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TO: TOWN ADMINISTRATORS AND MANAGERS
FROM: MEAD, TALERMAN & COSTA, LLC
RE: CLIENT ADVISORY
MARIJUANA BILL ~ HOUSE NO. 3818
DATE: AUGUST 9, 2017

This client advisory provides an update on the latest legislation affecting the cultivation and sale of recreational marijuana, as well as certain new statutory provisions relating to medical marijuana. As you have likely been informed, the Governor recently signed new legislation regarding this important subject.

Although certain questions relating to the regulation of marijuana in the Commonwealth remain unanswered because appointments to and regulations by the Cannabis Control Commission are not due until September 1, 2017 and March 15, 2018 respectively, House Bill No. 3818, "An Act to ensure safe access to medical and adult-use of marijuana in the Commonwealth" (the "Act"), signed into law on June 28, offers greater clarity as to municipal regulatory authority. This client advisory contains the pertinent changes to existing state law ~ Chapter 94G ~ and options for local control.

Although the Act, which is 75 pages long, enacts a variety of regulations and restrictions on the cultivation, use and sale of marijuana, only a handful of provisions relate to municipal regulation of this new industry. To wit:

Prohibition of marijuana establishments

Pursuant to the Act, the prohibition or limitation on the number of recreational marijuana establishments may not be accomplished through the amendment of zoning bylaws. Instead, the process municipalities must follow to either (1) prohibit recreational marijuana establishments entirely; (2) prohibit certain types of recreational marijuana establishments; (3) limit recreational marijuana retailers to fewer than 20% of town-issued retail liquor licenses; or (4) limit recreational marijuana establishments to fewer than town-registered marijuana treatment centers, is dependent upon the municipality's original vote on Question 4 - the underlying state referendum which legalized marijuana use, sales and cultivation. Municipalities that rejected Question 4 by a majority vote may prohibit or limit recreational marijuana businesses through their standard ordinance or general bylaw process until Dec. 31, 2019 - a ballot vote is not required. Conversely, communities which approved Question 4 by a majority vote, or communities which fail to enact an appropriate bylaw by December 31, 2019 as noted above, may prohibit or limit recreational marijuana establishments only by using the following process: the municipal government must prepare a general ordinance or bylaw, which must then be reviewed and summarized by municipal counsel. Following this review, the question - by a vote of the board of selectmen - must be placed on the ballot at a regular or special municipal election, not Town Meeting.

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Note further that nothing in the Act eliminates the placement of reasonable controls on marijuana establishments through zoning bylaws or ordinances. While zoning bylaws or ordinances may not have the effect of prohibiting marijuana cultivation or sales, placing such establishments within certain districts or requiring site plan approval or a special permit remains a viable means of regulating these new uses.

The Act further constrains municipalities by imposing limits on conversion of existing medical marijuana facilities. The Act makes clear that the conversion of existing medical marijuana establishments licensed before July 1, 2017 to recreational marijuana establishments may NOT be prohibited by a zoning bylaw. While it is clear that an outright prohibition on conversion is not allowed, such prohibition is in conflict with a municipality's right to create different zones for medical and recreational marijuana. Further guidance on resolving this conflict is necessary. Furthermore, while a Town may not adopt a bylaw that prohibits conversion, there does not appear to be any restriction on entering into an agreement that precludes conversion.

Remuneration by Agreement and Taxation

The Act contains provisions that substantially revise the common process of executing mitigation or host agreements with cultivation facilities or dispensaries. Commonly, such agreements have resulted in annual payments of substantial funds, often for dozens of years. The changes in the Act require that communities execute host community agreements ("HCAs") with both recreational and medical marijuana establishments. Pursuant to the Act, the community impact fee may not be greater than three (3%) percent of the gross sales of the establishment and must be reasonably related to costs to the municipality associated with the operation of the marijuana establishment. Impact fees also may not be effective for more than five (5) years, although other restrictions and requirements in the agreement may survive beyond such five-year period. What is unclear is the fate of existing HCAs that contain terms that conflict with the new statutory language. It is clear that the Act is intended to apply to existing HCAs and, accordingly may affect key terms in such agreements. However, each such HCA will have to be examined to determine whether other requirements will survive the changes mandated by the Act.

Additionally, a municipality may impose a local sales tax upon the sale or transfer of marijuana or marijuana products, not to exceed three (3%) percent. To impose the sales tax, the municipality first must accept the pertinent provisions of the statute in the same manner as all local acceptance statutes, by approval of the legislative body, which for most towns is the Town Meeting.

Conclusion

In our review of the Act, it is readily apparent that a variety of unanswered questions remain. We expect further guidance from State authorities, either by way of regulations or guidelines adopted by the legislature or the impending Cannabis Control Commission. In the meantime, note that the December 31, 2019 deadline to prohibit or limit marijuana establishments is fast approaching and on July 1, 2018, the first marijuana establishment licenses are expected to be issued. Whether your town is receptive or not, appropriate planning to prohibit, limit or otherwise regulate is strongly advised.

We are cognizant of the complexity and controversy surrounding this new industry. Given the fast-paced developments that are arising in the regulation of medical and recreational marijuana, we endeavor to provide you with updates and advice as it becomes available. We are always available to assist should the need arise and, to that end, please do not hesitate to contact us with your questions.