115 North Street, Suite 3; Hingham, MA 02043
Exec. Dir. email: jlampke@massmunilaw.org
(781) 749-9922 Fax (781) 749-9923
website: www.massmunilaw.org

December 1, 2016

His Excellency Charlie Baker
Governor
The State House, Room 280
Boston, MA 02133

The Honorable Stanley C. Rosenberg
Senate President
The State House, Room 332
Boston, MA 02133

The Honorable Robert A. DeLeo
Speaker of the House of Representatives
The State House, Room 356
Boston, MA 02133

Re: Recreational Marijuana Law – Local Control

Dear Governor Baker, President Rosenberg, and Speaker DeLeo:

I am writing on behalf of the Massachusetts Municipal Lawyers Association, the oldest and largest bar association with a membership of lawyers who represent the cities and towns in the Commonwealth. We want to bring to your attention certain provisions of the recently passed initiative petition which legalizes recreational and commercial marijuana. While there are numerous parts of the law which may warrant some re-tooling, we want to focus on those provisions which appear in Section 3 of Chapter 94G, local control of marijuana establishments.

Section 3 (a) reads as follows:

> (a) A city or town may adopt ordinances and by-laws that impose reasonable safeguards on the operation of marijuana establishments, provided they are not unreasonably impracticable and are not in conflict with this

> chapter or with regulations made pursuant to this chapter and that: ....
>
> (2) limit the number of marijuana establishments in the city or town, **except that a city or town may only adopt an ordinance or by-law by a vote of the voters** of that city or town if the ordinance or by-law:...(emphasis supplied)

The law then goes on to specify the types of ordinances and by-laws which may only be adopted "by vote of the voters". These categories of ordinances and by-laws are: an ordinance or by-law that prohibits the operation of one or more types of marijuana establishment; an ordinance or by-law that limits the number of marijuana retailers to fewer than 20% of the number of licenses issued within the city or town for the retail sale of alcoholic beverages not to be drunk on the premises; an ordinance which limits the number of any type of marijuana establishment to fewer than the number of medical marijuana treatment medical marijuana treatment centers registered to engage in the same type of activity in the city or town. Any ordinance which would seek to regulate the number or type of marijuana establishment beyond a certain limit, or which would seek to prohibit such establishments, may only be adopted by a "vote of the voters."

There is confusion as to what a "vote of the voters" means. Does this require that such a by-law or an ordinance be put to the voters at a municipal election or at a special election? If so, there are a number of issues to consider.

First, a by-law in a town and an ordinance in a city is adopted pursuant to the town or city charter, which in most cases requires enactment by the legislative body – town meeting or city council. In my experience, there is no authorization in a town or city charter for adoption of an ordinance or by-law by voters.

Second, in most if not all cases, a law which authorizes a local ballot measure contains the form in which the measure is to be placed on the ballot. For example, MGL C. 59, § 21C, authorizing an over-ride of the limitation on taxes which may be assessed by the municipality, is very clear. The section contains the form of the ballot question:

> "Shall the (city/town) of ___ be allowed to assess an additional $___ in real estate and personal

property taxes for the fiscal year beginning July first, nineteen hundred and ___?

YES ___ NO ___".

As an alternative reading requiring a local referendum on a particular by-law or ordinance, the language of Section 3 (a) (2) could be read to require the voters to authorize the local legislative body to adopt such a by-law or ordinance, or to have such a by-law or ordinance which has been enacted by the local legislative body to receive the affirmative vote of the voters before it goes into effect.

Without legislative clarification of this section, town counsel and city solicitors are in the position of advising their clients on how the city or town will be able to limit marijuana establishments and not run the real risk of a court challenge to any action which may be taken.

The second section of Chapter 94G, § 3 has to do with paragraph (b). This paragraph reads:

> (b) The city council of a city and the board of selectmen of a town shall, upon the filing with the city or town clerk of a petition (i) signed by not fewer than 10 per cent of the number of voters of such city or town voting at the state election preceding the filing of the petition and (ii) conforming to the provisions of the General Laws relating to initiative petitions at the municipal level, request that the question of whether to allow, in such city or town, the sale of marijuana and marijuana products for consumption on the premises where sold be submitted to the voters of such city or town at the next biennial state election. **If a majority of the votes cast in the city or town are not in favor of allowing the consumption of marijuana or marijuana products on the premises where sold, such city or town shall be taken to have not authorized the consumption of marijuana and marijuana products on the premises where sold.** (emphasis supplied)

Paragraph (b) is clear in how to get a question before the voters. But the effect of the outcome of the election is puzzling. Presumably, if a majority of votes cast are in favor of allowing the consumption of marijuana and its products on the premises where sold, such shall be allowed. This is not stated, but the intent is clear. However, the language in paragraph (b) that if a majority of votes are not in favor of on-premises consumption then the "city or town shall be taken not to have authorized" on-premises consumption. This begs the question of whether the city or town is "taken to have authorized" on-premises consumption if there is no ballot question. Paragraph (b) creates ambiguity relating to on-premises consumption without the failure of a ballot question seeking to authorize it.

Since towns will be preparing warrants for town meeting in short order, our members are in need of some clarity so as to properly advise their municipal clients. In addition, town elections will be held in the spring of 2017. This adds to the urgency of the need for clarification of these sections. We respectfully ask that the General Court and the Executive address these issues in a timely manner.

Very truly yours,

Henry C. Luthin
President
Massachusetts Municipal Lawyers Association

cc: Her Honor Karyn Polito, Lt. Governor
The Honorable Maura Healy, Attorney General
The Honorable Deborah D. Goldberg, Treasurer and Receiver General
The Honorable William Francis Galvin, Secretary of the Commonwealth