Dispensing Knowledge on MA Marijuana Law

BY GARY P. LILIENTHAL AND ERIC T. SPEED

BOSTON — Massachusetts is now among a number of states permitting the limited dispensing and use of marijuana and related products for medical purposes. After a resounding victory at the polls in 2012, the state adopted "An Act for the Humanitarian Medical Use of Marijuana" (Chapter 369 of the Acts of 2012) and its corresponding Department of Public Health regulations (105 CMR 725) enabling and regulating the establishment of up to 35 marijuana dispensaries statewide. The statute and the regulations closely control some salient aspects of the placement and operation of the dispensaries, yet the real "devils in the details" that continue to be worked out are local land use issues in siting and operating this unique use.

REAL IDEAS

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Of the 35 potential sites, the statute and the regulations provide for a maximum of five dispensaries per county and a minimum of one per county. There are 14 counties in Massachusetts. At present, there are seven counties with applications in the "Inspection Phase," the final stage of state review. Certain applicants with unapproved applications have been invited to submit applications for one or more of the seven open counties. Applications are considered on a first come, first served basis. The state review process considers criteria such as the reputation and experience of the people applying, financial viability of the applicant, and local support or opposition to the application. Applications must be site specific. The only state regulation addressing siting states that, absent local requirements, each dispensary must be at least 500 feet from a school, day care facility, or other type of location where children may gather. Beyond that, power is left to the local municipalities to institute land use controls.

Photo: Derek Szabo

A large number of municipalities, especially locations with proposed dispensaries, have debated whether to institute regulations controlling this use. Similar to any other business, the use of property for a marijuana dispensary will need to comply with local use and other zoning regulations. However, with this more impactful use category, municipalities are pursuing a myriad of controls over siting and operation. While an outright ban on dispensaries has been struck down by the Massachusetts Attorney General's office, temporary moratoria have been allowed as a method of delaying the opening of facilities while local officials decide how best to handle zoning issues.

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A number of municipalities have tailored specific "medical marijuana dispensary" use categories and adopted districts where the use may be allowed by special permit. New zoning regulations have been adopted in Brookline, Brockton, Milford, Springfield and Newton. In locations such as Salem, which have decided not to change their existing zoning, determinations must be made on which existing use category will encompass dispensaries. Whether a facility can qualify under a general "Business" use category has yet to be determined. While that may be possible in a community more receptive to the idea of hosting a dispensary, it could also lead to costly and delaying litigation.

Next in the local approval process is to determine what terms or conditions must be met for the approval of a dispensary in an allowed use district. Likely, each municipality permitting such use will make its operation dependent upon the issuance of a special permit or a similar public hearing type process. The use may also be made subject to district-wide, non-discretionary dimensional requirements (e.g. setbacks, parking etc.) and other specific use related restrictions.

These considerations and restrictions are not unlike those placed on Adult Entertainment Zones. Generally, special permits are governed by M.G.L. c. 40A §9. In short, they are a permitting safety net which gives the special permit granting authority, usually the Zoning Board of Appeals or the Planning Board, broad discretionary authority to determine whether a use is "in harmony with the general purpose and intent of the ordinance or by-law."

Marijuana dispensaries pose complicated issues. A board will likely consider the effect on other uses in the neighborhood, as well as the applicant's plans for its facility and operation. Such matters will be raised

continued on page 35

Marijuana Law

continued from page 10

both by the board and the public during the public hearing process. The board will likely impose conditions such as the following: security, hours of operation, refuse collection and disposal, lighting, crowd control, deliveries, access and egress, the potential presence of minors, public transportation, parking, accessibility by public safety, a written operations handbook, limiting the approval to the specific applicant, limiting the number of people at the facility at any one time, limiting the facility to "appointment only," minimum staffing requirements, requiring interior and exterior CCTV surveillance, interior and exterior facility maintenance, maintaining records of all individuals visiting facility (subject to HIPAA requirements) and banning congregating of customers within a certain distance of the facility. This process allows the municipality significant control on how the dispensaries will operate.

While 63 percent of the voters of the Commonwealth wanted to see medical marijuana dispensaries placed somewhere, it will be determined at the local level where and on what terms they will ultimately be located.

(As of the writing of this article, dispensaries have moved into the final state approval phase for the following municipalities: Dennis, Salem, Haverhill, Northampton, Ayer, Newton, Lowell, Quincy, Brookline, Brockton and Milford.)

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