SECTION REVIEW
MASSACHUSETTS BAR ASSOCIATION

Public Law

What cities and towns can do to regulate adult use marijuana

BY AMANDA ZURETTI, ESQ.

On Monday, March 5, 2018, Gov. Charlie Baker filed House Bill No. 4284 to make clarifying amendments to M.G.L. c. 94G and M.G.L.c. 94I. On Friday, March 9, 2018, the Cannabis Control Commission (Commission) posted its final regulations to be promulgated as 935 CMR 500.00 (Regulations) and filed them with the Office of the Secretary of the Commonwealth for publication on March 23, 2018. The Commission has supplemented the Regulations with guidance for municipalities (Guidance) dated Jan. 9, 2018, March 16, 2018 and March 21, 2018 to "assist municipalities by addressing questions related to the regulation of marijuana establishments." The Regulations and the Guidance can be downloaded from the Commission's internet website: https://mass-cannabis-control.com/documents/

The Regulations of primary interest to municipalities pertain to the license application process [935 CMR 500.101-500.102]; host community agreements [935 CMR 500.101]; security requirements and school buffer zones [935 CMR 500.110]; and the assurance to cities and towns that "Marijuana Establishments and marijuana establishment agents shall comply with all local rules, regulations, ordinances, and bylaws" and that "Nothing in 935 CMR 500.000 shall be construed so as to prohibit lawful local oversight and regulation, including fee requirements, that does not conflict or interfere with the operation of 935 CMR 500.000." [935 CMR 500.170].

On April 1, 2018 the Commission began accepting applications for adult use marijuana establishments. On June 1, 2018 the Commission will issue its first marijuana establishment licenses. Between now and June 1, 2018, municipal officials whose voters see a place for marijuana establishments in their cities and towns must decide how to regulate them in a way that makes sense for their constituents.

Lawful local oversight and regulation of adult use marijuana establishments

Overview

After the enactment of amendments to M.G.L. c. 94G on July 28, 2017, many Massachusetts municipalities enacted temporary moratoria on the use of land for marijuana establishments under zoning and general bylaws or ordinances to have time for "study, reflection and decision on a subject matter of [some] complexity." *W.R. Grace v. Cambridge City Council*, 56 Mass. App. Ct. 559, 569 (2002).

A few communities, including those that voted "yes" on Question 4 of the 2016 state election ballot, banned adult use marijuana establishments using a two-step process which requires both a ballot question in an annual or special election and the enactment of a local bylaw or ordinance in M.G.L. c. 94G, § 3(a)(2)(i). Other communities decided that marijuana establishments are welcome and chose not to impose any local limitations on such establishments.

Local controls available to cities and towns

Middle ground for communities who voted "yes" on Question 4 may be to impose rational controls on marijuana establishments by:

1. accepting M.G.L.c. 64N, § 3 to impose a local sales tax of up to 3 percent "upon sale or transfer of marijuana or marijuana products by a marijuana retailer operating within the city or town to anyone other than a marijuana establishment;"
2. enacting or amending *general* bylaws or ordinances to regulate the time, place and manner in which marijuana establishments may operate [M.G.L. c. 94G, § 3(a)(1)][M.G.L. c. 43B];
3. enacting or amending zoning bylaws or ordinances to regulate the time, place and manner in which marijuana establishments may operate [M.G.L. c. 94G, § 3 (a)(1)] [M.G.L. c.40A, §5];
4. limiting the number of marijuana retailers and/or limiting limit the number of any type of marijuana establishments [M.G.L. c. 94G, § 3 (a)(2)(ii)- (iii)] [H.B. 4284][M.G.L. c. 54, § 58A];
5. implementing a local licensing process that does not conflict with the state laws and regulations governing marijuana establishments [Guidance dated Jan. 9, 2018 at p.7 and March 16, 2018 at p. 13];
6. drafting sound host community agreements to meet local needs [M.G.L. c. 94G, § 3 (5)(d)][H.B. 4284];
7. adopting Board of Health regulations M.G.L. c. 111, § 26-33]; and
8. ensuring that they have appropriate wastewater regulations [M.G.L. c. 83, § 10].

Learning the language: "marijuana establishment" and "marijuana retailer"

For many municipal officials and their counsel, the process for enacting meaningful local bylaws, ordinances or regulations begins with mastering the language of M.G.L.c. 94G and 935 CMR 500.00. One source of confusion is that while the terms "marijuana establishment" and "marijuana retailer" are frequently used interchangeably, these terms have distinct meanings under the statute and regulations.

"Marijuana Establishment means a Marijuana Cultivator, Craft Marijuana Cooperative, Marijuana Product Manufacturer, *Marijuana Retailer*, Independent Testing Laboratory, Marijuana Research Facility, Marijuana Transporter, or any other type of licensed marijuana-related business, *except a medical marijuana treatment center*."

"Marijuana Retailer" is one category of marijuana establishment, i.e., "an entity licensed to purchase and transport cannabis or marijuana product from Marijuana Establishments and to sell or otherwise transfer this product to Marijuana Establishments and to consumers. Retailers are prohibited from delivering cannabis or marijuana products to consumers; and from offering cannabis or marijuana products for the purposes of on-site social consumption on the premises of a Marijuana Establishment."

Ballot question to limit the number of marijuana retailers or the number of types of marijuana establishments under M.G.L. c. 94G, § 3 (a)(2)(ii)-(iii)

A second source of stress for municipalities is the sequencing of the ballot question and adoption of a bylaw or ordinance to limit the number of marijuana retailers or the number of the several types of marijuana establishments as required by M.G.L. c. 94G, § 3(a)(2)(ii)-(iii) and M.G.L. c. 94G, § 3(5)(e).

These statutory sections require that a proposed bylaw or ordinance imposing either or both of the limitations referred to in M.G.L. c. 94G, § 3(a)(2)(ii)-(iii) be presented to the voters of the municipality on an annual or special election ballot *prior* to it being presented to town meeting or to a city council for vote. A ballot question must be referred to a city or town clerk no less than 35 days before an annual or special election under M.G.L. c. 54, § 58A.

While cities may enact ordinances throughout the year, municipal attorneys representing towns point out that town meetings generally occur only twice a year, in the spring and fall unless additional special town meetings are called. Further, unlike city ordinances, town bylaws are subject to review by the Attorney General's Municipal Law Unit pursuant to M.G.L. c. 40, § 32 and may be rejected in whole or in part if it is found that a bylaw or a portion of a bylaw is inconsistent with existing Massachusetts law or the Massachusetts constitution. This means that it is possible that an affirmative vote on a ballot question for a proposed town bylaw could be approved by town meeting but thereafter disapproved in whole or in part by the Attorney General's Municipal Law Unit.

A suggested approach to enacting local controls

Because the process for limiting the number or type of marijuana establishments is somewhat awkward, local policy makers may want to consider first addressing what zoning and general bylaws or ordinances and local regulations they need, and then deciding how many marijuana retailers and what types of marijuana establishments are appropriate for their communities.

Accepting M.G.L. c. 64N, § 3 to impose a local sales tax. As a first step, cities and towns that have not already done so may consider accepting the provisions of M.G.L. c. 64N, § 3 "by vote of the legislative body, subject to the charter of the municipality" pursuant to M.G.L. c. 4, § 4. Because acceptance of this provision requires only a simple majority vote, imposition of a local sales tax may be a workable first step for many municipalities.

Regulating the "time, place and manner of marijuana establishment operations" through general bylaws. Municipalities may control "time, place and manner of marijuana establishment operations" pursuant to M.G.L. c. 94G, § 3 (1). Acceptance of a general bylaw requires only a simple majority vote and a review of existing general bylaws or ordinances may reveal that the existing framework requires minimal amendment.

For example, public smoking bylaws and ordinances may be amended to prohibit public ingestion (i.e., smoking, eating and vaping) of marijuana and to provide for noncriminal disposition of violations of ordinances and bylaws pursuant to G.L. c. 40, § 21D.

General ordinances and bylaws may address hours of operation and impose controls on signage that are "not more restrictive than those applicable to retail establishments that sell alcoholic beverages within that city or town." [M.G.L.c. M.G.L. c. 94G, § 3 (4)]. They may also prohibit marijuana establishments from allowing smoke, vapor, or aroma from being emitted from their premises, may restrict the issuance of entertainment licenses, and may restrict "licensed cultivation, processing and manufacturing of marijuana that is a public nuisance." [M.G.L. c. 94G, § 3 (3)]. A general bylaw or ordinance would also be an appropriate vehicle to "[establish a civil penalty for violation of an ordinance or bylaw enacted pursuant to [M.G.L. c. 94G, § 5] similar to a penalty imposed for violation of an ordinance or bylaw relating to alcoholic beverages."

Regulating the "time, place and manner of marijuana establishment operations" through zoning bylaws and ordinances.

Both procedurally and in terms of policy and planning, the enactment or amendment of zoning bylaws or ordinances pursuant to M.G.L. c. 40A, § 5 can be arduous. New zoning bylaws or ordinances, or amendments to them, require Planning Board public hearings which may be held up to 65 days after a proposed bylaw or ordinance is submitted to the Planning Board. Thereafter, no vote may be taken until the Planning Board has reported to a board of selectmen or city council or until 21 days after the close of hearings if the Planning Board does not issue a report. A city council has 90 days to vote to adopt, amend, or reject a zoning ordinance. Town meeting has six months to do the same. Further, the adoption of zoning bylaws requires a two-thirds majority vote.

While cities that have completed the M.G.L. c. 40A, § 5 process may be able to enact zoning ordinances specific to adult use marijuana prior to June 1, 2018, towns that intend to do so in upcoming town meetings may not be able to do so if their bylaws fail to receive approval from the Attorney General's Municipal Law Unit. Towns must also be mindful that the Attorney General's Municipal Law Unit has consistently approved moratoria under town bylaws extending to Dec. 31, 2018 but is reluctant to extend moratoria into 2019. See, e.g., the Attorney General's Oct. 3, 2017 approval of a zoning moratorium under warrant Article 30 of the Town of Clinton's

➤ 27

WHAT CITIES AND TOWNS CAN DO TO REGULATE ADULT USE MARIJUANA *Continued from page 26*

annual town meeting of June 5, 2017 — Case # 8546, the Municipal Law Unit approved a moratorium lasting through Dec. 31, 2018.

Should an adult use marijuana establishment seek to locate in a municipality where there is neither a zoning moratorium on the use of land for adult use marijuana establishments nor bylaws or ordinances in effect governing marijuana establishments, the initial determinations as to the application of zoning bylaw or ordinance will fall to the enforcement officer pursuant to M.G.L. c. 40A, § 7.

Social consumption establishment licenses

Because M.G.L. c. 94G, § 3(5)(b) provides that on-premises consumption of marijuana must be authorized by a ballot question on the November 2018 biennial election ballot, it was a relief to many (but not all) to see that social consumption establishment licenses were omitted from the final Regulations. The March 16, 2018 Guidance at p. 10 explains, however, that "Regulations regarding licenses for social consumption and delivery to consumers have been delayed for further study. The Commission anticipates drafting regulations regarding licenses for this category in February 2019. In the meantime, municipalities wishing to authorize social consumption in their community must follow the ballot process established in G.L. c.94G §3 for the election in November, 2018."

Drafting sound host community agreements to meet local needs. Under M.G.L. c. 94G, § 3(5)(d), all marijuana establishments and medical marijuana treatment centers are required to execute host community agreements with the municipalities in which they are located. An applicant for licensure by the Commission must submit a fully executed host community agreement as part of the Commission's licensing application process in 935 CMR 500.101.

Under M.G.L. c. 94G, § 3(5)(d), a community impact fee many not exceed 3 percent of gross sales, and shall not require payment of a fee to that city or town that is not directly proportional and reasonably related to the costs imposed upon the city or town by the operation of a marijuana establishment . . . ." and may not have a term longer than five years. Under the proposed H.B. 4284, however, these limitations would not apply to a host community agreement for a medical marijuana treatment center that was entered into before July 1, 2017.

Host community agreements offer the opportunity for local governments to set the tone for marijuana business operations and may incorporate M.G.L. c. 94G, § 12 (h) to require that "[e]ach licensee shall file an emergency response plan with the fire department and police department of the host community." Further, host community agreements may incorporate local licensing requirements to the extent that such licensing is in place.

Pursuant to 935 CMR 500.103(4)(d), "At the time of renewal, licensees shall make available an accounting of the financial benefits accruing to the municipality as the result of the host community agreement with the licensee. The Commission will make this information available on its website. Municipalities are encouraged to share cost-benefit information with licensees and the Commission."

Local licensing

Cities and towns may have been pleased to see that in both the Guidance issued Jan. 9, 2018 at p. 7 and in the Guidance dated March 16, 2018 at p. 13, the Commission acknowledged that municipalities may create a local licensing scheme for adult use marijuana establishments so long as such a program does not conflict with M.G.L. c. 94G and the Regulations.

Although communities may determine that the Responsible Vendor training program in 935 CMR 500.105(2) provides sufficient oversight of marijuana establishments, it is conceivable that local police departments and licensing boards could develop marijuana licensing programs analogous to liquor licensing. Local licensing requirements could include oversight of marijuana establishments by a board of selectmen or city council with a licensing administrator, and that a municipality could require local registration of marijuana establishment employees, notice of change of employees and managers, and incident reporting to law enforcement.

Absent a local licensing program, 935 CMR 500.50(14) provides that "935 CMR 500.000 shall not be construed to prohibit access to authorized law enforcement personnel or local public health, inspectional services, or other permit-granting agents acting within their lawful jurisdiction." This means that boards of health and departments of public works also have important roles to play as marijuana establishments take their places in local business communities.

Board of health regulations

Under M.G.L. c. 111, § 26-33, boards of health have the authority to adopt and enforce reasonable health regulations, that are more restrictive than state standards so long as the local regulations do not conflict with state law and are not specifically preempted.

A welcome and noteworthy reference to the Sanitary Code at 105 CMR 300, 105 CMR 500, and 105 CMR 950 in the Regulations indicates that local boards of health have jurisdiction to inspect marijuana establishment to enforce the Sanitary Code. In anticipation of the licensing of adult use marijuana establishments, the Massachusetts Association of Health Boards has posted model regulations for use by local health boards at: http://mahb.org/wp-content/uploads/2018/03/Final-Marijuana-Placeholder-Regulation-3.8.18.pdf. ■

Departments of public works — wastewater regulations

As a final note, the Regulations at 935 CMR 500.105(12) address waste disposal and wastewater treatment. With respect to wastewater regulation, the Commission has no authority to enforce "compliance with all applicable state and federal requirements . . . for discharge of pollutants into surface water or groundwater" but cities and towns do, as provided by M.G.L. c. 83, § 10.

Conclusion

Cities and towns have a significant role to play in shaping how marijuana establishments will grow in Massachusetts. Between now and June 1, 2018, municipal officials and their counsel should take hold of this singular opportunity to design policy and to enact suitable bylaws and ordinances and local regulations to meet local needs. ■

Amanda Zuretti is an associate at Petrini and Associates, P.C., in Framingham, Massachusetts. She is a member of the Massachusetts Bar Association's Public Law Council and the Massachusetts Municipal Lawyers Association (MMLA). The writer extends thanks to the members of the MMLA's Marijuana Committee (particularly James Lampke, Esq., John Goldrosen, Esq., and Patty Correa, Esq.) whose observations shaped this article.

LANDMARK IDENTIFICATION CASE *Continued from page 18*

victim was driven to the defendant and identified him "fairly immediately" from a distance of about 15 feet. The victim said he recognized the defendant's eyes and the unique shape of his nose. The defendant was arrested and charged in Essex Superior Court with masked armed robbery and with being a subsequent offender. The victim was permitted to identify the defendant at trial and a jury found him guilty. On appeal, the defendant challenged the denial of his motion to suppress the showup identification and the trial judge's decision to permit an in-court identification.

While Massachusetts appellate courts have repeatedly warned that showup identification procedures are generally disfavored as inherently suggestive, those same courts have repeatedly allowed the results of showup identifications to be admitted in court. The Supreme Judicial Court has said that a one-on-one pretrial identification procedure does not violate a defendant's due process rights unless it is determined to be "unnecessarily suggestive." *Commonwealth v. Austin*, 421 Mass. 357, 361 (1995). Good reasons to conduct these types of identification procedures include: the nature of the crime; police concerns for public safety; the need for efficient police investigation in the immediate aftermath of a crime; and confirmation that the police have accurate investigatory information and are on the right track to solving the case. *Id.* at 362. In *Dew*, the court concluded the defendant had failed to prove by a preponderance of the evidence that the showup was unnecessarily suggestive, and the out-of-court identification was therefore properly admitted in court.

The defendant argued the inherent suggestiveness of the showup identification prevented the eyewitness from offering an unequivocal identification of the defendant, as required by *Collins*. While acknowledging that "the defendant raises important issues regarding the potential disproportionate impact of inherently suggestive, in-court identification testimony on the jury," the court determined that because the eyewitness' identification of the defendant at the showup procedure was unequivocal, it was proper to also allow an in-court identification. *Dew, supra*, slip. op. at 19. The court noted that a trial judge has the authority, based on common law principles of fairness, to exclude otherwise-admissible, unreliable eyewitness identification testimony if its probative value is substantially outweighed by the danger of unfair prejudice.

Concurrence

Chief Justice Ralph Gants, who authored *Crayton* and *Collins*, penned a concurrence joined by Justice Kimberly Budd. The chief justice argued that the victim in *Dew* should not have been permitted to identify the defendant in court. The in-court identification, according to the chief justice, had minimal probative value but contained a "substantial" risk of unfair prejudice to the defendant. *Id.* (Gants, C.J., concurring, slip. op. at 7). "Allowing an in-court identification in addition to a showup identification creates a risk that the jury will gloss over these particular aspects of the showup identification and simply accept the subsequent in-court identification." *Id.* (Gants, C.J., concurring, slip. op. at 8-9). Because the showup identification here was seriously flawed, according to the chief justice, it had been an abuse of discretion for the trial judge to have allowed the in-court identification. Nevertheless, the chief justice concluded the error had not been prejudicial, and it had therefore been proper for the court to have affirmed the defendant's convictions.

Conclusion

For three short years, criminal defense attorneys rejoiced at the incredibly favorable identification jurisprudence created by *Crayton* and *Collins*. Criminal cases were regularly being dismissed on the morning of trial when witnesses had been unable to identify defendants prior to the trial date. *Crayton* offered important safeguards to criminal defendants who advanced a misidentification defense at trial. *Dew* will substantially limit the impact of *Crayton*. A suggestive showup identification procedure can now be used as the predicate for an in-court identification, as long as the showup was not "unnecessarily" suggestive. *Dew* will increase the likelihood of criminal defendants being convicted of crimes they did not commit. ■

Christopher W. Spring graduated from Notre Dame Law School in 2001 and began work as an assistant district attorney in Middlesex County. After prosecuting cases in district and superior courts for more than three years, Spring left the district attorney's office and worked for one year as a litigation associate at Morrison Mahoney in Boston. In 2006, Spring founded Spring & Spring, which is a full-service criminal defense law firm servicing Eastern Massachusetts.