

KP | LAW



The Leader in Public Sector Law

A GUIDE TO THE LAW LEGALIZING NON-MEDICAL MARIJUANA

REVISED JANUARY 2018

At the November 2016 state election, Massachusetts voters approved Question 4, adoption “The Regulation and Taxation of Marijuana Act” (Chapter 334 of the Acts of 2016), allowing non-medical (also known as “adult” or “recreational”) use of marijuana by adults in the Commonwealth and authorizing various commercial non-medical marijuana establishments. We issued a guide to the new law in January, 2017, following the amendments made pursuant to Chapter 351 of the Acts of 2016 (December 30, 2016), and updated that guidance in July, 2017 following enactment of Chapter 55 of the Acts of 2017, “An Act to Ensure Safe Access to Marijuana” (the “Act”). The Act makes numerous changes to the law as approved by the voters, including licensing, the local tax surcharge, and local restrictions and prohibitions. Additionally, the Act will soon repeal the original 2012 marijuana law, and codified in a new G.L. c.941 the statutory requirements for cultivation, distribution, possession and use of marijuana for medical purposes. This guide will address key issues.

CURRENT TIMELINE

 AUGUST 1, 2017 Cannabis Advisory Board	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. The President (or a designee) of the Massachusetts Municipal Association shall hold one seat. See the <u>Governor's</u> and <u>Treasurer's</u> press released for information on the members of the Board.
 SEPTEMBER 1, 2017 Cannabis Control Commission	Appointment of a five-member Cannabis Control Commission (“CCC”), by the Governor, Attorney General and Treasurer. The CCC has authority to adopt regulations and issue licenses for commercial production and sale of marijuana, much like the Alcoholic Beverages Control Commission for alcohol. The CCC shall also assume authority over the licensing of medical marijuana treatment centers, which will be transferred from the Department of Public Health before December 31, 2018. See the CCC's <u>website</u> for information about the appointees - Mr. Steven Hoffman, Chair; Attorney Kay Doyle; Senator Jennifer Flanagan; Attorney Britte McBride; and Ms. Shaleen Title.
MARCH 15, 2018 CCC Adoption of Regulations	Adoption of regulations, guidelines and protocols by the CCC for the issuance of licenses for recreational marijuana establishments. The CCC must additionally make necessary accommodations and promulgate special regulations for the counties of Dukes and Nantucket by May 1, 2018. DRAFT <u>regulations</u> filed on December 21, 2017

<p>April 1, 2018</p> <p>License Applications Begin</p>	<p>Acceptance of applications by the CCC for recreational marijuana licenses pursuant to G.L. c.94G will begin not later than April 1.</p> <p>IMPORTANT: The zoning bylaws or ordinances in effect at the time of application will be an essential component of the CCC's ability to grant a license. Municipalities will be asked to inform the CCC of any bylaw or ordinance that would make the application noncompliant with local law if the license is issued.</p>
<p>June 1, 2018</p> <p>License Issuance</p>	<p>The CCC may begin issuing licenses, prioritizing applications under statutory criteria. The CCC must approve or deny applications within 90 days.</p>

ZONING MORATORIA

The emerging area of marijuana regulation presents many policy and planning issues for municipalities. A zoning moratorium, which would impose a temporary restriction on marijuana establishments within a municipality, is a powerful tool available to municipalities to provide additional time to consider how a community will regulate marijuana uses.

It appears that over one-third of the Commonwealth's municipalities have adopted a moratorium, ban or limitation on marijuana establishments. The Attorney General has approved, and appears likely to continue to approve, such moratoria for towns through December 31, 2018. If a municipality seeks to adopt substantive zoning, but is not ready to enact a bylaw or ordinance prior to April 1, or cannot due to the need for a related election, consideration may be given to adopting a moratorium (sample attached).

LOCAL REGULATION UNDER G.L. c.94G, §3

Municipalities may by bylaw or ordinance: regulate the time, place and manner of marijuana establishment operations; impose reasonable safeguards on such operations, provided that such bylaws or ordinances do not render operations "unreasonably impracticable"; restrict licensed cultivation, processing and manufacturing of marijuana that is a "public nuisance"; establish restrictions on public signs related to marijuana establishments, and establish a civil penalty for violation of an ordinance or bylaw.

Municipalities seeking to prohibit or otherwise limit the number or types of marijuana establishments within a community must follow the applicable statutory procedure to impose such limitations, which procedure depends on whether the municipality voted "yes" or "no" on Question 4, as discussed in further detail below.

Prohibitions or Limitations Permitted by Bylaws or Ordinances

Pursuant to G.L. c.94G, §3, a municipality may, by bylaw or ordinance, exercise the following local controls:

- prohibit the operation of one or more types of marijuana establishments;
- limit the number of marijuana retailers to fewer than 20 per cent of the number of retail off-premises alcoholic beverage licenses issued by the municipality under G.L. c.138; or
- limit the number of any type of marijuana establishment to fewer than the number of medical marijuana treatment centers registered in the municipality to engage in the same type of activity.

For those municipalities that voted against Question 4, the procedure for adopting a bylaw or ordinance to prohibit or limit the number of marijuana establishments has significantly changed:

- If a municipality voted *in favor* of Question 4 on November 8, 2016, then two votes must be taken before an ordinance or bylaw can be effective: (1) approval by the voters at annual or special election; and (2) approval by the local legislative body.
- If a municipality voted *against* Question 4, the ordinance or bylaw must only be adopted by the local legislative body. This special provision will expire on December 31, 2019, after which the two-step process requiring a ballot question and legislative approval will apply to all municipalities.

Chapter 94G, §3 now provides the general form for a ballot question. The question presented to the voters must include the entire proposed bylaw or ordinance and be accompanied by a brief summary prepared by the City Solicitor/Town Counsel identifying the number and types of marijuana establishments that will be permitted to operate. As with all ballot questions, pursuant to G.L. c.54, §42C, no less than 35 days prior to the date of the election at which the questions will appear notice must be provided to the City or Town Clerk, including the statutory form of the question, the full text of the bylaw or ordinance, and the counsel summary. The form of the ballot question is attached.

Additional Issues to Consider When Imposing Prohibitions or Limitations

The Act is silent on several issues concerning the adoption of local legislation, including the following:

Zoning v. General Legislation: The Act does not specify whether a bylaw or ordinance implementing a prohibition or limitation must be zoning or general in nature. The Attorney General has approved zoning bylaws imposing such restrictions on marijuana establishments. However, when approving similar general bylaws, the Attorney General has recommended adoption of a zoning bylaw as well. Based upon the Attorney General's position, we have recommended adoption of a zoning bylaw for such purposes, but, in our opinion, there may nevertheless be some benefit to adopting a general bylaw as well, or, if the zoning fails to pass, in the alternative. This remains a developing issue, dependent upon different policy considerations. Sample bylaw/ordinance language is attached.

Agreement of Bylaw or Ordinance Language with Ballot Question: For municipalities subject to the two-step approval process for implementing a prohibition or limitation on marijuana establishments, it is essential that the bylaw or ordinance approved by ballot be the same as or substantially similar to that approved by the legislative body. While the Attorney General has indicated that either vote can occur first, if the bylaw is presented to the legislative body after approval by the electorate, in our opinion, in order to withstand a challenge, any substantive amendments or revisions will likely necessitate a further vote by the electorate.

Conversion of Existing Marijuana Treatment Centers

The original law required a municipality to allow a recreational marijuana establishment to be located in “any area in which a medical marijuana treatment center is registered to engage in the same type of activity.” The Act rescinded that requirement, adding a new requirement prohibiting a zoning bylaw or ordinance from preventing a medical marijuana treatment center licensed by or registered with the Commonwealth on or before July 1, 2017 from converting to a marijuana establishment engaged in the same type of activity under the Act. It is our opinion, however, that any medical marijuana treatment center licensed or registered after that date could be prevented from converting to a marijuana establishment by the adoption of a bylaw or ordinance prohibiting all marijuana establishments.

Petition for Ballot Question to Permit Marijuana “Cafés”

The procedure for allowing consumption on the premises where marijuana is sold remains unchanged from that presented in Question 4. In our opinion, based on the plain language of the Act, the only mechanism for permitting so-called social consumption is a petition process, which petition must be signed by at least 10% of the registered voters of the municipality. The question can only appear on the ballot at a biennial state election, the next of which will be held in November 2018.

The CCC’s draft regulations suggest a different understanding of the law, however. In their current form, the draft regulations list a “Marijuana social consumption operator” within the definition of “Marijuana retailer”. Such an interpretation suggests that a municipality that allows retail sales of marijuana in any district, without more, will also be authorizing “marijuana social consumption”. Although it is possible this issue will be revisited by the CCC prior to the issuance of final regulations, a municipality that wishes to allow marijuana retailers but prohibit social consumption should specifically so provide in their zoning.

Marijuana Growing and Cultivation

Chapter 351 of the Acts of 2016 amended the Zoning Act, G.L. c.40A, §3, to explicitly provide that the “growing, cultivation, distribution or dispensation of marijuana” does not qualify for the agricultural exemption under G.L. c.40A. The Act expressly adds, however, 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.”

HOST COMMUNITY AGREEMENTS

The Host Community Agreement (HCA) provision in G.L. c.94G, §3 was substantially revised by the Act to cover both non-medical marijuana establishments and medical marijuana treatment centers. The Act now requires that both types of entities enter into HCAs with host communities. The Act authorizes a “reasonable” community impact fee that “shall not amount to more than 3 percent of the gross sales of the marijuana establishment or medical marijuana treatment center or be effective for longer than three years.” The Act does not preclude renegotiation of a HCA at the end of the initial five-year term. The Act continues to require that a HCA only include community impact fees that are “reasonably related” to the costs imposed upon the municipality by the operation of the marijuana establishment. The municipality is required to document its costs.

TAXATION ON SALE OF RECREATIONAL MARIJUANA

The Act increases from 2% to 3% the amount of local tax that municipalities may impose on the “sale or transfer of marijuana or marijuana products by a marijuana retailer operating within the city or town”. The tax is based on the total sales price.

- If a municipality wishes to adopt the local sales tax, it must accept G.L. c.64N, §3 by a vote of its legislative body and in compliance with its charter, if any. If a municipality has already accepted §3 to impose the 2% tax, and now wishes to increase the tax, a new vote of the legislative body will be required.
- This local tax does not apply to sales of marijuana or marijuana product between marijuana establishments.

The Act revised G.L. c.64N, §2 to increase from 3.75% to 10.75% the state tax on sales of non-medical marijuana.

CHANGES TO MEDICAL MARIJUANA LAWS

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

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

PERSONAL USE OF RECREATIONAL MARIJUANA

The following personal use of recreational marijuana is permitted under the Act:

- Persons 21 years of age or older may possess one ounce or less of marijuana. G.L. c94C, §32L.
- Within a person’s “primary residence,” a person may possess up to 10 ounces of marijuana and any marijuana produced on the premises by not more than six marijuana plants for personal use. If there is more than one grower at the residence, there may be up to 12 plants cultivated on the premises.
- A person may give away or transfer without “remuneration” to a person age 21 years or older up to one ounce of marijuana, of which no more than five grams may be in the form of marijuana concentrate, provided that such transfer is not advertised or promoted to the “public.”
- A person 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.

The following are significant limitations imposed by the Act on personal use of non-medical marijuana:

- Cultivation and processing marijuana plants may not be visible from a public place.
- Marijuana or marijuana products exceeding 1 ounce within the person's place of residence must be secured by a lock.
- 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 but is generally understood to include areas both privately and publicly owned to which the public has rights of access by invitation, either express or implied.
- Open containers of marijuana or marijuana products are prohibited in the passenger area of any motor vehicle.

FURTHER DEVELOPMENTS

We continue to monitor developments in this quickly evolving area of the law. The next significant milestones include the issuance of final regulations, the filing of license applications, and issuance of initial licenses.

If you have any questions concerning regulation of non-medical marijuana, please contact Attorneys Joel Bard (jbard@k-plaw.com), Katherine Laughman (klaughman@k-plaw.com), or Brian Riley (briley@k-plaw.com) at 617.556.0007. Members of our Labor and Employment Practice Group are also available to assist with employment-related questions.

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. Neither the provision nor receipt of this information creates an attorney-client relationship with KP Law, P.C. Whether to take any action based upon the information contained herein should be determined only after consultation with legal counsel.

MODEL MORATORIUM WARRANT ARTICLE

To see if the Town will vote to amend the Town's Zoning Bylaw by adding a new Section _____, **TEMPORARY MORATORIUM ON RECREATIONAL MARIJUANA ESTABLISHMENTS**, that would provide as follows:

Section _____ Purpose

On November 8, 2016, the voters of the Commonwealth approved a law regulating the cultivation, processing, distribution, possession and use of marijuana for recreational purposes (new G.L. c. 94G, Regulation of the Use and Distribution of Marijuana Not Medically Prescribed). The law, which allows certain personal use and possession of marijuana, took effect on December 15, 2016 and was amended on December 30, 2016 by Chapter 351 of the Acts of 2016 and thereafter, on July 28, 2017 by Chapter 55 of the Acts of 2017. The law requires the Cannabis Control Commission ("CCC") to issue regulations regarding the licensing of commercial activities by March 15, 2018 and to begin accepting applications for licenses no later than April 1, 2018. Currently the Zoning Bylaw does not specifically address marijuana establishments as that term is defined in G.L. c. 94G, §1. The final CCC regulations may provide guidance on certain aspects of local regulation of marijuana establishments. The regulation of non-medical marijuana raises novel legal, planning, and public safety issues, and the Town needs time to study and consider these issues, as well as to address the potential impact of the CCC regulations on local zoning and, in connection therewith, to undertake a planning process to consider amending the Zoning Bylaw regarding regulation of marijuana establishments. The Town intends to adopt a temporary moratorium on the use of land and structures for marijuana establishments so as to allow sufficient time to address the effects of such structures and uses in the Town and to enact bylaws in a consistent manner.

Section _____ Definition

"Marijuana Establishment" shall mean a marijuana cultivator, independent testing laboratory, marijuana product manufacturer, marijuana retailer or any other type of licensed marijuana-related business, all as defined for purposes of G.L. c.94G, §1

Section _____ Temporary Moratorium

For the reasons set forth above and notwithstanding any other provision of the Zoning Bylaw to the contrary, the Town hereby adopts a temporary moratorium on the use of land or structures for a marijuana establishment and other uses related to non-medical marijuana. The moratorium shall be in effect through December 31, 2018. During the moratorium period, the Town shall undertake a planning process to address the potential impacts marijuana establishments, and shall consider adopting new Zoning Bylaws in response to these new issues.

Or take any action relative thereto.



The Leader in Public Sector Law

MODEL MARIJUANA ESTABLISHMENT BAN WARRANT ARTICLES FOR TOWNS REQUIRING A BALLOT VOTE

ZONING BYLAW ARTICLE:

To see if the Town will vote to amend the Town's Zoning Bylaw by adding a new Section [INSERT BYLAW SECTION REFERENCE HERE], **MARIJUANA ESTABLISHMENTS**, that would provide as follows, with the understanding that in accordance with G.L. c.94G, §3(a)(s) such bylaw must also be approved by the voters of the Town at an election:

Section [INSERT BYLAW SECTION REFERENCE HERE]

Consistent with G.L. c.94G, § 3(a)(2), all types of non-medical "marijuana establishments" as defined in G.L. c.94G, §1, including marijuana cultivators, independent testing laboratories, marijuana product manufacturers, marijuana retailers or any other types of licensed marijuana-related businesses, shall be prohibited within the Town of _____.

Or take any action relative thereto.

GENERAL BYLAW ARTICLE:

To see if the Town will vote to amend the Town's General Bylaw by adding a new Section [INSERT BYLAW SECTION REFERENCE HERE], **MARIJUANA ESTABLISHMENTS**, that would provide as follows, with the understand that in accordance with G.L. c.94G, §3(a)(2) such a bylaw must also be approved by the voters of the Town at an election:

Section [INSERT BYLAW SECTION REFERENCE HERE]

Consistent with G.L. c.94G, § 3(a)(2), all types of non-medical "marijuana establishments" as defined in G.L. c.94G, §1, including marijuana cultivators, independent testing laboratories, marijuana product manufacturers, marijuana retailers or any other types of licensed marijuana-related businesses, shall be prohibited within the Town of _____.

This Section shall be effective upon passage by the voters at a Town Election.

Or take any action relative thereto.



The Leader in Public Sector Law

ARTICLES FOR MUNICIPALITIES NOT REQUIRING A BALLOT VOTE

ZONING BYLAW ARTICLE:

To see if the Town will vote to amend the Town's Zoning Bylaw by adding a new Section [INSERT BYLAW SECTION REFERENCE HERE], **MARIJUANA ESTABLISHMENTS**, that would provide as follows:

Section [INSERT BYLAW SECTION REFERENCE HERE]

Consistent with G.L. c.94G, § 3(a)(2), all types of non-medical "marijuana establishments" as defined in G.L. c.94G, §1, including marijuana cultivators, independent testing laboratory, marijuana product manufacturers, marijuana retailers or any other types of licensed marijuana-related businesses, shall be prohibited within the Town of _____.

Or take any action relative thereto.

GENERAL BYLAW ARTICLE:

To see if the Town will vote to amend the Town's General Bylaw by adding a new Section [INSERT BYLAW SECTION REFERENCE HERE], **MARIJUANA ESTABLISHMENTS**, that would provide as follows:

Section [INSERT BYLAW SECTION REFERENCE HERE]

Consistent with G.L. c.94G, § 3(a)(2), all types of non-medical "marijuana establishments" as defined in G.L. c.94G, §1, including marijuana cultivators, independent testing laboratory, marijuana product manufacturers, marijuana retailers or any other types of licensed marijuana-related businesses, shall be prohibited within the Town of _____.

Or take any action relative thereto.



The Leader in Public Sector Law

**MODEL RECREATIONAL MARIJUANA ESTABLISHMENT
BALLOT QUESTION FOR IMPOSING LIMITATION OR PROHIBITION**

Ballot Question:

Shall this [City or Town] adopt the following [ordinance or bylaw]?

Summary:

[Insert solicitor/counsel summary]

Full Text:

[Insert full text of bylaw or ordinance]