



115 North Street, Suite 3; Hingham, MA 02043  
Exec. Dir. email: [jjampke@massmunilaw.org](mailto:jjampke@massmunilaw.org)

(781) 749-9922 Fax (781) 749-9923  
website: [www.massmunilaw.org](http://www.massmunilaw.org)

**“THE REGULATION AND TAXATION OF MARIJUANA ACT”:  
What Municipalities Need to Know  
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.)

The Act adds a new **Chapter 94G** to the General Laws, entitled “Regulation of the Use and Distribution of Marijuana Not Medically Prescribed.” The following summarizes the key provisions of Chapter 94G that particularly affect the extent of municipal authority to regulate the siting and operation of **marijuana establishments (“MEs”)** that will produce and sell marijuana products, as well as the possession and use of marijuana in public buildings and places, use by municipal employees, and the personal use and cultivation of marijuana.

**When Do Provisions of the Act Take Effect?**

Unless the Legislature changes the dates, the Act legalizes (with restrictions) the personal use and cultivation of marijuana, as of December 15, 2016. The licensing process for MEs is scheduled to begin on October 1, 2017. To prepare for the implementation of the Act, municipalities need to understand, and respond to, several provisions of the Act, especially those that affect:

- **Zoning Bylaws and Ordinances**
- **Local Excise Taxes**
- **Regulation of Marijuana Use in Public Spaces and by Municipal Employees**

**What Agency Will Issue Licenses to ME’s?**

Unlike the licensing of alcohol sales, licenses for MEs will be issued by a state agency, not by municipalities. The Act establishes a Cannabis Control Commission (“CCC”), to be appointed by the State Treasurer, which will largely control the licensing of MEs other than

medical marijuana treatment centers (“MMTCs”). MMTCs will remain under the control of the Department of Public Health.

### **May Municipalities Regulate the Operation of MEs?**

Under Section 3 of Chapter 94G, municipalities may adopt ordinances/bylaws for MEs that impose “reasonable safeguards” on the time, place, and manner of operation of an ME, as long as the requirements are not “unreasonably impracticable,” and not in conflict with Chapter 94G or CCC regulations. An “unreasonably impracticable” requirement is one that subjects an ME licensee 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” an ME.

### **May Municipal Zoning Ordinances and Bylaws Regulate or Prohibit MEs?**

A zoning ordinance or bylaw may limit the location of MEs. However, such an ordinance/bylaw may not prohibit an ME “in any area in which a MMTC is registered to engage in the same type of activity.”

Further, 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.

Section 3 also provides for a municipal referendum, to be held at a biennial state election, on whether to allow or prohibit the consumption of marijuana products on the premises where they are sold. If there is a majority vote not to allow such businesses, the municipality “shall be taken to have not authorized” such consumption.

### **What Effect Will Local Zoning Provisions Have on State Licensing of MEs?**

Under Chapter 94G, when the CCC receives an ME license application, it may not issue the license if the municipality in which the ME is to be located informs the CCC that the ME is not in compliance with an ordinance/bylaw that (i) is in effect at the time of the application, and (ii) that complies with the provisions of Chapter 94G.

Since Chapter 94G directs the CCC to begin accepting ME applications by October 1, 2017, municipalities should have ordinances/bylaws that control ME locations (and that comply with the limitations discussed above) in effect before that date, in order to have an effect on CCC licensing.

### **What Other Controls May Municipalities Impose on Marijuana Production and Sales?**

Under Chapter 94G, municipalities will have authority to:

- Restrict the licensed cultivation, processing and manufacturing of marijuana that is a public nuisance.
- Establish reasonable restrictions on public signs related to marijuana establishments.
- Establish civil penalties for ordinance/by-law violations.

Municipalities may not prohibit the transportation of marijuana or marijuana products, or impose requirements that make such transportation “unreasonably impracticable.”

### **May Municipalities Impose Excise Taxes and Fees on MEs?**

Under the Act, municipalities, as a local option, may impose a local excise tax of up to 2% on the sales of marijuana and marijuana products (other than medical marijuana). (The Act also imposes a state excise tax of 3.75%.) The Act does not specify the procedure for adopting the local excise tax. Presumably this would require action by the municipal legislative body (i.e., town meeting or the town/city council).

Chapter 94G provides that municipalities may have agreements with MEs for the payment of a fee to the municipality, but the fee must be “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.

### **How Might Chapter 94G Affect Municipal Authorization of MMTCs?**

Although MMTCs are not directly affected by Chapter 94G, municipalities should be aware that the licensing of MMTCs in the municipality will affect municipal regulation of MEs.

As noted above, under Chapter 94G, a zoning ordinance/bylaw may not prohibit an ME “in any area in which an MMTC is registered to engage in the same type of activity.” Therefore, approval of an MMTC may limit the future regulation of ME’s within the same “area.” (While ambiguous, this term might be interpreted to mean the zoning district where the MMTC is allowed).

Further, Chapter 94G directs the CCC to give licensing priority to MMTCs that wish to establish a related ME. If a municipality wishes to ensure that an MMTC (or a for-profit affiliate) does not undertake the sale or production of non-medical marijuana, this should be the subject of a contractual agreement between the municipality and the MMTC.

### **May Municipalities Regulate Marijuana Use in Public Places and by Municipal Employees?**

Under Chapter 94G, a municipality may:

- Regulate or prohibit possession or consumption in a public building.
- Prohibit smoking in public places or where tobacco smoking is otherwise prohibited.
- Enforce municipal workplace policies restricting consumption of marijuana by municipal employees.

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.

### **How Does Chapter 94G Affect the Personal Use and Cultivation of Marijuana Products?**

Municipal officials should be aware of the following provisions of Chapter 94G that affect personal possession and use.

Chapter 94G allows the possession, use, purchasing, processing, and manufacturing of one ounce or less of marijuana. Within his or her “primary residence,” a person may possess up to ten ounces of marijuana, and may possess, cultivate, or process not more than 6 plants for personal use, “so long as not more than 12 plants are cultivated on the premises at once”.

Chapter 94G 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.

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[jlampke@massmunilaw.org](mailto:jlampke@massmunilaw.org)