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"THE REGULATION AND TAXATION OF MARIJUANA ACT":

A Summary for Municipal Counsel

AN INFORMATIONAL MEMO FROM THE MASSACHUSETTS MUNICIPAL LAWYERS ASSOCIATION

The "Regulation and Taxation of Marijuana Act" ("Act"), which was approved by the voters at the November 2016 state election, adds several new provisions to existing statutes and enacts new statutes, related to the licensing and taxation of marijuana production and sales. (Although this has been popularly referred to as allowing "recreational" use of marijuana, the term "recreational" is not used in the Act.)

First, the Act adds new sections to Chapter 10 of the General Laws, which establish (i) a Cannabis Control Commission ("CCC"), to be appointed by the State Treasurer, and (ii) a "Cannabis Advisory Board" ("CAB"), to be appointed by the Governor. (G.L. c. 10, §§76, 77).

Second, the Act enacts a new Chapter 64N, which imposes a state excise tax of 3.75% on the sales of marijuana and marijuana products (other than medical marijuana), and allows municipalities, as a local option, to impose an additional local sales tax of up to 2%.

Third, the Act enacts a new Chapter 94G to the General Laws, entitled "Regulation of the Use and Distribution of Marijuana Not Medically Prescribed" ("Chapter 94G"). Some of the key provisions of Chapter 94G are the following:

A. Definitions. Section 1 of Chapter 94G defines a "marijuana establishment" ("ME") to include marijuana cultivators, product manufacturers, testing facility, retailers, or another "licensed marijuana-related business," as well as establishments for on-premises consumption of marijuana products.

B. Functions of the CCC. Section 4 of Chapter 94G provides that MEs and related marijuana businesses will be licensed by the CCC (not by local licensing authorities, as is the case with liquor establishments subject to G.L. c. 138). The CCC is directed to promulgate regulations, including fees (subject to maximums set in the Act). Among the subjects to be addressed by the CCC are licensure and employment qualifications, health and safety standards for processing and manufacture, and requirements for security, record-keeping, testing and

labeling. The CCC regulations may not prohibit the operation of a state-registered medical marijuana treatment centers ("MMTC") and an ME at a shared location.

Section 5 of Chapter 94G provides that the CCC shall issue a license to an applicant that meets all regulatory requirements, unless the municipality in which the ME is to be located notifies the CCC that the ME "is not in compliance" with an ordinance or bylaw adopted in compliance with Section 3 of the chapter (discussed below) that is "in effect at the time of application." MEs must be at least 500 feet from a public or private school (grades K-12), unless a municipality has, by ordinance or bylaw, reduced the requirement.

Separately, Section 9 of the Act requires the CCC to promulgate regulations by September 15, 2017, and to begin to accept applications from "experienced marijuana establishment operators" by October 1, 2017. An "experienced marijuana establishment operator" is defined as either a registered MMTC, or a "reorganized marijuana business" established by an MMTC board of directors. This seems intended to allow MMTCs to create affiliated, for-profit businesses to operate the recreational-marijuana facilities that are allowed by the Act. Under Section 6 of the Act, if the CCC fails to adopt regulations by January 1, 2018, MMTCs may begin to manufacture and sell marijuana products, until the CCC adopts regulations and begins to issue licenses.

C. Municipal controls on MEs. Section 3 of Chapter 94G allows municipalities to adopt ordinances/bylaws for MEs that impose "reasonable safeguards" on the time, place, and manner of operation of an ME that are not "unreasonably impracticable," and not in conflict with Chapter 94G or CCC regulations. An "unreasonably impracticable" requirement is defined in Section 1 as one that subjects a ME licensee to "unreasonable risk" or "require[s] such a high investment of risk, money, time, or any other resource or asset that a reasonably prudent businessperson would not operate" an ME. Further, Section 3(a)(1)-(2)imposes limits on the extent of municipal regulation:

(1) A zoning ordinance or bylaw may not prohibit an ME "in any area in which a MMTC is registered to engage in the same type of activity."

(2) An ordinance/bylaw that limits the number of MEs in the municipality requires a vote of the voters," if the ordinance/bylaw would:

(a) Prohibit one or more types of MEs;

(b) Limit the number of marijuana retailers to fewer than 20% of the number of licenses issued in the municipality for the retail sale of alcoholic beverages; or,

(c) Limit the number of MEs to fewer than the number of registered MMTCs registered to engage in the same type of activity in the municipality.

It is unclear what procedure is to be followed to implement the requirement for a "vote of the voters" or, indeed, whether that requirement for the adoption of an ordinance/bylaw is consistent with other statutes that apply to municipalities.

A municipality may restrict the cultivation, processing, and manufacturing of marijuana that is a public nuisance, and may reasonably restrict ME signage. (Section 3(a)(3)-(4).)

A municipality may establish civil penalties for violations of ordinances/bylaws adopted under Section 3. (Section 3(a)(5).)

Section 3(b) of Chapter 94G establishes a procedure for holding a municipal referendum, by petition, at the next biennial state election to determine whether to allow the on-premises consumption of marijuana sold on the premises. If there is a majority vote not to allow such businesses, the municipality "shall be taken to have not authorized" such consumption. It is unclear whether this negative vote is necessary to prevent the CCC from licensing such establishments in the municipality, or whether a favorable municipal vote is needed to allow CCC licensing.

Section 3(d) provides that an agreement between a municipality and an ME may not require payment of a fee "that is not directly proportional and reasonably related to the costs imposed" on the municipality by the operation of the ME. (It is not clear whether this provision would affect "host community agreements" that have already been executed with MMTCs.)

D. Other Provisions Affecting Municipal Regulation of Marijuana Use

Chapter 94G allows a municipality to regulate or prohibit possession or consumption of marijuana in a public building, and to prohibit smoking of marijuana in public places or where smoking tobacco is prohibited. (Sections 2(d)(2) and 13(c).) A municipality may also enforce municipal workplace policies that prohibit the consumption of marijuana by municipal employees.

A municipality may not prohibit the transportation of marijuana or marijuana products, or impose requirements that make such transportation "unreasonably impracticable."

As noted above, a municipality may impose a local excise tax of up to 2% on the sale of marijuana products. The Act does not specify the procedure for doing so, but presumably this would require legislative action, as with the adoption of other local-option laws and taxes.

E. Provisions Affecting Personal Cultivation, Possession, and Use

Section 2 of Chapter 94G provides that the statute does not affect existing penalties for operating a motor vehicle while impaired by marijuana use. Further, the statute does not permit either the transfer of marijuana products to a person under 21 years of age or the possession, use, or sale of marijuana by such persons.

Section 7 allows possession, use, purchasing, processing, and manufacturing one ounce or less of marijuana. Within his or her "primary residence," a person may possess up to ten ounces of marijuana, and possessing, cultivating, or processing not more than 6 plants for personal use, "so long as not more than 12 plants are cultivated on the premises at once".

Section 2(d) of Chapter 94G provides that the possession or consumption of marijuana may be prohibited or otherwise regulated "within a building owned, leased or occupied by the commonwealth, a political subdivision of the commonwealth or an agency of the commonwealth or a political subdivision of the commonwealth." However, a provision of the same section that applies to all property states that "a lease agreement shall not prohibit a tenant from consuming marijuana by means other than smoking on or in property in which the tenant resides unless failing to do so would cause the landlord to violate a federal law or regulation." Therefore, the effect of the Act on the use of non-smoking marijuana products in public housing may need to be clarified.

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