

The Knowledge Now series features practical research on timely topics from the Colorado Municipal League.

MARIJUANA LEGISLATION IMPLEMENTATION

By Rachel Allen, Colorado Municipal League staff attorney, and Kevin Bommer, deputy director

IMPORTANT ACTION ITEM FOR MUNICIPALITIES:

By **Oct. 1**, municipalities must enact a local ordinance as described in the "Local Ordinance" section on page 2 of this document unless the governing body of the municipality opts out of retail marijuana pursuant to provisions in Amendment 64. CML will draft a boilerplate ordinance and collect samples that will be available upon request. It also will be available at www.cml.org/marijuana.aspx.

Introduction

In November 2012, Colorado voters passed Amendment 64 to the Colorado Constitution, legalizing the personal use and possession of marijuana for adults 21-years-of-age and older, as well as allowing for the retail sale, cultivation, and testing of marijuana and the production of marijuana-infused products.

Gov. John Hickenlooper assembled the Amendment 64 Implementation Task Force on Dec. 10, 2012, in Executive Order B2012-004. The task force was asked to identify the legal, policy, and procedural issues that needed to be resolved, and to offer suggestions and proposals for legislative, regulatory, and executive actions necessary for the effective and efficient implementation of Amendment 64. The task force met for two months and delivered its final report on March 13.

Late in the 2013 legislative session, the Colorado General Assembly passed legislation to implement the licensing and regulatory framework for retail marijuana establishments, as well as legislation submitting a single question

to voters to implement state sales and excise taxes.

This paper is intended to be a general introduction to the constitutional amendment, state legislation, upcoming regulatory actions by the state, and some of the options municipalities have to regulate local retail marijuana operations. It is not intended as an exhaustive legal analysis, and it should not serve as a substitute for advice from your municipal attorney.

State legislation

Three predominant bills encompass the state marijuana law pertaining to retail marijuana regulation and taxation: HB 13-1317, HB 13-1318, and SB 13-283.

HB 13-1317

HB 13-1317 contains the bulk of the task force recommendations and establishes the regulatory framework for licensing by the state and local jurisdictions. The established language of the Colorado Medical Marijuana Code (CMMC) was used to fill in the process-related components of the new Colorado Retail Marijuana Code (CRMC), but differences in the licensing process between the two led to significant changes in the legislation as it progressed.¹

¹ It is worth noting that the licensing process in the CMMC was significantly altered by HB 13-1238 to mirror licensing under Amendment 64 going forward. Municipalities are encouraged to familiarize themselves with these changes regarding any new medical marijuana license applications in the future. CML is available for further assistance.

HB 13-1317 contains the following significant provisions:

- At the state level, all future medical and retail marijuana sales and excise tax revenue, as well as all state licensing and application fees, will be deposited into a single fund for the newly rebranded Marijuana Enforcement Division of the Department of Revenue.
- On **Oct. 1**, an existing medical marijuana licensee may apply to the state licensing authority for a state retail marijuana establishment license. Under certain circumstances, including local approval, the licensee may continue to operate part of the licensed premises for medical marijuana (MMJ) and part for retail marijuana (RMJ). The state is required to act upon such applications between 45 and 90 days, and conditional licenses (explained later) must be issued before **Jan. 1**, and will be effective on Jan. 1.
- After Jan. 1, any person not already licensed for MMJ may submit a notice of intent to apply for a retail license. A notice fee may be collected and half will be sent to the local jurisdiction. The person may apply for a state license on July 1, 2014.
- Under all circumstances, one-half of the application fee collected will be sent to the local jurisdiction unless the jurisdiction has opted out pursuant to its authority to do so under Amendment 64.
- Consistent with Amendment 64, local jurisdictions may enact ordinances and regulations governing the time, place, manner, and number of marijuana establishments. Under these provisions, a local jurisdiction has the option to create a local licensing requirement.

- The duties of the state licensing authority and the manner in which it interacts with local jurisdictions is established in Part 2. A state license will be conditionally approved within 45 and 90 days, provided the applicant meets state licensing standards, but the state license only becomes operational upon approval from the local jurisdiction. A RMJ establishment cannot operate legally without both a state license and local approval, in whatever form that approval is granted as chosen by the local jurisdiction.
- Once the conditional license has been issued, local jurisdictions are required to acknowledge to the state licensing authority whether or not the application is either approved or denied by the local jurisdiction. There is no time frame established in the statute under which this approval or denial must occur.
- Definitions and appropriate limitations are created on each of the four state license types under Amendment 64.
- Numerous unlawful acts related to state licensure are established.

There are numerous other provisions in the bill. It is important to note that, consistent with Amendment 64, local governments may adopt ordinances and regulations that are more restrictive as long as they do not conflict with Amendment 64, state statutes, or state rules.

Municipalities that do not choose to opt out will need to consider the manner in which they will approve or deny any state application for an establishment. While there is no requirement to have a local license, the decision to require establishments to meet local licensing requirements provides an additional element of local control, especially as it relates to enforcement. (In the Colorado Liquor Code, there are some types of licenses — such as limited winery licenses and manufacturers’ licenses — that may be issued without local government approval, and CML occasionally fields complaints and concerns from members about a lack of local control on the establishments. Several municipalities requested HB 13-1317 clearly establish the option for a local licensing requirement to

maintain a clear local interest in RMJ establishments within their respective jurisdictions.)

HB 13-1318

HB 13-1318 contains the statutory implementation of a special sales tax and an excise tax, as well as refers a single question on the adoption of both to voters on the November ballot. If approved by the voters, both the sales and excise tax described in the “Revenue and taxation” section below become operational.

SB 13-283

SB 13-283 enacts several provisions that were generally identified as “consensus items” by the Amendment 64 Task Force. The bill

- enacts permissive language allowing local governments the ability to prohibit the use of compressed, flammable gas in a residential setting for use as a solvent in the extraction of cannabinoids or THC;
- establishes the legality and enforceability of contracts pertaining to lawful activities authorized by Amendment 64;
- creates several required state reports and studies on various social and health impacts of legalization of possession and use of marijuana;
- includes marijuana smoke within the Clean Indoor Air Act’s prohibition on smoking in public places; and
- establishes a prohibition on open containers of marijuana or marijuana products within a motor vehicle that mirrors the same prohibition on open containers of alcohol.

As introduced, the legislation also included consensus language on criminal matters in Title 18, including key definitions and related prohibitions on terms stated in Amendment 64 but left undefined. All of this language was stripped, and the bill instead requires a report by the Colorado Commission on Criminal and Juvenile Justice (CCJJ) by the end of the year with the intention of introducing a bill in the next legislative session. The result is a failure to have a standard language in the state’s criminal code of “openly and publicly,” “enclosed, locked space,” and other language connected to the now legalized possession and use of

cannabis until legislation is enacted next year. In the meantime, municipalities may choose to address these issues within their respective municipal codes.

Constitutional requirements

State rulemaking

The Colorado Department of Revenue (DOR) Marijuana Enforcement Division (MED) must adopt regulations implementing Amendment 64 by July 1, 2013.² Should the state fail to meet this deadline, applicants may submit license applications directly to local jurisdictions starting on Oct. 1, 2013, and the local jurisdiction must act on the application within 90 days.³ This local license is issued under authority of the constitutionally mandated local ordinance discussed below, and the licensee is not subject to any regulation or enforcement by MED while the local license is active.

Local ordinance

By **Oct. 1**, every municipality and county (that has not already prohibited retail marijuana establishments) must adopt an ordinance that designates the entity within the local government responsible for licensing under three specific circumstances:

- if the state fails to adopt regulations by the July 1 deadline;
- if the state fails to issue any licenses by Jan. 1, 2014; or
- if the state licensing authority fails to act within 90 days upon an application submitted to it.

Should the state fail to license under any of the three scenarios above, then applicants may apply directly to the local jurisdiction for a local license under the required ordinance unless that municipality has opted to prohibit retail marijuana operations. Amendment 64 recognizes that a local jurisdiction will not have any state assistance in this case, and allows the local jurisdiction to establish procedures for the issuance, suspension, and revocation of any license issued by the local jurisdiction.

² COLO. CONST.art. XVIII, § 16(5)(a), PERSONAL USE AND REGULATION OF MARIJUANA (also known as “Amendment 64”).

³ *Id.* at § 16(5)(i).

A local license in this scenario is different than a local license that *may* be required by a local jurisdiction as part of dual state and local licensing. The former scenario is in lieu of the state's license, and the latter (described in more detail below) is in conjunction with a state license.

To maintain harmony with the apparent intent of Amendment 64, local governments that want to prohibit the operation of any or all of the retail marijuana licenses should adopt an ordinance to do so prior to Oct. 1, and in a manner consistent with the language of Amendment 64. Moratoriums should be worded sufficiently to apply enough force of law to be recognized as the "opt-out" allowed by Amendment 64. While a retail marijuana business cannot become operational without local approval, the only guarantee against the state processing any applications for state licenses within jurisdictions that do not want them is to choose to prohibit retail marijuana operations via ordinance.

Only the governing body can opt its jurisdiction out prior to Oct. 1, as well as any time thereafter. Initiated or referred questions to opt out cannot be voted on until November 2014, or any even year thereafter. Referenda, initiatives, and referred questions to opt back into Amendment 64 are not prohibited or restricted by Amendment 64 and can apparently occur at any time.⁴

Options permitted under the constitution

In conjunction with the adoption of the required ordinance mentioned above, Amendment 64 also permits local ordinances governing local fees, local regulations, and the time, place, manner, and number of marijuana establishments within a city or town.⁵

Fees

While the constitution allows the establishment of application, operating, and licensing fees, only the operating fee may be collected by the local government unless the state fails to enact rules by July 1 or fails to act upon an individual state license

application within 90 days.⁶ Operating fees, while not defined in Amendment 64, are defined by HB 13-1317 as "fees that may be charged by a local jurisdiction for costs, including but not limited to inspection, administration, and enforcement of retail marijuana establishments."⁷

Local licenses

Even though it is not expressly permitted or prohibited by Amendment 64, HB 13-1317 establishes the ability for local jurisdictions to require a local license under local "time, place, and manner" conditions. This should not be confused with the constitutional requirement mentioned above that directs local jurisdictions to establish a local licensing procedure based on the state's failure to meet certain deadlines. A local licensing requirement under "time, place, and manner" is purely optional and is meant to work similar to alcohol beverage dual licensing.

Key decision points

The legislation from the 2013 session addressing state and local authority to license and regulate retail marijuana establishments and the text of Amendment 64 leave cities and towns with numerous options for local regulation. Some of the considerations for local regulation might include:

1. Whether to allow retail marijuana establishments to exist at all?
2. Whether to prohibit the establishment of licensed retail marijuana businesses permanently, or to do so only until a certain date in the future at which time the municipality would reevaluate whether or not to allow such businesses to exist after some later date?
3. Which of the four distinct types of retail marijuana establishments will be allowed?
 - a) retail marijuana stores?
 - b) retail marijuana cultivation facilities?
 - c) retail marijuana products manufacturers?
 - d) retail marijuana testing facilities?
4. Whether to provide a phase-in period during which only current medical marijuana licensees may be allowed to convert to retail marijuana establishments or add a retail marijuana license to current operations?
 - a) if so, for how long?
 - b) allow changes of ownership during the phase-in period?
 - c) allow changes in location during the phase-in period?
5. Whether to allow collocation (i.e., dual use of the same location) for medical marijuana businesses and retail marijuana businesses?
6. Whether to limit the number of businesses allowed in any of the four classes of state licensing and, if so, determine how to prioritize those who would compete for the limited number of approvals.
7. Whether to establish and administer a separate local licensing requirement, per se, or instead depend entirely on other laws (e.g., zoning and land use laws) to enforce "time, place, and manner" restrictions on retail marijuana establishments?
8. Whether to adopt counterpart local regulations addressing some or all of the same subject matter being addressed in state regulations, or instead focus local regulations entirely on aspects of "time, place, and manner" that are not being regulated by the state?
 - a) character and background checks for state license applicants?
 - b) business operational standards?
 - c) product standards?
9. Whether to establish hearing procedures and approval criteria for retail marijuana establishments?
 - a) only for retail marijuana stores, or for other classes of state licensing as well?
 - b) mandate public hearing requirements?
 - c) criteria for approval: "needs and desires" and "reasonable requirements of the neighborhood" as it is for liquor licensing or something else?
 - d) apply same approval procedures and criteria equally

⁴ *Id.* at § 16(5)(f).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*; C.R.S. § 12-43.4-103(11).

to existing medical marijuana licensees who seek to convert to or add a retail marijuana license?

10. Whether to impose spacing restrictions?
 - a) for retail marijuana stores, or for other classes of state licensing as well?
 - b) carry forward any existing spacing requirements currently imposed upon medical marijuana centers?
 - c) carry forward any existing grandfathering provisions currently enjoyed by medical marijuana centers and cultivators under previous city licensing and zoning laws?
 - d) adopt new forms of spacing requirements to be applied to retail marijuana establishments?
11. Whether to impose other location restrictions on retail marijuana establishments through zoning or otherwise, e.g., by identifying specific zone districts in which retail marijuana establishments are or are not allowed?
12. Whether to impose special restrictions on signs and advertising?
 - a) defer to state restrictions?
 - b) carry forward restrictions previously imposed on medical marijuana centers and apply the same to retail marijuana establishments?
 - c) adopt new restrictions?
13. To the extent a municipality establishes a local licensing and regulatory regime, what is an appropriate annual “operating fee” to impose upon licensed retail marijuana establishments?
14. Whether board or council members want to allow retail marijuana businesses to exist in the municipality at all if the state defaults on its licensing and regulatory responsibility by failing to adopt necessary regulations by July 1, 2013; or, failing to act on any license application, the state licensing authority receives within 90 days?

15. In general, any implementing ordinance allowing retail marijuana establishments to exist should establish “civil penalties” for violation of city requirements.

16. Any implementing ordinance allowing retail marijuana establishments to exist should:
 - a) clearly identify a single point of contact with whom the state licensing authority will interact to determine whether or not a particular license application or other licensing action complies with local requirements; and
 - b) specify deadlines for responding to the state regarding new license approvals and other licensing actions.

Revenue and taxation

The major marijuana taxation bill of the session was HB 13-1318, which refers a single question to the November 2013 statewide ballot with two revenue raising components: a wholesale 15 percent excise tax on cultivated marijuana earmarked for school capital construction as described in Amendment 64; and a special 10 percent sales tax to be imposed over and above the state’s normal 2.9 percent sales tax. The legislature will have the ability through legislation to increase the tax. Of the special 10 percent sales tax revenue, 15 percent will be shared with the local jurisdictions in which the tax is collected, similar to the cigarette tax share back, with the exception that local governments would not be penalized for retaining their own sales tax authority and existing taxes.

Both HB 1317 and 1318 capture sales tax and fee revenue derived from retail marijuana businesses and dedicate these revenues to the “direct and indirect costs” of administering the state regulatory regimes for both medical and retail marijuana. However, the local share-back of revenue derived from the special 10 percent

sales tax is not earmarked by 1318 for any particular purpose.⁸

Policy makers should consider a variety of options including:

- Whether to budget and appropriate monies to provide additional resources for marijuana-related regulatory enforcement and services?
- Whether to require marijuana establishments to post a marijuana tax bond to ensure the payment of local taxes by these retail establishments?
- Whether to refer to the ballot a question imposing additional local sales or excise tax on marijuana?
 - if your board or council decides to refer a ballot question
 - at what rate?
 - earmark the revenues for a purpose?
 - additional tax considerations include
 - what to do with state share back?
 - what to do with existing sales tax revenues derived from medical and/or retail marijuana operations?
 - opt to levy an additional sales or excise tax?
- Whether to impose operating fees on retail marijuana establishments?

FAQs

Is dual licensing at both the state and local level (like liquor licensing) contemplated in the legislation?

Dual licensing is expressly allowed, but not mandated. However, unlike liquor licensing, an applicant will get conditional state approval before any local approval is considered.⁹

Can an adult purchase and consume marijuana in the same location?

No, consumption of marijuana is prohibited on public premises that are licensed to sell retail marijuana or products.¹⁰

⁸ The ballot title designates that tax revenues will be used “to fund the enforcement of regulations on the retail marijuana industry and other costs related to the use and regulation of retail marijuana.” Some may argue this creates a limitation.

⁹ C.R.S. § 12-43.3-104(3) (2013).

¹⁰ *Id.* at § 12-43.4-901(4)(c).

Reports of co-ops and mobile marijuana delivery services have emerged after the passage of Amendment 64. Does the legislation curb these activities?

Co-ops, and mobile delivery of marijuana are prohibited.¹¹

Municipalities may be better served by enacting clearer local prohibitions in zoning ordinances or other local land use and regulatory tools.

Social clubs (where adults gather in a commercial space to consume but not sell marijuana) have become another recent concern. What options do local governments have to regulate these?

The state legislation prohibits on-site consumption in licensed establishments,¹² and language added to HB 13-1317 late in the session is largely insufficient to effectively prohibit social clubs. Some municipalities have regulated private cannabis clubs with local ordinances under their land use authority.

Can a person be charged with stoned driving, similar to DUI?

Yes. In addition to existing laws prohibiting driving under the influence, the legislature passed a “driving under the influence of drugs” (DUID) bill this session, specific to marijuana, which creates a “permissive inference” of intoxication if a person tests positive for five or more nanograms of active THC.¹³

Can adults use marijuana while operating a motor vehicle or possess an open container?

No, the open container law has been amended to include marijuana in addition to alcohol.¹⁴

Does the Clean Indoor Air Act apply to marijuana smoking in addition to cigarette smoking indoors?

Yes, the Clean Indoor Air Act was amended to prohibit marijuana smoke in an identical manner to the existing prohibition on cigarette smoke.¹⁵

Do the same 1,000-foot distance requirements from a school; an alcohol or drug treatment facility; the principal campus of a college, university, or seminary; or a residential child care facility, as medical marijuana establishments apply to retail marijuana operations?

No, there is no 1,000-foot distance limitation for retail marijuana establishments as it pertains to qualifications for a state license, so municipalities should consider addressing this in their local ordinances or rules.

Can a municipality act as the grower or owner?

No, state law prohibits government-run retail marijuana operations.¹⁶

Does the same requirement for the state to issue a state license between 45 and 90 days also apply to local jurisdictions?

No. There is no constitutional or statutory requirement specifying how long a local government may take to indicate its approval or denial of a conditional state license. However, in the event the state fails to meet any of the obligations that would otherwise cause an applicant to apply directly to the local government under the constitutionally required local licensing ordinance, then the local government must act within 90 days.¹⁷

If we choose to license retail marijuana establishments, can the city or town prohibit use in public buildings and parks?

Yes. While consumption of marijuana “openly and publicly”¹⁸ is not allowed, Amendment 64 specifically allows for the prohibition of marijuana possession, consumption, use, display, transfer, sale, transportation, or growing in public buildings.¹⁹ The state legislation does not define “open and public,” so municipalities might consider doing so in their local codes.

Can a municipality limit the size of personal home grows authorized by Amendment 64?

While Amendment 64 allows each adult to grow six plants “provided that the growing takes place in an enclosed, locked space, is not conducted openly and publicly, and is not made available for sale,”²⁰ the law does not define those terms, so municipalities may consider clearly defining what constitutes an “enclosed, locked space” in their municipal codes. Much like they can with medical marijuana, municipalities can use land use, building, and fire codes to regulate home grows. Some municipalities have limited the number of plants per household (regardless of the number of residents), some have dictated the minimum space needed per plant, others have restricted indoor grows to specific types of lights, while others have prohibited home grows in multifamily housing.

Additional Resources

CML has sample ordinances and a table tracking municipal actions on retail marijuana at www.cml.org/marijuana.aspx. Please contact CML Staff Attorney Rachel Allen at 303-831-6411, 866-578-0936, or rallen@cml.org to request copies of additional sample ordinances.

If you have questions, please contact CML Deputy Director Kevin Bommer (kbommer@cml.org) or CML Staff Attorney Rachel Allen (rallen@cml.org). Both can be reached at 303-831-6411 or 866-578-0936.

Special thanks

CML would like to extend a special “thank you” and acknowledgement to Denver Assistant City Attorney David Broadwell for authoring the “Key Decision Points” section of this document.

11 C.R.S. 12-43.4-901(4)(c) and (h) (2013).

12 *Id.* at § 12-43.4-901(4)(c).

13 C.R.S. 42-4-1301 (2013).

14 C.R.S. § 42-4-1305.5 (2013).

15 C.R.S. § 25-14-203 to 204, et seq. (2013).

16 C.R.S. § 12-43.4-103 (2013).

17 COLO. CONST. art. XVIII, § 16(5)(h).

18 *Id.* at § 16(3)(d).

19 *Id.* at § 16(6)(d).

20 *Id.* at § 16(3)(b).



Colorado Municipal League
1144 Sherman Street
Denver, CO 80203-2207

KNOWLEDGE *HOW*