marijuana



Municipalities that allow for retail sales but do not intend to allow for on-site social consumption (absent a citizen petitioned ballot vote) may need to be pro-active in prohibiting social consumption establishments as a separate use.

ZONING MORATORIA

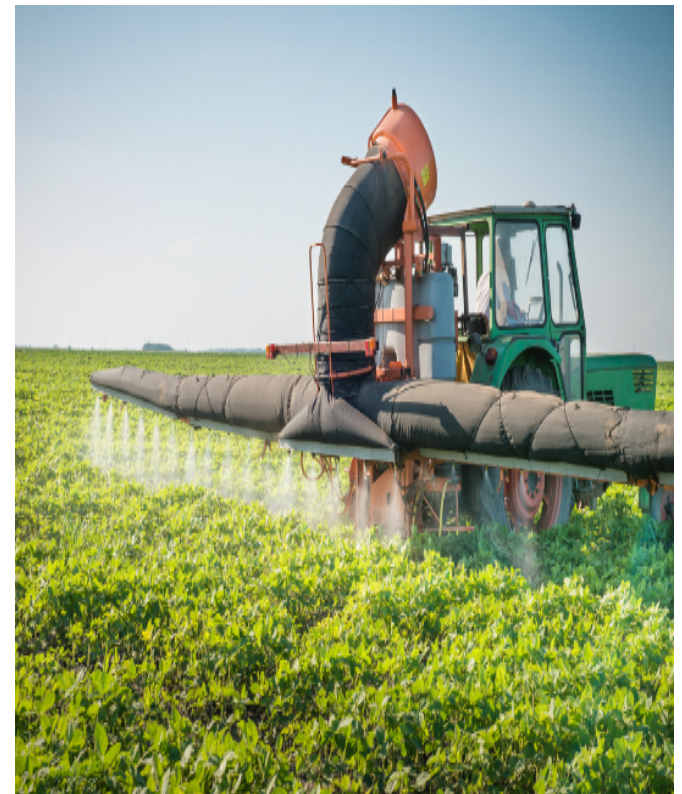
Zoning Moratoria

- A zoning moratorium, imposing a temporary limit on the ability of applicants to locate marijuana establishments within a municipality, may be a powerful tool available to municipalities to allow additional time to plan for regulation of marijuana uses.
- The Attorney General has approved moratoria in many municipalities through December 31, 2018.
- Approximately one-third of the municipalities in the Commonwealth have imposed a moratorium or some form of prohibition to date.

AGRICULTURAL USE EXEMPTION

Marijuana Related Uses Not “Agriculture”

- Chapter 351 of the Acts of 2016 included an amendment to the Zoning Act, G.L. c.40A, §3 which states that the “growing, cultivation, distribution or dispensation of marijuana” does not qualify for the agricultural exemption under the Zoning Act.
- The Act now expressly adds that municipalities are not precluded “from establishing zoning bylaws or ordinances which allow commercial marijuana growing and cultivation on land used for commercial agriculture, aquaculture, floriculture, or horticulture.”



LOCAL TAX OPTION



- The Act created a new Chapter 64N of the General Laws setting tax rates for the sale of recreational marijuana products.
- Section 3 allows cities and towns to impose a local sales tax on the “sale or transfer of marijuana or marijuana products by a marijuana retailer operating within the city or town” up to 3% of the total sales price, an increase from the previous 2%.
- If a municipality has already accepted §3, a new vote of the legislative body will be required in order to increase a sales tax rate up to 3%.

MEDICAL-USE MARIJUANA

The Act also makes a number of significant changes to the regulation of medical-use marijuana including the following:

- The eventual repeal of chapter 369 of the Acts of 2012, “An Act for the Humanitarian Medical Use of Marijuana.”
- The adoption of a new Chapter 94I – “Medical Use of Marijuana.”
- The transfer of the oversight and regulation of medical-use marijuana to the CCC.
- The continuation of the Department of Public Health regulating medical-use marijuana in the short-term under its existing regulatory scheme, 105 CMR 725, until the transfer of oversight and regulation is complete.
 - This transfer must occur on or before December 31, 2018.



MEDICAL-USE MARIJUANA - PRIORITIZATION



The CCC shall – for purposes of reviewing and approving an application – consider the issuance of a provisional or final certificate of registration as of July 1, 2017 as achieving “accreditation status”:

- The CCC shall ensure an expedited review process for these applicants and shall only require specific information not previously required by DPH



Beginning April 1 to April 15, 2018, the CCC shall prioritize review and licensing decisions for certain applicants:

- Medical Marijuana Treatment Centers (RMDs) with a final or provisional certificate in good standing that are operational and dispensing
- Applicants who demonstrate experience in or business practices that promote economic empowerment in communities disproportionately impacted by high rates of arrest and incarceration for offenses . . .

CO-LOCATION OF MEDICAL AND ADULT-USE MARIJUANA

Virtual Separation Requirements:

- A Marijuana Establishment that is cultivating, processing or selling marijuana and marijuana products for medical use as well as marijuana and marijuana products for adult use must create virtual separation of the products through tracking methodology approved by the Commission under 935 CMR 500.

Physical Separation Requirements:

- A marijuana retailer that is co-located with a medical marijuana treatment center shall physically separate marijuana and marijuana products for medical use from marijuana for adult use within the sales area. There shall be a physical barrier that, in the opinion of the Commission, adequately separates sales of marijuana and marijuana products for medical use from marijuana for adult use within the sales area.

FEDERAL LAW

2009	<u>The Ogden Memorandum</u> : DOJ guidance that federal resources should not be used to prosecute operations which are in compliance with state law.
2011	<u>The Cole Memorandum</u> : federal resources should not be used for enforcement against individuals with serious illnesses (or their caregivers) who use marijuana as part of a recommended treatment regimen consistent with state law.
2018	<u>Sessions Memorandum</u> : Rescinds previous DOJ policy guidance; directs all U.S. Attorneys to “use previously established prosecutorial principles that provide them all the necessary tools to disrupt criminal organizations, tackle the growing drug crisis, and thwart violent crime across our country.”
	<u>U.S. Attorney for Massachusetts (Andrew E. Lelling)</u> : responded to the Sessions Memorandum stating that his office will “aggressively investigate and prosecute bulk cultivation and trafficking cases, as well as individuals who use the federal banking system illegally” and that his office “cannot ... provide assurances that certain categories of participants in the state-level marijuana trade will be immune from federal prosecution.”

EMPLOYMENT ISSUES

- The new law may also have significant implications for public employers.
- The relevant portion of the law provides:

“This chapter shall not require an employer to permit or accommodate conduct otherwise allowed by this chapter in the workplace and shall not affect the authority of employers to enact and enforce workplace policies restricting the consumption of marijuana by employees.”
- Public employers may continue to prohibit their employees from using or possessing marijuana in the workplace or in public buildings and from working while impaired by marijuana.
- Drug and alcohol testing and related policies should be reviewed and updated or clarified to ensure that such policies will continue to be consistent with the public entity’s desired treatment of marijuana following the change in the law.

QUESTIONS?



CONTACT INFORMATION

Katherine D. Laughman, Esq.

KP Law, P.C.

101 Arch Street, 12th Floor

Boston, MA 02110

(617) 556-0007

klaughman@k-plaw.com



The Leader in Public Sector Law