Legislature answers calls to clarify marijuana laws

Medical marijuana law changes are still subject to veto. Legislation progressed well on balance, although financial recognition of the local enforcement burden is a sore spot.

By Garrett Corbin, Legislative Advocate, State & Federal Relations, MMA

In the wake of the marijuana legalization referendum passed some 20 months ago, a number of important questions have cropped up related to the regulation of both the existing medical as well as the looming non-medical marijuana industries. Heading into the 128th Legislature, the Maine Municipal Association's Legislative Policy Committee made it a priority to close a number of loopholes and remove the cloud of legal uncertainty that had been casting a shadow over local efforts to ensure that marijuana businesses are subject to the same ordinances and codes that apply to other businesses.

In the second regular and second special legislative sessions this year, members of the House and Senate did an admirable job of addressing most municipal issues with the non-medical Marijuana Legalization Act, while also managing to address a fundamental ambiguity regarding local regulation in the Medical Use of Marijuana Act. The Legislature also moved to apply a new "opt-in" provision to all commercial sales, both medical and non-medical, requiring approval of the local legislative body before new marijuana businesses can operate legally. The law is now opt-in for non-medical establishments, and poised to become opt-in for medical ones as well.

At the time of printing, it was still unclear whether the two bills addressing the medical act will be vetoed and, if so, whether the veto will be overridden or sustained. More on that at the end of this article.

Brief history of marijuana regulation

By regulating medical and non-medical marijuana through two separate chapters of law, this story has developed into something of a Tale of Two Citizen Initiated Acts. The first came about when Maine voters legalized the medical use of marijuana in 1999, by a margin of 61-39 percent at referendum. Maine's Medical Use of Marijuana Act (MUMA) has stayed in place since that time, evolving through various amendments and generally authorizing certified "caregivers" to dispense the medicine to patients who have received a doctor's certification qualifying them for treatment.

This new "boutique" is located along Route 202 in Manchester. *(Photo by Ben Thomas)*

In 2016, voters approved legalizing the consumption of the plant for non-medical purposes as well, albeit by the razor thin margin of 50.3 percent to 49.7 percent. This more recent effort, enacted as the Marijuana Legalization Act (MLA), has been referred to as legalization for "recreational" or "adult use" purposes. This act authorizes a right for persons 21 years of age and older to grow and possess marijuana in private, as well as a privilege for related commercial business enterprises to operate subject to licensing and regulation.

Non-medical law solidified

Just months after the referendum vote, the Legislature in its first session last year bought time to iron out the wrinkles in the voter-adopted MLA by enacting three bills addressing issues that needed to be resolved immediately. One of those bills delayed the agency rulemaking deadline for the state's commercial licensing program until Feb. 1, 2018, effectively imposing a year-long statewide moratorium on the commercial aspects of the new law. With the commercial implementation date delayed to 2018, the Senate President and Speaker of the House established a new 17-member Marijuana Legalization Implementation Committee, comprised of five senators and 12 representatives.

After eight months of public hearings and work sessions, 15 members

of the committee voted to support the 73-page bill printed as LD 1650, An Act to Amend the Marijuana Legalization Act. Although LD 1650 was passed to be enacted by both chambers during the first special session of the Legislature in October 2017, the bill ultimately died when, on Nov. 6, the House fell shy of the two-thirds majority margin necessary to override Governor Paul LePage's veto.

This year, the committee rolled up its sleeves, redoubled its efforts, and reformed LD 1650 into LD 1719, An Act to Implement a Regulatory Structure for Adult Use Marijuana. The reincarnated 82-page bill managed to garner the support of 16 of the 17 committee members, pass to be enacted in the House and Senate, and gain enough votes to overcome another gubernatorial veto on the final day of the second regular legislative session on May 2 of this year.

New and improved law

As a result of the amendments made in the enacted bill (now Public Law 2017, Chapter 409), the MLA now provides the framework necessary for the new agency of oversight, the Department of Administrative and Financial Services, to begin drafting the detailed rules governing the licensure and regulation of the commercial elements of the law.

Because LD 1719 removed the licensing deadline, it is unclear when the department's rules will be promulgated, but they will govern the licensure of four types of business enterprises or establishments: cultivation, manufacturing, testing and retail. Public consumption is still not allowed under the new act, even in a licensed commercial establishment. The original act's allowances for "social clubs" as well as online delivery, drive-through, and vending machine dispersal have been repealed by LD 1719 and are no longer authorized.

As referenced above and described in the New Laws article printed in this edition of the magazine, LD 1719 includes a municipally welcome change to the act allowing towns, cities and plantations to affirmatively "opt-in"

to regulate some or all types of commercial establishments within the municipality before those establishments are permitted to operate. All municipalities which have not taken action to authorize establishments are effectively deemed to have opted-out, meaning commercial marijuana operations are prohibited. Establishments may not apply for authorization to operate unless the municipality's legislative body has adopted an applicable ordinance or approved a permissive warrant article.

Fiscal fail

Along with this extremely positive opt-in revision came an almost equally unfortunate financial development. For a variety of reasons that even in hindsight remain unclear, the requirement that the state share with host municipalities a relatively small portion of the sales and excise tax revenue generated by the new regulated marijuana industry was repealed from the law.

Drawing from experiences in other states that have legalized adult use, and from Maine's history with medical marijuana operations, local administrative and enforcement-related costs are likely to be significant. Those cost include, but are far from limited to: increased risk of fires and power outages as a result of faulty electrical wiring or extraction operations; mold resulting from the moisture created when plants are grown indoors, causing habitability and resale issues; fertilizer runoff that can negatively impact wastewater and storm water treatment efforts; increased water intake/usage and related demand on infrastructure and water sources; nuisance-level odor and lighting; parking and transportation safety at high traffic operations; and, general criminal issues such as OUI, theft or burglary.

Yet the committee decided that its amendment to LD 1719 would not include any direct provision of tax revenues to municipalities, nor would it allow for local impact fees, nor would it afford a half-share of state licensing application fees as provided in the original Act. This public policy seems to undercut the very premise of the Legislature's efforts, which have been to reform the law in a way that ensures a highly regulated yet robust legal market for non-medical marijuana that eventually eliminates the existing, and now flourishing, illicit market. All along, a key component of this initiative has been a two-tier regulatory approach, with the state and municipalities working in tandem.

This makes Maine the only legalizing state which is not allowing for any new local revenues, aside from ordinary municipal licensing fees that are strictly limited by existing statute. How the state expects municipalities to act as partners in regulating an industry filled with uncertainties without the proceeds to offset local costs is anyone's guess.

For now, it's all of the home rule with none of the revenue. Following legislative approval of the department's draft rules, state licenses are expected to be issued. While no one has a crystal ball, most stakeholders expect the state licensing program governing the four types of non-medical establishments to go online sometime in 2019.

Medical act overhaul

As municipal officials throughout the state have learned, the medical act, MUMA, established a significant ambiguity regarding local authority to regulate medical marijuana caregivers. The ambiguity results from the law's clear allowance for municipal regulation of dispensaries, but silence with respect to local regulation of caregiver's cultivation and distribution operations.

Originally, caregivers used a home-based or house call delivery model. For years, it seemed understood that the highly regulated eight statewide dispensaries were the only entities authorized to distribute medical marijuana in a retail store setting. Today, caregivers are increasingly taking advantage of a "rotating patient" loophole and silence in MUMA regarding caregiver retail operations to attempt to open lo-

cal retail storefronts. Caregiver stores are now reported to be running in dozens of Maine towns and cities, with minimal state oversight.

Because the act did not address local regulation of caregivers, municipal attorneys – and, certainly, caregivers' attorneys – have arrived at different opinions on how to interpret the silence. Does silence mean home rule authority has not been restricted and local governments may address issues with caregivers in a manner similar to how they regulate other businesses? Or, does the silence indicate that the explicit provision of local regulatory authority over dispensaries is the only home rule authorized by the Legislature?

Dual medical bills enacted

To help answer this question, on June 26, the last day of session before this edition went to print, the Legislature passed LD 238, An Act To Amend the Maine Medical Use of Marijuana Act, and LD 1539, An Act To Amend Maine's Medical Marijuana Law. Although the titles are similar, LD 238 makes a few small changes to the existing MUMA, while LD 1539 significantly reworks the program.

LD 238. The Legislature's Health and Human Services Committee intended for LD 238 to serve as an emergency stop-gap measure until LD 1539 takes effect. The language legalizes accredited third-party testing of medical marijuana, authorizes the manufacture of medical marijuana products using non-hazardous extraction and concentration processes, and requires processors who utilize hazardous substances to be certified as safe by a state-licensed professional engineer.

Importantly, the proposal also recognizes comprehensive home rule authority to fully regulate registered medical marijuana caregivers, dispensaries, and testing and manufacturing facilities, with a key limitation: municipalities may not prohibit registered primary caregivers from operating within the municipality, nor may they limit the number of registered primary caregivers.

These caveats reflect the balance that was necessary to gain broad legislative support for clearly recognizing the local authority to regulate all commercial medical marijuana operations. Both the House and Senate enacted LD 238 as an emergency measure with minimal debate.

It should also be noted that this bill only recognizes local regulatory authority over commercial caregivers. The question of whether or not municipalities may regulate caregiver-patient relationships in more private family or household settings may need to be answered by a future Legislature or court. Because communities have been chiefly concerned with commercial caregivers, MMA's advocacy efforts prioritized addressing those operations first.

LD 1539. For the commercial caregivers, this bill is the big kahuna. It acquiesces to many of the business activities that have been working in gray areas of the law and may have been struck down had they been challenged in court. The product of months of committee effort and vigorous end-of-session lobbying, as amended the legislation would make the changes brought about by LD 238 and then some.

As enacted, doctors will be authorized to certify for treatment patients who have a medical condition the physician thinks marijuana might help. Patients will be able to possess eight pounds of the plant instead of just 2.5 ounces under the previous law, and they will no longer need to be serviced by only one caregiver.

Limitations on the number of patients a registered caregiver (i.e., those serving more than two household or family members) may serve, or employees a registered caregiver may hire are gone, and registered caregivers will be authorized by virtue of their state registration certificate to operate a retail store. Instead of growing a maximum of six plants per patient, registered caregivers will be allowed to grow a maximum of 30 mature marijuana plants (plus additional immature seedling-type plants). The quid for this quo is expanded oversight by state and local authorities.

Dispensaries back LD 1539 as it authorizes six new dispensaries, in addition to the existing eight, until 2021, when the cap on the number of dispensaries will be lifted altogether. The bill also removes the requirement that dispensaries operate as non-profits. A topic of much discussion in the committee's final work sessions on the bill was whether or not municipalities would be allowed to prohibit caregiver retail stores, just as they may for dispensaries and non-medical marijuana enterprises. MMA lost the first round of that battle, with the committee deciding to apply to stores the same terms as to caregivers in general; towns and cities could regulate but not prohibit caregiver operations. When the bill reached the Senate, however, Sen. Roger Katz of Kennebec County, the co-chair of the Marijuana Legalization Implementation Committee, insisted on an amendment requiring the same opt-in rule that applies to non-medical retail to apply to medical retail outposts as well.

The result is that the version of LD 1539 recognizes home rule regulatory authority over all medical marijuana businesses, makes invalid local prohibitions or number limits on non-retail medical caregiver operations, and in turn, moving forward, disallows any retail operations that have not received municipal authorization. Stores existing on the effective date of the law will be grandfathered to the extent they are operating with requisite municipal approvals.

Veto possible?

Alternatively, the Governor may veto these two medical marijuana bills. Should a veto be issued, the Legislature will consider overriding that decision when it reconvenes its second special session the week of July 9. The August-September edition of this publication will update readers on whether or not LDs 238 and 1539 went into law, and the Marijuana Resources section of MMA's website will be updated as soon as any vetoes are sustained or overridden.

For more information on these legislative twists and turns, municipal officials are welcome to contact Garrett Corbin in MMA's State & Federal Relations Department via email at gcorbin@memun.org, or an attorney in the Legal Services Department at legal@memun.org with questions regarding ordinances, how to handle existing operations, and applications for new businesses. The Legal Services Department has also recently published its Adult Use Marijuana Information Packet, now available online at https://memun.org/Member-Center/Info-Packets-Guides/Adult-Use-Marijuana. ■