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CITY OF FORT PIERCE - OFFICE OF THE CITY ATTORNEY

M E M O R A N D U M

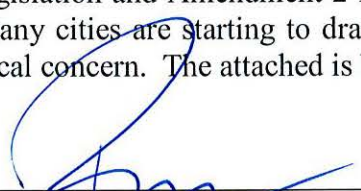
TO: Robert J. Bradshaw, City Manager (*via email*)

FROM: Robert V. Schwerer, City Attorney

SUBJECT: Medical Marijuana

DATE: August 26, 2014

Attached is an updated outline of various issues presented by the Medical Marijuana legislation and Amendment 2 initiative which should be of interest to all municipalities. Many cities are starting to draft local legislation in anticipation of the various issues of local concern. The attached is being circulated solely for informational purposes.



Robert V. Schwerer, Esq.
City Attorney

/mlp

Attachment

cc: Fort Pierce Mayor and Commissioners (*via email*)
Nicholas Mimms, Deputy City Manager (*via email*)
R. Sean Baldwin, Chief of Police (*via email*)
Rebecca Grohall, Manager, Planning (*via email*)

MEDICAL MARIJUANA

Ryan G. Padgett
Assistant General Counsel
Florida League of Cities
(850) 701-3616
rpadgett@flcities.com

I. 2014 MEDICAL MARIJUANA LEGISLATION

“The Compassionate Medical Cannabis Act of 2014” (CS/CS/SB 1030) allows the use of low-THC cannabis to treat certain specified medical conditions such as epilepsy and ALS (Lou Gehrig’s disease). The strain of low-THC marijuana which has been legalized is popularly known as “Charlotte’s Web” and is administered in an oil or capsule form. This differs from Amendment 2, which would legalize all forms of cannabis to treat a wider variety of medical conditions. The legislation does not contain any provisions which preempt municipalities from enacting ordinances relating to medical marijuana.

The legislation provides the Florida Department of Health (DOH) rulemaking authority to establish the framework for the implementation and regulation of medical marijuana. DOH issued its most recent draft of proposed rules in mid-August. The draft rules still do not contain any provisions which preempt municipalities from enacting ordinances relating to medical marijuana. There are provisions in the draft rules which are of interest to municipalities.

- A marijuana dispensing organization facility (includes buildings where marijuana is grown as well as physically dispensed) may not be located within 1,000 feet, as measured from the primary dispensing organization structure to the nearest property line of an elementary, middle or secondary school, day care facility as defined in Section 402.302, F.S., county or municipal park, or place of worship which was in existence prior to the dispensing organization’s application to DOH.
- A marijuana dispensary must comply with current state and local building codes, fire codes, and electric codes. The previous draft included a catch-all phrase “...and other laws.” which was deleted from the most recent draft. Although the requirement only applies to the initial DOH application approval, the ambiguity may create uncertainty as to what other regulations municipalities can impose upon dispensaries.
- A marijuana dispensary must be open on a regular schedule approved by DOH. Specific weekly and daily operational time requirements have been removed.
- Allows law enforcement agencies to enter dispensing organization facilities and access to the “Compassionate Use Registry” of persons eligible for medical marijuana
- DOH will take public access, right-of-way, and parking needs into consideration when granting an application to become a dispensing organization

- The dispensary's medical director is required to respond to local municipalities regarding compliance with rules and regulations and community health and public safety concerns

During public comments at the rule hearing, questions regarding zoning and the ability of local governments to regulate medical marijuana were raised, with some advocating treating the dispensaries no different than drugstores. The concern of these advocates is local governments enacting restrictive ordinances which would effectively prohibit dispensaries from operating in city limits. DOH did not give any indication of its position on this issue. The next hearing will be on September 5.

II. AMENDMENT 2 – 2014 GENERAL ELECTION

In the 2014 general election, Florida voters will be asked to cast a “yes” or “no” vote on Amendment 2 which, per the ballot title, would allow for the “Use of Marijuana for Certain Medical Conditions.” Voters must approve the Amendment by a 60% majority. Several recent polls have shown support at or above the 60% threshold.

The Amendment does the following:

1. Authorizes use of medical marijuana
2. Specifies certain medical conditions which make a patient eligible for medical marijuana
3. Defines terms necessary for implementation and rulemaking by the Florida department of Health (DOH)
4. Requires DOH to promulgate implementing regulations within six months
5. Requires DOH to begin registering marijuana treatment centers and issuing identification cards to qualifying patients within nine months
6. Permits the Legislature to enact laws consistent with the Amendment

Absent from the text of the Amendment is any reference to the role of local government in its implementation and regulation. Since the Amendment leaves all discretion to the DOH and the Legislature on how the Amendment will be implemented, municipalities may wish to wait for guidance from the state. However, we do not recommend that approach.

Per the Amendment, two parties are involved in promulgating and implementing regulations, DOH and the Legislature. The regulatory framework provided by DOH will likely be based on the rules promulgated in implementing the 2014 “Charlotte’s Web” legislation. The Legislature’s involvement during the 2015 session will likely depend on the final rules adopted by DOH. Further clouding the issue is the 2014 gubernatorial race, with one candidate in favor of the Amendment and one candidate opposed. Depending on the outcome, the regulations promulgated by DOH could differ greatly.

III. ISSUES FOR MUNICIPALITIES TO CONSIDER

The 2014 “Charlotte’s Web” legislation and the possible passage of Amendment 2 provide much uncertainty to municipalities as to how medical marijuana will be regulated on a statewide level and what role local governments will be able to play (or be preempted) in its regulation in the future. In the event a municipality wants enact any ordinances prior to the rules being issued by the Department of Health (DOH) or any further action by the Legislature, here are some concepts to consider:

- **Prohibition**: A complete prohibition on the operation of “medical marijuana treatment centers” as defined in Amendment 2 and “dispensing organizations” as defined in the 2014 legislation in s. 381.986, F.S.
- **Impacts**: The locations of marijuana cultivation and dispensaries may impact municipalities in several ways:
 - Increased traffic flow, interference with the adjacent right-of-way, and limited parking similar to past experiences with pain clinics.
 - The odor of marijuana is very strong. All buildings in the area surrounding the dispensary could be negatively affected.
 - Marijuana dispensaries in other states have been unable to deposit cash in banks due to the banks’ concerns over violating federal money laundering laws. Any business with a large amount of cash on hand risks criminal activity such as robberies and burglaries.
- **Zoning**: If a municipality does not change its zoning ordinances, marijuana dispensaries are likely to be located in areas where medical offices and pharmacies currently exist. Many cities in other states have restricted dispensaries to areas which have been zoned for industrial use. While DOH has promulgated a draft rule which restricts a marijuana dispensing organization from being located within 500 feet of a school, a municipality may want to go beyond this limitation and add additional setback requirements. Municipalities may want to review the zoning requirements in adult entertainment ordinances for guidance.
- **Security standards**: Although municipalities are preempted from adopting security standards for convenience stores pursuant to s. 812.1725, F.S., there are no such preemptions in Amendment 2, the 2014 legislation, or DOH draft rules. The state standards for convenience store security in s. 812.173, F.S. may be a useful template for any municipal ordinances regulating marijuana dispensaries
- **Permitting**: In addition to other restrictions, municipalities in other states have added a licensing requirement for medical marijuana dispensaries. The municipalities have then restricted the number of permits which may be issued at any one time. Municipalities may want to review the permitting requirements in adult entertainment ordinances for guidance.

- **Smoking bans:** As stated above, the smoke and strong odor of marijuana can be a nuisance. No law or draft rule prohibits municipalities from treating marijuana in the same manner as is currently allowed for tobacco products. In fact, the website of the group pushing Amendment 2 contains specific language that their intent is for the smoking medicinal marijuana to be treated in a manner identical to tobacco. While the opinion of this group are neither law nor rule, the stated intent of the group is positive for municipal regulation authority.
- **Utility impacts:** Other states have reported the amount of electricity needed to grow marijuana has, in some circumstances, significantly increased demand on the power grid. Municipalities which operate municipal utilities may want to consider reviewing current policies on the use of electricity. Municipalities may also want to consider the existing utility infrastructure in making a determination of where dispensaries may be located.
- **Fire:** The processing equipment and contents of marijuana dispensaries are extremely flammable. Municipalities may want to consider setback requirements and the impact on fire services when making decisions on where dispensaries can be located.
- **Licensing requirements / Fees:** In a manner similar to the establishment of security requirements, municipalities may want to consider any additional licensing requirements and fees required for dispensaries to operate in city limits. While cities may not levy sales taxes on marijuana as they have been permitted to do in Colorado, other fees and business taxes may be available for municipalities to pursue.
- **Drug testing of employees:** The Supreme Courts of several states have held because marijuana is still a banned substance under federal law, an employee may be discharged for a positive marijuana drug test even if the employee is permitted to use medicinal marijuana under state law. Florida courts have not had the opportunity to consider the matter. Although these decisions are not binding in Florida, they may be persuasive when such a case arises. Municipalities may want to amend their employment policies consistent with these decisions.
- **Law enforcement:** The initial draft of DOH rules allow law enforcement agencies to enter marijuana dispensaries and access the “Compassionate Use Registry.” Municipal law enforcement agencies may want to consider creating policies and procedures for when and how to enter a dispensary or access the Registry.

Several municipalities have already enacted ordinances related to medical marijuana dispensaries. Copies of these ordinances can be obtained by contacting Ryan Padgett, Assistant General Counsel, Florida League of Cities.