LEAGUE OF OREGON CITIES

LOCAL GOVERNMENT REGULATION OF MEDICAL MARIJUANA IN OREGON

MARCH 2015

Published by the League of Oregon Cities

Table of Contents

Introduction and a Word of Caution 1

Home Rule in Oregon 2

An Overview of Oregon's Medical Marijuana Act 4

- Federal Law 4
- Growing and Possession 4
- Limitations 5
- Dispensaries 5
- Legislation on Local Regulation 6

Local Government Options for Regulation of Medical Marijuana 8

- Taxation 8
- Moratoriums, Bans and Other Prohibitions 8
- Time, Place and Manner Regulations 10

Appendix A: Time, Place and Manner Restrictions on Medical Marijuana Dispensaries A1

- Overview of Subject Areas Covered A3

Introduction and A Word of Caution

The League of Oregon Cities (League) has prepared this guide to assist cities in evaluating local needs and issues regarding medical marijuana so that city councils can find local solutions that are in the best interests of their community. The League does not take a position on which choices a city council should make. Rather, part of the League's mission is to protect the home rule authority of cities and their governing bodies to make local decisions and to assist city councils in implementing the decisions they make, whatever those decisions might be.

This guide discusses only the local regulation of medical marijuana. Although Oregon voters adopted Ballot Measure 91 in November 2014 which legalized personal possession and the growing, processing, delivery and sale of non-medical marijuana, at the time this document was published, the Legislature was considering refinements to that measure, and the Oregon Liquor Control Commission (OLCC) had yet to issue rules implementing the measure. In fact, the OLCC is not required to begin accepting applications for non-medical marijuana production, processing, wholesale and retail licenses until January 2016. Just as the gusts off the Pacific Ocean can alter the shape and course of the Oregon sand dunes, so too the political and legal winds could end up reshaping the contours of Measure 91 and the degree to which local governments can regulate non-medical marijuana. Consequently, given the potential for that area of the law to change, this guide does not address local regulation of non-medical marijuana. Once the Legislature adjourns and the OLCC issues its rules, the League anticipates publishing separate guidance for cities that desire to regulate non-medical marijuana within their communities.

If the law relating to non-medical marijuana can be compared to a shifting sand dune, then it is fitting to say that the legal landscape is only slightly more stable with regard to medical marijuana. To be certain, the law with regard to local government regulation of medical marijuana is complex because it involves the interplay of state and federal law, and the law continues to evolve. At press time, there were several court cases pending regarding the legal authority of local governments to regulate, up to and including prohibiting, the operation of medical marijuana facilities. As noted above, there remains the possibility that the Legislature might pass legislation affecting a city's authority to regulate medical marijuana facilities. Consequently, the League will endeavor to update its members as new laws are adopted and court decisions are issued.

As a final word of caution, city councils considering regulating or prohibiting medical marijuana facilities should not rely solely on this guide or the resources contained within it. **This guide is not a substitute for legal advice.** Any city council considering any form of regulation of marijuana should consult with its city attorney regarding the advantages, disadvantages, risks and limitations of any given approach. Legal counsel can also assist a city in preparing an ordinance that is consistent with existing ordinances and with a city's charter, and advise on what process is needed to adopt the ordinance. The sample ordinance provisions included in this guide are intended to be a starting point, not an ending point, for any jurisdiction considering regulating medical marijuana facilities.

Home Rule in Oregon

Any discussion of a city's options for regulating a subject also regulated by state law must begin with a discussion of the home rule provisions of the Oregon Constitution from which cities in Oregon derive their legal authority. Home rule is the power of a local government to set up its own system of governance and gives that local government the authority to adopt local ordinances without having to obtain permission from the state.

The concept of home rule stands in contrast to a corollary principle known as Dillon's Rule, which holds that municipal governments may engage only in activities expressly allowed by the state because municipal governments derive their authority and existence from the state.[1] Under Dillon's Rule, if there is a reasonable doubt about whether a power has been conferred to a local government, then the power has not been conferred. Although many states follow Dillon's Rule, Oregon does not.

Instead, city governments in Oregon derive home rule authority through the adoption of a home rule charter by the voters of that community pursuant to Article XI, section 2, of the Oregon Constitution, which was added in 1906 by the people's initiative. Article XI, section 2, provides, in part, that:

> "The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation of any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon."

A home rule charter operates like a state constitution in that it vests all government power in the governing body of a municipality, except as expressly stated in that charter, or preempted by state or federal law. According to the League's records, all of Oregon's 242 incorporated cities have adopted home rule charters.

The leading court case interpreting Oregon's home rule amendment is *La Grande/Astoria v. PERB*, 281 Or 137, 148-49, 576 P2d 1204, *aff'd on reh'g*, 284 Or 173, 586 P2d 765 (1978). In that case, the Oregon Supreme Court said that home rule municipalities have authority to enact substantive policies, even in an area also regulated by state statute, as long as the local enactment is not "incompatible" with state law, "either because both cannot operate concurrently or because the Legislature meant its law to be exclusive." In addition, the court said that where there is a local enactment and state enactment on the same subject, the courts should attempt to harmonize state statutes and local regulations whenever possible.[2]

[1] *See* John F. Dillon, 1 The Law of Municipal Corporations § 9b, 93 (2d ed 1873).

[2] Criminal enactments are treated differently. Local criminal ordinances are presumed invalid, and that presumption cannot be overcome if the local enactment prohibits what state criminal law allows or allows what state criminal law prohibits. See *City of Portland v. Dollarhide*, 300 Or 490, 501, 714 P2d 220 (1986). Consequently, as discussed later in this guide, the Supreme Court's case law is clear that a local government may not recriminalize conduct for which state law provides criminal immunity. *See City of Portland v. Jackson*, 316 Or 143, 147-48, 850 P2d 1093 (1993) (explaining how to determine whether a state law permits what an ordinance prohibits, including where the Legislature expressly permits specified conduct).

In a subsequent case, the Oregon Supreme Court directed courts to presume that the state did not intend to displace a local ordinance in the absence of an apparent and unambiguous intent to do so.[3] Along the same lines, the Oregon Court of Appeals has explained, "[a] local ordinance is not incompatible with state law simply because it imposes greater requirements than does the state, nor because the ordinance and state law deal with different aspects of the same subject."[4]

Where the Legislature's intent to preempt local governments is not express and where the local and state law can operate concurrently, there is no preemption. As such, the Oregon Supreme Court has concluded that generally a negative inference that can be drawn from a statute is insufficient to preempt a local government's home rule authority.[5] For example, where legislation "authorizes" a local government to regulate in a particular manner, a court will not read into that legislation that the specific action authorized is to the exclusion of other regulatory alternatives, unless the Legislature makes it clear that the authorized regulatory form is to be the exclusive means of regulating.

[3] *See, e.g., State ex rel Haley v. City of Troutdale*, 281 Or 203, 210-11, 576 P2d 1238 (1978) (finding no manifest legislative intent to preempt local provisions that supplemented the state building code with more stringent restrictions).
[4] *Thunderbird Mobile Club v. City of Wilsonville*, 234 Or App 457, 474, 228 P3d 650, rev den, 348 Or 524 (2010).
[5] *Gunderson, LLC v. City of Portland*, 352 Or 648, 662, 290 P3d 803 (2012) (explaining that even if a preemption based on a negative inference is plausible, if it is not the only inference that is plausible, it is "insufficient to constitute the unambiguous expression of preemptive intention" required under home rule cases).

An Overview of Oregon's Medical Marijuana Act

On November 3, 1998, Oregon voters approved Ballot Measure 67, the Oregon Medical Marijuana Act (OMMA) (codified at ORS 475.300 - ORS 475.346), which allowed medical use of marijuana in Oregon within specified limits for persons suffering from a qualifying debilitating health condition. Specifically, the act:

- Requires a physician-written statement of a patient's qualifying debilitating medical condition;
- Directs the Oregon Health Authority to establish a registration system for the issuance of what is commonly referred to as a medical marijuana card; and
- Provides protection from state prosecution for qualified patients, their caregivers and identified growers.

The Legislature subsequently amended the OMMA to expand the list of qualifying debilitating health conditions and to increase the marijuana possession limits. As discussed below, in 2013, the Legislature again amended the OMMA to provide for medical marijuana dispensaries.

Federal Law

It is important to note that marijuana remains a Schedule I controlled substance under the federal Controlled Substances Act (CSA). Schedule I substances are those for which the federal government has made the following findings:

- The drug or other substance has a high potential for abuse;
- The drug or other substance has no currently accepted medical use in treatment in the United States; and
- There is a lack of accepted safety for use of the drug or other substance under medical supervision.

The OMMA does not, and could not, give immunity from federal prosecution. Consequently, the OMMA does not protect marijuana plants from being seized or people from being prosecuted if the federal government chooses to take action under the CSA against registered cardholders. Similarly, cities cannot provide immunity from federal prosecution.

Growing and Possession

Patients may grow for themselves or identify a grower. A patient and his or her grower and caregiver may possess a combined total of up to 24 ounces (1.5 pounds) of usable marijuana. A grower may produce marijuana for up to four medical marijuana patients at the same time. A grower may grow up to six mature plants and 18 seedlings or starts (also known as immature plants)[6] at a registered growsite for each patient who gets marijuana from the grower. All usable

[6] A seedling or start must meet the following criteria or it is considered a mature plant: no flowers; less than 12 inches in height; less than 12 inches in diameter. A mature plant is a marijuana plant that does not fall within the definition of a seedling or a start.

marijuana, plants, seedlings and starts belong to the patient. The grower must return all marijuana to the patient whenever the patient asks for it.

A grower must be 18 years or older and cannot have been convicted within the last five years of a Class A or Class B felony for the manufacture or delivery of a controlled substance. There are no other limitations on growers. Consequently, a patient (who has identified another grower) may also be a grower for up to four other patients. Those patients may likewise be a grower for up to four other patients each, and those patients can each grow for four other patients, and so on and so on. Thus it is possible under the OMMA to build an exponentially growing pyramid of growers who are also patients with their own identified growers. Doing so is a process commonly referred to as card stacking and results in very large medical marijuana grow operations.

A patient may reimburse his or her grower for the cost of supplies and utilities associated with producing medical marijuana. The patient may not reimburse the grower for any other costs associated with producing marijuana for the patient, including the cost of labor. A grower must always display a growsite registration card for each patient who receives marijuana from the grower. A grower must possess his or her OMMA identification card when transporting marijuana.

Limitations

The state criminal immunity provided to a medical marijuana cardholder is not absolute. Cardholders can lose immunity from state prosecution if they:

- Give medical marijuana to a non-OMMA cardholder;
- Sell medical marijuana, even to another cardholder, unless that sale is pursuant to Oregon's dispensary laws discussed below;
- Grow, deliver or consume medical marijuana in a public place or in public view;
- Drive under the influence of marijuana; or
- Manufacture or produce marijuana anywhere other than at the growsite address listed on the patient's application.

Dispensaries

The original OMMA did not envision a dispensary system. Rather, the OMMA was built on the assumption and foundation that patients would grow marijuana for themselves or identify someone to grow for them. However, given card stacking and the quantities allowed, growers were soon producing more marijuana than their patients needed. The marijuana that exceeded what patients needed is commonly referred to as "excess marijuana" and a market soon developed in which other patients sought to obtain the excess marijuana from growers who were not identified as those patients' growers. Dispensaries grew out of those demands in order to connect patients with the growers of excess marijuana.

Because the original OMMA allowed transfer of marijuana only between a patient and his or her identified grower, soon-to-be dispensary operators and others sought legislation that would

create a system whereby a registered facility could lawfully purchase excess marijuana from a grower and then sell it to a patient cardholder or their caregiver. Those efforts would eventually lead to the enactment of House Bill (HB) 3460 by the Oregon Legislature in 2013.

HB 3460 provided state criminal immunity to any registered medical marijuana dispensary (which the law calls a medical marijuana facility) that transfers marijuana between any identified grower and any qualified patient or caregiver. The bill required the Oregon Health Authority to develop and implement a process to register medical marijuana facilities. The bill also set out certain restrictions. Specifically, HB 3460 provided that registered facilities must be located only on property zoned for agricultural, commercial, industrial or mixed uses (no residential zones). The bill also prohibited a medical marijuana facility from locating within 1,000 feet of another registered facility, within 1,000 feet of a school, or at the same location as a grow site. Finally, HB 3460 also required background checks of dispensary owners (but not their employees), certain security requirements, and testing of medical marijuana.

Although HB 3460 established a registration system, thereby allowing local governments to know where dispensaries were operating, the bill did not completely address a number of concerns that local governments had relating to the dispensing of medical marijuana. Specifically, the law did not:

- Regulate or license marijuana testers;
- Regulate or license growers;
- Regulate product types, including edibles and products that might be enticing to children;
- Address product labeling;
- Address whether dispensaries could locate in places where children congregate (such as day care centers, parks, libraries, etc.); and
- Require background checks for dispensary employees.

The Oregon Health Authority adopted interim rules implementing HB 3460 and has since amended the rules several times. Those rules are codified at OAR 333-008-0000 to OAR 333-008-1400.

Legislation on Local Regulation

Based on the gaps left open by HB 3460, and because the bill was neither expressly preemptive nor did it mandate local governments to accept dispensaries, several local governments began considering ordinances that regulated or prohibited the operation of medical marijuana dispensaries in their communities.

In September 2013, the Legislature adopted and the governor signed into law Senate Bill (SB) 863, commonly known as the genetically modified organism, or GMO bill. SB 863 was in response to a local government's regulation of genetically modified crops. The bill was intended to preempt all local governments from regulating whether or not genetically modified organisms could be grown, processed or sold within their jurisdictions so that the state could create a

uniform statewide standard. SB 863, however, does not use the term genetically modified organism and its preemption was written broadly. Specifically, SB 863 provides:

> ". . .a local government may not enact or enforce a local law or measure, including but not limited to an ordinance, regulation, control area or quarantine, to inhibit or prevent the production or use of agricultural seed, flower seed, nursery seed or vegetable seed or products of agricultural seed, flower seed, nursery seed or vegetable seed."

Based on that broad preemption, some people asserted that SB 863's preemption extended to medical marijuana, which they believed qualified as a product of an "agricultural seed" or in the alternative "nursery seed." Other people also asserted that, despite the wording of HB 3460, its provisions were also preemptive. In response, in 2014 the Legislature adopted SB 1531, which accomplished two things. First, SB 1531 stated, without deciding, that if SB 863's preemptions reached medical marijuana, local governments could nonetheless adopt reasonable time, place and manner regulations. Second, SB 1531 stated, without deciding, that if HB 3460's provisions were preemptive, a local government could impose a one-year moratorium on the operation of a medical marijuana facility if the moratorium was adopted before May 1, 2014 and a copy was filed with the Oregon Health Authority.

SB 1531 also did something local governments could not do under their home rule authority. The bill removed immunity from state prosecution for any person operating a dispensary in a jurisdiction with a moratorium adopted in accordance with SB 1531's provisions.[7]

Because SB 1531's moratorium provisions were limited to one year, expiring on May 1, 2015, local governments are and have been considering what options are available to them with respect to the regulation of medical marijuana dispensaries. The following section explores those options as they currently exist under Oregon law.

[7] As noted above, cities in Oregon that have obtained home rule authority through the adoption of a home rule charter do so subject to the criminal laws of the state of Oregon. As such, a city may not allow that which state criminal law expressly prohibits, nor prohibit that which state criminal law expressly allows. As applied to medical marijuana dispensaries, that means that a city that enacts a general prohibition on the operation of a medical marijuana dispensary may not enforce that prohibition through its criminal ordinances. SB 1531, however, gave cities the option to adopt a one-year moratorium and obtain the benefit of being able to enforce that moratorium through a criminal prosecution.

Local Government Options for Regulation of Medical Marijuana

Under Oregon's constitutional home rule provision and the case law interpreting it, the League believes that local governments retain local control over all issues relating to medical marijuana, provided however that local governments may not recriminalize conduct for which the OMMA provides criminal immunity from state prosecution or allow conduct that remains unlawful under state law. As explained below, this means that unless a court declares otherwise or the Legislature adopts preemptive legislation, the League believes that cities that desire to do so currently have the authority to ban medical marijuana operations within their jurisdictions, or in the alternative to regulate those operations, including imposing local taxes.

However, cities that decide to prohibit or tax medical marijuana operations should understand that there are others in the state that disagree with the League's conclusions. As such, cities considering banning or taxing medical marijuana operations should consult with their legal counsel on the risks of litigation and the likelihood of prevailing. Those cities should also carefully monitor court decisions as these issues make their way through the Oregon appellate courts.

Before adopting regulations, another consideration for a city is whether existing state law would effectively preclude a person from obtaining a state license from the Oregon Health Authority to operate a medical marijuana facility. It is important to keep in mind that HB 3460 does not allow a dispensary to operate within 1,000 feet of a school or locate in a residential zone, or by Oregon Health Authority rule, another zone that does not allow retail activity. Consequently, it may well be that state law effectively forecloses any possibility of a medical marijuana facility operating in smaller communities.

Taxation

Nothing in the OMMA, HB 3460, nor any other legislation, expressly or by operation of its provisions, precludes a local government from imposing a tax on medical marijuana operations. Consequently, recognizing that the use of medical marijuana can increase demands on public safety resources, several cities have elected to impose a medical marijuana tax, including Ashland, Lake Oswego, West Linn and Wilsonville. A city desiring to impose such a tax can look to those communities for sample ordinance wording.

Moratoriums, Bans and Other Prohibitions

As noted above, it is the League's position that local governments that desire to ban the operation of medical marijuana dispensaries may do so. Although some people believe that SB 1531 limits local governments to only time, place and manner restrictions, thus far at least one Oregon court that has looked at this issue has concluded that HB 3460 is not preemptive, that

SB 863's preemptions do not reach medical marijuana, and that, as such, SB 1531's time, place and manner provisions do not provide the only option available to local governments.[8]

A city that desires to prohibit medical marijuana operations has several options to implement that prohibition. Specifically, a city might do so through a direct ban, amendments to the land use code, or restrictions on the issuance of a business license or other permit. Each of those options is briefly discussed below.

Direct Ban

A direct ban is one in which the city expressly prohibits the operation of a medical marijuana facility. The city of Jacksonville, Oregon has adopted an ordinance with that type of ban, and jurisdictions considering a direct ban might look to the Jacksonville ordinance for sample wording. It is important to note, however, that under Oregon's Home Rule provisions and the case law interpreting them, a city that adopts this type of ban likely would not be able to bring a local criminal action against a person violating the ban. Consequently, cities that desire to enact a direct ban should work closely with their legal counsel to determine what enforcement mechanisms could lawfully be put in place.

Land Use Code

Cities that desire to prohibit medical marijuana operations might also do so through amendments to their land use codes. Before considering this option, cities should work with their legal counsel to first determine if the wording of their zoning codes already prohibits medical marijuana operations, and if not, to identify the appropriate land use procedures and the amount of time it would take to comply with them. If the wording in a city's zoning codes does not prohibit medical marijuana operations, the city has different options. One option is to add wording such as "an allowed use is one that does not violate local, state or federal law" to the city's zoning code. Because marijuana remains a Schedule I controlled substance under the federal CSA, the effect of that wording would be to preclude medical marijuana operations. Cities that adopt a prohibition that references federal law would then rely on existing mechanisms in their ordinances for dealing with zoning violations.[9]

---

[8] See *City of Cave Junction v. State of Oregon*, Josephine County Circuit Court Case #14CV0588, currently on appeal to the Oregon Court of Appeals. Cities considering a ban and their legal counsel may obtain more information on that court case and read the League's legal briefs on the A to Z page on the League's website (www.orcities.org), under medical marijuana.

[9] Under existing law, the League believes it is clear that a city may enforce civil regulations of general applicability (such as zoning codes, business licenses and the like) through the imposition of civil penalties. Although a city likely cannot directly recriminalize conduct allowed under state criminal law, it is a different legal question whether a city may impose criminal penalties for violating a requirement of general applicability when the conduct at issue is otherwise immune from prosecution under state law (i.e. whether a city may impose criminal penalties for operation of a medical marijuana dispensary in violation of a city's land use code). *Cf. State v. Babson*, 355 Or 383, 326 P3d 559 (2014) (explaining that generally applicable, facially neutral law, such as a rule prohibiting use of public property during certain hours, may be valid even if it burdens expressive conduct otherwise protected under Article I, section 8, of the Oregon Constitution). Consequently, a city should work closely with its city attorney before imposing criminal penalties against a person operating a medical marijuana facility in violation of a local civil code, such as a zoning, business license or development code.

Business License Ordinance

Cities could also impose a ban through a local business license ordinance that provides that it is unlawful for any person to operate a business within the city without a business license, and further provides that the city will not issue a business license to any person operating a business that violates local, state or federal law. Indeed, cities that have a business license ordinance in place should review their existing codes to determine if such wording already exists. Additionally, whether adopting a new business license program or amending an existing one to provide that the city will not issue a business license to any person operating a business that violates local, state or federal law, a city should work with its legal counsel to ensure that its business license ordinance includes an enforcement mechanism to address a situation where a person is operating a business without a business license.

Development Code

Cities that lack a business license (or that do not wish to require a business license) but desire to impose a prohibition on medical marijuana operations could include in their development codes a provision stating that the city will not issue a development permit to any person operating a business that violates local, state or federal law. If not already defined, or if defined narrowly, the city will want to amend its code to provide that a development permit includes any permit needed to develop, improve or occupy land including, but not limited to, public works permits, building permits, or occupancy permits.

The four options described above are not exclusive. A city could elect to impose more than one of these options. Other mechanisms for prohibiting medical marijuana operations not otherwise covered here might also exist. The key is that any city wanting to prohibit medical marijuana operations should work closely with its legal counsel to survey existing code, develop a means to implement and enforce such a prohibition, and then craft the necessary amendments to the city's code to accomplish the council's intent.

Time, Place and Manner Regulations

As recognized by SB 1531, cities may also opt to regulate medical marijuana dispensaries by imposing time, place and manner restrictions on their operations. Appendix A includes sample wording that a city could use when developing a time, place and manner regulation. As explained further in that appendix, the means for implementing a time, place and manner regulation can vary. Cities could decide to establish a new licensing/registration requirement for medical marijuana dispensaries and impose restrictions as a condition of that license. Alternatively, cities could impose time, place and manner restrictions generally through their community enforcement code, or through restrictions in their zoning regulations, such as amendments that expressly prohibit medical marijuana operations in certain zones. Whatever the means, cities should work closely with their city attorney to ensure adequate enforcement mechanisms are in place to deal with violations of those codes.

Appendix A

Time, Place and Manner Restrictions on Medical Marijuana Dispensaries

APPENDIX A

Time, Place and Manner Restrictions on Medical Marijuana Dispensaries

Cities that desire to implement time, place and manner restrictions on medical marijuana dispensaries have several options to do so. Among those options, cities could impose and enforce restrictions through development or zoning codes.[10] Cities could also develop a new licensing/registration scheme, impose restrictions as a condition on the license, and establish a penalty for any person operating a dispensary without a license or in violation of the license terms. Cities could also impose time, place and manner restrictions through general civil ordinances and enforce those provisions with existing code enforcement mechanisms. None of those options are exclusive, and a city could also take a combined approach.

Whether to impose time, place and manner restrictions and the way in which the city does so are decisions that should be made after carefully considering the following:

- Community values;
- Availability of staff and budget for regulation and enforcement; and
- Existing regulatory and enforcement mechanisms, such as availability of code enforcement staff, law enforcement staff, and municipal court.

Given the diversity among cities and the various options and combinations available to cities, the League prepared this document to provide sample wording that could be applied in a variety of circumstances. What follows is sample wording that a city could use in developing an ordinance, which is preceded by a discussion of what the sample text does, other options and additional considerations. Put differently, what follows is not a model ordinance that can or should be adopted in its entirety. Rather, the sample ordinance text provided is meant to provide a menu of options that can be used to facilitate a discussion and aid in the development of a local ordinance that reflects local choices. Whatever option a city chooses, this document is intended to be a starting point, not an ending point, for cities that are considering adopting time, place, and manner restrictions on medical marijuana dispensaries.

This document is not a substitute for legal advice. Any local jurisdiction considering time, place and manner regulations should consult with legal counsel to obtain advice regarding the advantages, disadvantages, limitations and applicability of such an ordinance to local circumstances. Legal counsel can assist a city in preparing an ordinance that is consistent with existing ordinances and with a city's charter, and advise on what process is needed to adopt the ordinance. The law in this area is complex, and jurisdictions might face unintended

[10] Note, a city electing this option will have to take into account statutory notice procedures, which could delay implementation of the regulations beyond May 1, 2015, when SB 1531 moratoriums will expire. Cities that desire to impose regulations through a land use ordinance should work with their legal counsel to evaluate those timelines and to put a temporary provision in place if need be.

consequences by simply adopting any of the following wording without the advice of legal counsel.

Finally, although the sample wording addresses a variety of subjects, and is intended to be extensive: it is not necessarily a complete list of all subjects that a city's ordinance should address. Local circumstances and community values might require an ordinance to address subjects not covered by this document. Additionally, as Oregon's experience with medical marijuana continues to develop, cities will need to revisit their ordinances and make adjustments as necessary. Likewise, the League will endeavor to do the same by periodically updating this document.

Time, Place and Manner Restrictions on Medical Marijuana Dispensaries:
Overview of Subject Areas Covered

This document is not a substitute for legal advice. This document is not intended to be a complete or comprehensive code chapter on medical marijuana dispensaries. A city should not adopt the sample wording in its entirety. Rather, this document, much like a restaurant menu, covers various subjects, which a city may or may not want to include in a medical marijuana dispensary ordinance, and provides different options under each of those subjects. Consequently, this document is organized by subject area and includes a discussion of the subject followed by sample text on the following:

- Findings
- Definitions
- Rulemaking
- Licenses / Registration
    - Facility License Required
    - License Application
    - Issuance of License
    - Fees
    - Display of License
    - License Term, Renewal and Surrender
    - Transferability
    - Indemnification
- Criminal Background Checks
- Standards of Operation
    - Registration and Compliance with Oregon Health Authority Rules
    - Compliance with Other Laws
    - Hours of Operation
    - Public View into Facility
    - Odors
    - Lighting
    - Registry Identification Card Required
    - Sales in Facility
    - On-Site Use
    - On-Site Manufacturing
    - Outdoor Storage

    - Secure Disposal
    - Home Occupation
    - Drive-Through, Walk-Up
    - Labeling
    - Accounting Systems
    - Accounting Records
- Location
- Signs
- Edible Marijuana Products
- Examination of Books, Records and Premises
- Civil Enforcement
- Public Nuisance
- Criminal Enforcement
- Confidentiality
- Emergency Clause

Findings

Discussion

Findings provide the background and purpose of the legislation. Cities should consider how the sample findings below need to be modified to reflect their unique circumstances.

In preparing the findings, as well as other provisions of the ordinance, cities should keep in mind that marijuana remains an illegal drug under the federal Controlled Substances Act. To avoid allegations that city officials are violating federal law by authorizing the commission of a federal offense, the sample findings make clear that the authorization to operate a medical marijuana dispensary comes from state law, and not local law. As such, the sample has been drafted in a manner to be restrictive rather than permissive.

To illustrate that point, this sample includes wording for cities that desire to create a local licensing program as a way to implement their time, place and manner regulations. The sample's wording is drafted with care, however, to indicate that the source of authority to operate a medical marijuana dispensary derives from state law and that the local license is a means to impose restrictions on the operator and is not intended to be a separate source of authority. Consequently, the wording of the following sample text carefully avoids terms that would affirmatively "allow" or "authorize" medical marijuana dispensaries.

Sample Text

1. State law authorizes the operation of medical marijuana facilities and provides those facilities with immunity from state criminal prosecution.

2. Although the State of Oregon has passed legislation authorizing medical marijuana facilities and providing criminal immunity under state law, the operation of those facilities remains illegal under federal law.

3. The city council has home rule authority to decide whether, and under what conditions, certain commercial conduct should be regulated within the city and subject to the general and police powers of the city, except when local action has been clearly and unambiguously preempted by state statute.

4. Whether a certain business should operate within a local jurisdiction is a local government decision, and local governments may enforce that decision through the general and police powers of that jurisdiction.

5. [*If using an existing or creating a new license/registration system for medical marijuana facilities*] The city's licensing [*or registration*] and regulatory system should not be construed to constitute an authorization to engage in any activity prohibited by law nor a waiver of any other license or regulatory requirement imposed by any other provisions of city ordinance or local, regional, state or federal law.

6. The city council wants to regulate the operation of medical marijuana facilities in the city in ways that protect and benefit the public health, safety and welfare of existing and future residents and businesses in the city.

Definitions

Discussion

Definitions should be used to clarify intent and avoid ambiguity. The specific terms defined in a medical marijuana ordinance will depend on the provisions of that ordinance. The terms listed here are offered as examples and cover some of the most commonly-used terms in state law relating to medical marijuana facilities. They may or may not be applicable, depending on the ordinance the city adopts. In addition, depending on the needs of a particular city, it may be useful or necessary to include additional definitions not listed below.

The definitions of "marijuana" and "registration identification card" are taken primarily from ORS 475.302, which is the provision of the Oregon Revised Statutes that provides definitions for the Oregon Medical Marijuana Act. The sample text uses the term "medical marijuana facility"—rather than the term "dispensary" —because that is the term used in state statute. Another source for potential definitions is the Oregon Health Authority's administrative rules regulating the dispensary program at OAR 333-008-1010.

It is important to note that when interpreting ordinances that contain specific references to state law, the courts will use the version of the state statute that was in effect at the time that the ordinance was adopted. Put differently, if the Legislature amends a state statute, a city ordinance that references that statute is not automatically updated to reflect the legislative change. Consequently, if using statutory cites, the city will need to periodically review and update their ordinances if the city wants the benefit of the new statutory wording.

Sample Text

1. Marijuana or medical marijuana means all parts of the plant Cannabis family Moraceae, whether growing or not; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination. As used in this chapter, "marijuana" or "medical marijuana" refers to marijuana dried, produced, processed, kept, stored, delivered, transferred, dispensed or otherwise provided for the exclusive benefit of and use by a person to mitigate the symptoms or effects of a person's debilitating medical condition as defined in ORS 475.302.

2. Medical marijuana facility means a facility that is registered with the Oregon Health Authority and that sells, distributes, transmits, gives, dispenses or otherwise provides medical

marijuana to a person with a registry identification card. A facility includes all premises, buildings, curtilage or other structures used to accomplish the storage, distribution and dissemination of marijuana.

Alternative Sample Text: any facility or operation designed, intended or used for the purpose of delivering, dispensing or transferring marijuana to a person with a registry identification card.

3. Operator means a person who owns, operates or otherwise has legal responsibility for a facility and who meets the qualifications established by the Oregon Health Authority and has been approved by the Oregon Health Authority to operate a medical marijuana facility.
4. Principal means members, partners or corporate officers, and all stockholders holding more than 10 percent of the voting stock for any applicant who is not a natural person.
5. Registration identification card means a document issued by the Oregon Health Authority that identifies a person authorized to engage in the medical use of marijuana, and the person's designated caregiver, if any.

Rulemaking

Discussion

Depending on the size and structure of the city, a city may want to provide the city manager/ administrator or that person's designee, or another appointed city official such as the chief of police, with authority to adopt administrative rules to implement and enforce the city's medical marijuana ordinances.

Sample Text

1. Rulemaking. The city manager [*administrator*] or the city manager's [*administrator's*] designee [*or some other designated public official, such as "chief of police"*] has authority to adopt administrative rules and procedures necessary for the proper administration and enforcement of this chapter [*or if not creating a new chapter, "ordinances relating to the operation of a medical marijuana facility"*].

Licenses / Registration

Facility License Required

Discussion

Cities that want to regulate medical marijuana facilities can do so in a number of ways. Many cities, particularly those with larger staffs, have decided to regulate medical marijuana facilities

through a license or permit system. Even those cities that are using a licensing system are imposing differing levels of regulation, from basic registration and tracking to extensively restricting the activities of medical marijuana facilities. Because a licensing approach allows cities to both track and regulate medical marijuana facilities, with multiple enforcement mechanisms, the sample wording provides for a licensing system. Although this sample only requires a facility license, a city could also require the employees of medical marijuana facilities to get licenses.

As explained above, to avoid conflicts with federal law, the sample text is drafted to make clear that the authority for medical marijuana dispensaries to operate comes from state, and not local, law. Although the sample text uses the word "license," the text is intended to clarify that the license operates as a registration system, and not as a grant of authority to violate federal law. Cities that want to further emphasize that point may want to avoid the use of the word "license" and instead convert the sample text to "registration."

Cities that adopt a licensing/registration system will have to determine where to incorporate that system into their code. For example, cities with police protection licenses may want to add medical marijuana facilities to those licensing provisions.

Sample Text

1. Local License Required. Medical marijuana facilities must possess a valid license issued under this chapter to operate within the city. The license required by this chapter facilitates the registration and the city's oversight of a medical marijuana facility. The license required by this chapter should not be construed to constitute an authorization to engage in any activity prohibited by law nor a waiver of any other regulatory or license requirement imposed by any other provision of city ordinance or local, regional, state or federal law.

2. State Registration Required. To be eligible to apply for a license under this chapter, medical marijuana facilities must be registered with the Oregon Health Authority and authorized by state law to operate.

License Application

Discussion

Cities using a licensing/registration system will have to decide what information to request in an application. The sample list of information provided below is a compilation of application requirements from different city ordinances. Cities may determine that they want to require less, more or different information from applicants.

In addition, although this sample requires the same information for both an initial and renewal application, cities may want to use a less intensive or otherwise different process for license renewals.

Sample Text

1. Application / Renewals. Applications for new and renewed licenses must be submitted to _____ [*designated public official or city department*]. A separate application must be submitted for each proposed facility. The initial or renewal application must include the following information:

   a. Certification that the proposed facility is registered at that location as a medical marijuana facility with the Oregon Health Authority pursuant to ORS 475.314.

   b. The applicant's name, residence address, and date of birth. [*A city may want to require photo identification, such as a driver's license or other government-issued identification*.]

   c. The names and residence addresses of:

      i. Any person or legal entity that has an ownership interest in the facility, including all principals of the applicant;

      ii. Any person or legal entity with a financial interest that has loaned or given money or real or personal property to the applicant, or principal of the applicant, for use by the proposed facility within the preceding year;

      iii. Any person or legal entity that has leased real property to the applicant for use by the facility and any person who manages that property; and

      iv. Any person who is anticipated at the time of the application to be an employee or volunteer at the proposed facility.

   d. The business name.

   e. The address and telephone number of the proposed facility.

   f. The mailing address for correspondence about the license.

   g. A detailed description of the type, nature and extent of the business.

   h. The proposed days and hours of operation.

   i. A detailed description of the proposed accounting and inventory system of the facility.

   j. Certification that the facility has met all applicable requirements of the city development and sign code.

   k. Certification that all applicable taxes and fees have been paid.

   l. A complete application for a criminal background check for the applicant, and all principals, persons with a financial interest, employees, and volunteers of the proposed medical marijuana facility.

      Alternative Sample Text on Criminal Background: A statement whether the applicant, principals, persons with a financial interest, employees or volunteers have been convicted

of a misdemeanor within the past ____ [*time period*] that relates to _____, [*relevant crimes, such as fraud, theft, manufacture or delivery of a Schedule I controlled substance*] or have ever been convicted of a felony.

m. The names of at least three natural persons who can give an informed account of the business and moral character of the applicant and principals.

n. The signature, under penalty of perjury, of the applicant, if a natural person, or otherwise the signature of an authorized agent of the applicant, if the applicant is other than a natural person.

o. Other information deemed necessary by _____ [*designated public official*] to complete review of the application.

2. Continuing obligation to update information. All information provided in an initial or renewal application must be kept current at all times, including after a license is issued. Each licensee shall notify _____ [*designated public official or department*] in writing within _____ [*time period, such as ten business days*] of any change in the information provided to obtain the license.

Issuance of License

Discussion

Each city that adopts a licensing/registration system will have to determine the process for issuing licenses, the criteria for issuing or denying a license, and who within the city will apply those criteria. Cities may want to look to how other local licenses, such as business licenses, are issued in crafting a process for issuing medical marijuana facility licenses.

If a city wants to cap the number of licenses that it will issue, the city could address that issue in this section. If a city takes that approach, it should consider what method it will use to determine which applicants will receive licenses when the number of applications exceeds the cap.

Sample Text

1. Determination. Within ____ [*time period*] after receiving a complete [*initial or renewal*] application and license fee for a medical marijuana facility license, the _____ [*designated public official or department*] will issue the license if _____ [*designated public official or department*] finds that the facility is registered as a medical marijuana facility with the Oregon Health Authority pursuant to ORS 475.314 and that all other requirements under this chapter have been met.

2. Denial. In addition to denial for failure to meet the requirements of this chapter, the _____ [*designated public official or department*] may deny a license if:

    a. The applicant made an untrue, misleading, or incomplete statement on, or in connection with, the application for the license or a previous application for a license;

b. Notwithstanding the federal Controlled Substances Act, the applicant fails to meet all requirements of local, state, and federal laws and regulations, including, but not limited to, other permitting or licensing requirements and land use regulations; or

c. The _____ [*applicant, principals, employees, volunteers, persons with a financial interest in the facility*] have been convicted of _____ [*specified crimes*].

Fees

Discussion

Cities adopting a licensing system may want to charge a one-time initial license application fee, an annual license fee, or both. Cities may want to look at how their other licensing fees are structured when setting the medical marijuana facility license fee. Some cities prorate the license fee for licenses that are issued after a certain point in the licensing year. For example, if all licenses expire on December 31 each year, a city might prorate the fees for licenses issued after June 30 of that year. Some cities also provide that license fees are not refundable.

Sample Text

1. Fee. An initial license application or renewal application must be accompanied by a license fee. The fee amount will be established by _____ [*method for setting fees, commonly through council resolution; alternatively, fee amount may be set by ordinance*].

Display of License

Sample Text

1. Display. When requested, the licensee shall show the license issued under this chapter to any person with whom the licensee is dealing as part of the licensed activity or to _____ [*designated public official*].

   Alternative Sample Text: The license issued under this chapter must be prominently displayed at all times in an easily visible location inside the facility.

License Term, Renewal and Surrender

Discussion

Cities with licensing/registration systems will need to set a term and create a renewal process. The two options in the first subsection below provide different means of tracking expiration and renewal. The first option would put all renewals at one time of year and the second option would

put renewals on a rolling basis. Cities may want to consider schedules for other local license and renewal processes to determine whether to align medical marijuana facility licenses with those other processes. In addition, cities may want to provide a process for surrendering a license/registration.

Sample Text

1. Termination. A license terminates automatically _____ [*on month and day of each year/certain years or some time period from the date of issuance*], unless a license renewal application has been approved.
2. Renewal. A license may be renewed for additional _____ [*duration*] terms as provided by this chapter.
3. Renewal Application. Renewal applications shall be submitted, with the required license fee, to _____ [*designated public official or department*] not less than _____ [*days, months*] prior to the expiration date of the existing license.
4. Termination Due to Change in Law. A license terminates automatically if federal or state statutes, regulations or guidelines are modified, changed, or interpreted in such a way by state or federal law enforcement officials as to prohibit operation of the facility under this ordinance.
5. Surrender. A licensee may surrender a medical marijuana facility license by delivering written notice to the city that the licensee thereby surrenders the license. A licensee's surrender of a license under this section does not affect the licensee's civil or criminal liability for acts the licensee committed before surrendering the license.

Transferability

Discussion

Cities should consider whether they want to allow licensees to transfer their license, and, if so, the process for allowing such a transfer. For example, under certain circumstances, a city might allow the license to be transferred if the business is sold. The alternative sample text below provides for a license transfer. Cities that allow for transfer might consider creating a transfer application, which could require an accompanying fee, to ensure that the new licensee is eligible to hold the license. In addition, cities that allow for transfer should review the restrictions in state law. For example, under OAR 333-008-1050(7), a facility's registration may not be transferred to another location, and OAR 333-008-1090 describes additional limits on transfers between individuals.

Sample Text

1. Transferability. Licenses issued under this chapter shall not be transferred to any other person.

   Alternative Sample Text: Licenses issued under this chapter may be transferred to another person upon determination by _____ [*designated public official*] that the person receiving the license meets the requirements of this chapter for licensees.

Indemnification

Sample Text

1. Waiver. By accepting a medical marijuana facility license issued under this chapter, the licensee waives and releases the city, its officers, elected officials, employees, volunteers and agents from any liability for injuries, damages or liabilities of any kind that result from any arrest or prosecution of a facility owner or operator, principal, person or legal entity with a financial interest in the facility, person or entity that has leased real property to the facility, employee, volunteer, client or customer for a violation of federal, state or local laws and regulations.
2. Indemnification. By accepting a medical marijuana facility license issued under this chapter, the licensee(s), jointly and severally if there is more than one, agree to indemnify and hold harmless the city, its officers, elected officials, employees, volunteers, and agents, insurers, and self-insurance pool against all liability, claims, and demands on account of any injury, loss, or damage, including, without limitation, claims arising from bodily injury, personal injury, sickness, disease, death, property loss or damage, or any other loss of any kind whatsoever arising out of or in any manner connected with the operation of the medical marijuana facility that is the subject of the license.

Criminal Background Checks

Discussion

Under state statute, only the "person responsible for a medical marijuana facility" —in most cases, the owner—is required to submit to a criminal background check. Cities may want to require additional background checks for employees, volunteers or other individuals associated with a medical marijuana facility. Alternatively, cities could require license applicants and others associated with licensed facilities to self-report that information as part of the application process, as provided in the License Application alternative sample text above.

State statute limits the class of convictions that would prohibit a person from registering with the Oregon Health Authority as a facility owner. Cities may want to include additional disqualifying convictions.

Alternatively, some cities may want to use their licenses solely for tracking purposes, without limiting who is eligible to receive a license or work at a licensed facility. In that case, a city may not want to require criminal background checks.

Sample Text

1. Background Check Required / Disqualification. All _____ [*applicants, principals, employees, volunteers, persons with a financial interest in the facility*] must submit to a criminal background check performed by _____ [*designated public official*] before _____ [*a license will be issued; beginning employment at a facility; etc.*]. A person who has been convicted of _____ [*specified crimes*] may not be _____ [*a licensee, employee, volunteer, etc.*].

Standards of Operation

Discussion

The topics covered in this section are examples of some of the many issues that a city may want to address in regulating medical marijuana facilities, but the list is not exhaustive. In drafting provisions for a section covering standards of operation, there are at least three considerations to keep in mind.

First, SB 1531 provides that time, place and manner regulations need to be "reasonable," however the bill does not define that term. As noted above, the preemptive effect of SB 1531 is currently the subject of litigation. Nonetheless, until that litigation is resolved, regulations that exceed what others think are needed to meet public health, welfare and safety concerns could face legal challenge as being "unreasonable." Consequently, a city will be better positioned against a potential legal challenge if it makes specific findings as to why the regulations serve public health, welfare and safety concerns.

Second, as a reminder, a city should consider drafting ordinances to restrict, rather than authorize, certain activities in an effort to avoid conflicts with federal law. For example, rather than providing that a medical marijuana facility *may* operate between the hours of 8:00 a.m. and 5:00 p.m., the ordinance should provide that a facility *may not* operate between the hours of 5:00 p.m. and 8:00 a.m. If the city does not want to restrict activity, it should simply remain silent on that issue, rather than affirmatively authorizing conduct that is illegal under federal law.

Third, when deciding what restrictions to impose, cities should become familiar with the conditions the state is placing on dispensaries by reviewing the most recent version of OAR 333-008-0000 to OAR 333-008-1400. After reviewing those conditions, cities should consider whether they want to impose additional requirements or whether they want to include similar requirements in their code so that they can independently enforce those provisions of state law through local enforcement mechanisms.

Sample Text

1. Registration and Compliance with Oregon Health Authority Rules. The facility's registration as a medical marijuana facility under ORS 475.314 must be in good standing with the Oregon Health Authority, and the facility must comply with all applicable laws and regulations administered by the Oregon Health Authority for facilities.

2. Compliance with Other Laws. The facility must comply with all applicable laws and regulations, including, but not limited to, the building and fire codes.

3. Hours of Operation. Operating hours for medical marijuana facilities must be no earlier than _____ and no later than _____ on the same day. *[consider using same time period as allowed under any applicable ordinance relating to liquor stores]*

4. Public View into Facility. All doorways, windows and other openings shall be located, covered or screened in such a manner to prevent a view into the interior from any exterior public or semipublic area.

5. Odors. The facility must use an air filtration and ventilation system which, to the greatest extent feasible, confines all objectionable odors associated with the facility to the premises. For the purposes of this provision, the standard for judging "objectionable odors" shall be that of an average, reasonable person with ordinary sensibilities after taking into consideration the character of the neighborhood in which the odor is made and the odor is detected.

6. Lighting. Facilities must maintain adequate outdoor lighting over each exterior exit.

7. Registry Identification Card Required. All persons allowed within the facility, except _____ [*designated public officials*], must have a valid registry identification card and be in compliance with rules adopted by the Oregon Health Authority.

8. Sales in Facility. Sales or any other transfers of marijuana on the facility premises must occur inside the facility building and must be conducted only between the facility and individuals with registry identification cards.

9. On-Site Use. Marijuana and tobacco products must not be smoked, ingested, consumed or otherwise used on the premises of a medical marijuana facility.

10. On-Site Manufacturing. Manufacturing or production of any extracts, oils, resins or similar derivatives of marijuana is prohibited at a facility. Use of open flames or gases in the preparation of any products is prohibited at a facility.

11. Outdoor Storage. Outdoor storage of merchandise, raw materials or other material associated with the facility is prohibited.

12. Secure Disposal. The facility must provide for secure disposal of marijuana remnants or by-products; marijuana remnants or by-products shall not be placed within the facility's exterior refuse containers.

13. Home Occupation. A facility may not be operated as a home occupation.

14. Drive-Through, Walk-Up. A facility may not have a walk-up window or a drive-through. *[Note, if the mobile dispensary provisions discussed below under Location are not used, a city might consider adding them here.]*

15. Labeling. All products containing medical marijuana intended to be ingested (i.e. edibles) must be labeled with the product's serving size and the amount of tetrahydrocannabinol in each serving.

16. Accounting Systems. The medical marijuana facility must have an accounting system specifically designed for enterprises reliant on transactions conducted primarily in cash and sufficient to maintain detailed, auditable financial records. If the _____ *[designated public official]* finds the books and records of the facility are deficient in any way or if the facility's accounting system is not auditable, the facility must modify the accounting system to meet the requirements of the _____ *[designated public official]*.

17. Accounting Records. Every facility must keep and preserve, in an accounting format established by _____ *[designated public official]*, records of all sales made by the dispensary and such other books or accounts as may be required by the _____ *[designated public official]*. Each facility must keep and preserve for a period of at least _____ *[time period]* records containing at least the following information:

    a. Daily wholesale purchases (including grow receipts) and retail sales, including a cash receipts and expenses journal;

    b. State and federal income tax returns;

    c. True names and any aliases of any owner, operator, employee or volunteer of the facility;

    d. True names and addresses and any aliases of persons that have, or have had within the preceding year, a financial interest in the facility; and

    e. _____ *[designated public official]* may require additional information as he or she deems necessary.

Location

Discussion

A city can regulate the location of a medical marijuana dispensary either through amendments to its zoning code, made in accordance with local and statutory land use procedures, or by imposing conditions on the medical marijuana facility license. Cities should consult their city attorney to discuss the benefits, risks and timelines associated with each approach.

Cities may want to impose restrictions on where medical marijuana facilities can locate in relation to other zones or specified locations. For example, a city could impose limits on the distance of medical marijuana facilities from:

- A residential zone or residentially zoned property;
- Places where children congregate;
- A public elementary, private elementary, secondary, or career school attended primarily by individuals under the age of 21;
- A public library;
- A public park, public playground, recreation center, or facility;
- A licensed child care facility;
- A public transit center;
- Any game arcade where admission is not restricted to persons aged 21 or older;
- Another licensed medical marijuana facility;
- Any public property, not including the right of way; or
- Any combination of the above.

Cities that impose those types of distance restrictions should consider how those provisions will operate if one of the protected properties, such as a school, locates within a restricted area of an existing medical marijuana facility. An ordinance could provide that the medical marijuana facility may remain in place, that the license will be revoked, or that the license will no longer be eligible for renewal. Cities should work closely with their city attorney to evaluate the risks and benefits of those options. In addition, cities may want to look to the state regulations for guidance. For example, under OAR 333-008-1090(4), a facility may no longer transfer medical marijuana if certain types of schools are "found to be within 1,000 feet of the registered facility."

In addition, cities should consult their city attorney if they are imposing restrictions that are more stringent than those imposed under state law, by, for example, requiring facilities to locate 2,000 feet from other medical marijuana facilities. Although the courts have generally upheld local authority to impose more stringent requirements than those imposed by state law, a city should consult its city attorney regarding the risks associated with taking a more restrictive approach. That is true particularly if the regulations have the effect of prohibiting dispensary operations within the city. As noted above, the League believes SB 1531's provisions are not exclusive, and that a city may prohibit dispensary operations. Consequently, even if a city's regulations effectively result in prohibiting dispensaries from operating, the League believes it is within a city's authority to adopt such regulations. However, a city that takes that route should work closely with its legal counsel to follow current court cases in this area and be prepared to defend its regulations against a legal challenge.

Cities that adopt distance restrictions will also need to consider how the distance will be measured. For example, one city provided that the distance would be measured in a straight line from the closest edge of each property line, while another city provided that the distance would be measured from the property line of the affected property, such as a school, to the closest point of space occupied by the medical marijuana facility. Another city provided that the distance would be measured between the closest points of the respective lot lines.

In addition to distance restrictions, some cities have imposed restrictions on what types of businesses can collocate with medical marijuana facilities. For example, some cities have prohibited collocation with tobacco smoking lounges, marijuana social clubs, and retail marijuana facilities. Some cities have also required medical marijuana facilities to be located at fixed, permanent locations. For example, an ordinance might provide, "A medical marijuana facility may not be located at a temporary or mobile site. No person shall locate, operate, own, allow to be operated or aid, abet or assist in the operation of any mobile medical marijuana facility which transports or delivers, or arranges transportation or delivery, of medical marijuana to a person."

Sample Text

1. Restrictions on Location. A medical marijuana facility shall not locate:
    a. Within a residence or mixed-use property that includes a residence.
    b. Within _____ zone(s).
    c. Within _____ [*distance*] of _____ [*certain zones, types of properties, medical marijuana facilities, etc.*]
    d. On the same property or within the same building with _____ [*other types of facilities, such as marijuana social clubs*].
2. Distances. For purposes of this section, all distances shall be measured _____ [*method for measuring distance*].

Signs

Discussion

No sample text is provided because cities that want to regulate the signs on medical marijuana facilities should consider applying their existing sign code. If a city does not have a sign code, the League has "A Guide for Drafting a Sign Code," which includes a sign code template, available in the Library on the League's website (www.orcities.org). Cities that want to impose sign restrictions on medical marijuana facilities other than those already in the city sign code should consult their city attorney about possible free speech implications.

Edible Marijuana Products

Discussion

SB 1531 requires certain marijuana products to be packaged in child-resistant safety packaging and prohibits the transfer of certain marijuana products that are manufactured or packaged in a manner that is attractive to minors. The Oregon Health Authority has enacted rules that further clarify those standards. See OAR 333-008-1225 (defining what qualifies as "child-resistant safety packaging" and "packaged in a manner not attractive to minors"). A city might wish to review those sections and replicate them in local code so that it may use local enforcement procedures in the event that the state declines to take an enforcement action under state law.

Examination of Books, Records and Premises

Discussion

Cities regulating medical marijuana facilities should consider who will enforce those regulations and how. One aspect of that decision is whether a city will provide for inspections, and, if so, what those inspections will entail and who will conduct them. In addition, cities that provide for inspection of a facility and its records may want to specify which records a medical marijuana facility must keep, and for how long. Sample text on records retention is provided in the Standards of Operation section above.

Sample Text

1. Examination of Books, Records and Premises. To determine compliance with the requirements of this chapter and other chapters of _____ [*city's code*], a licensee shall allow _____ [*designated public official*] to examine or cause to be examined by an agent or representative designated by _____ [*designated public official*], at any reasonable time, the premises of the facility, including wastewater from the facility, and any and all facility financial, operational and facility information, including books, papers, payroll reports, and state and federal income tax returns. Every licensee is directed and required to furnish to _____ [*designated public official*] the means, facilities and opportunity for making such examinations and investigations.

2. Compliance with Law Enforcement. As part of investigation of a crime or a violation of this chapter which law enforcement officials reasonably suspect has taken place on the facility's premises or in connection with the operation of the facility, the _____ [*designated public official*] shall be allowed to view surveillance videotapes or digital recordings at any reasonable time. Without reducing or waiving any provisions of this chapter, the _____ [*law enforcement department*] shall have the same access to the facility, its records and its operations as allowed to state inspectors.

   Alternative Sample Text: Facilities shall be open for inspection and examination by _____ [*public official charged with enforcement*] during all operating hours.

Civil Enforcement

Discussion

A licensing system allows a city multiple methods of enforcement. As included in the sample text below, the city can deny, suspend or revoke a license, but it may also impose penalties on a facility owner that does not comply with local ordinances.

If a city adopts a license suspension and revocation provision like the one listed below, a city may want to consider whether to address additional issues such as:

- Will the ordinance list all possible reasons for revocation, or will it include a more general revocation provision based on noncompliance with this chapter, as provided in the sample?
- Will the ordinance provide the form and timing of the suspension or revocation? For example, "Any denial, suspension or revocation under this section shall be in writing, including the reasons for the denial, suspension or revocation, and sent by first-class mail at least _____ [*time period*] prior to the effective date of the denial, suspension or revocation." If the licensee is given advanced notice of the pending suspension or revocation, as is the case in this sample language, the city may want to give the licensee a period of time within which to correct the problem to avoid suspension or revocation.
- Will the ordinance allow for an appeal, and, if so, can that decision be appealed? For example, "A denial, suspension, or revocation under this section may be appealed to _____ [*designated public official*]. The findings of _____ [*designated public official*] shall be final and conclusive." In addition, if the ordinance allows for an appeal, the city may want to include in the ordinance whether the appeal stays the pending enforcement action.
- Will the ordinance put limitations on how soon after revocation a person or entity can apply for a new license? For example, "A person or entity who has had a license revoked may not apply for a new license until _____ [*time period*] from the date of the revocation."

Cities may also want to review their existing city codes to see if there are other violation provisions that they want to incorporate by reference here.

Sample Text

1. Enforcement. _____ [*designated public official*] may deny, suspend or revoke a license issued under this chapter for failure to comply with this chapter [*and rules adopted under this chapter*], for submitting falsified information to the city or the Oregon Health Authority, or for noncompliance with any other city ordinances or state law.
2. Civil Penalty. In addition to the other remedies provided in this section, any person or entity, including any person who acts as the agent of, or otherwise assists, a person or entity who fails to comply with the requirements of this chapter or the terms of a license issued under

this chapter, who undertakes an activity regulated by this chapter without first obtaining a license, who fails to comply with a cease and desist order issued pursuant to this chapter, or who fails to comply with state law shall be subject to a civil penalty not to exceed _____ [*amount*] per violation.

3. Other Remedies. In addition to the other remedies provided in this section, the city may institute any legal proceedings in circuit court necessary to enforce the provisions of this chapter. Proceedings may include, but are not limited to, injunctions to prohibit the continuance of a licensed activity, and any use or occupation of any building or structure used in violation of this chapter.

4. Remedies not Exclusive. The remedies provided in this section are not exclusive and shall not prevent the city from exercising any other remedy available under the law, nor shall the provisions of this chapter prohibit or restrict the city or other appropriate prosecutor from pursuing criminal charges under city ordinance or state law.

Public Nuisance

Discussion

Public nuisance ordinances provide a means for cities to take action to protect the public in general. Adding a public nuisance provision to a medical marijuana facility ordinance provides the city with another means of enforcing its local regulations. A city that has a municipal court might also consider working with its legal counsel to determine whether it can provide for private nuisance actions in municipal court.

Sample Text

1. Public Nuisance. Any premises, house, building, structure or place of any kind where medical marijuana is grown, processed, manufactured, sold, bartered, distributed or given away in violation of state law or this chapter, or any place where medical marijuana is kept or possessed for sale, barter, distribution or gift in violation of state law or this chapter, is a public nuisance.

2. Action to Remedy Public Nuisance. The city many institute an action in circuit court in the name of the city to abate, and to temporarily and permanently enjoin, such nuisance. The court has the right to make temporary and final orders as in other injunction proceedings. The city shall not be required to give bond in such an action.

Criminal Enforcement

Discussion

As noted, cities generally cannot criminalize what state law expressly allows. However, it is an open question whether a city can impose criminal penalties for violating a law of general applicability that reaches conduct expressly authorized under state law. For example, it is an open question whether a city can impose criminal penalties on a medical marijuana facility that operates without a business license, in violation of local law, because state law does not expressly provide that a facility is exempt from criminal prosecution for operating without a business license. Therefore, cities that want to impose criminal penalties should work closely with their city attorney to determine whether the city can impose criminal penalties for failure to comply with the city's licensing provisions or other provisions of general applicability.

Confidentiality

Sample Text

1. Confidentiality. Except as otherwise required by law, it shall be unlawful for the city, any officer, employee or agent to divulge, release or make known in any manner any financial or employee information submitted or disclosed to the city under the terms of this chapter. Nothing in this section shall prohibit the following:

    a. The disclosure of names and facility addresses of any licensee under this chapter or of _____ [*other individuals associated with a medical marijuana facility, such as other owners*];

    b. The disclosure of general statistics in a form which would prevent identification of financial information regarding a facility [*or facility operator*];

    c. The presentation of evidence to a court, or other tribunal having jurisdiction in the prosecution of any criminal or civil claim by the city under this chapter;

    d. The disclosure of information upon request of a local, state or federal law enforcement official; or

    e. The disclosure of information when such disclosure of conditionally exempt information is ordered under public records law procedures [*or when such disclosure is ordered under the Oregon Public Records Law*].

Emergency Clause

Discussion

The League's model charter, available on the Library page under Publications on the League's website (www.orcities.org), provides that ordinances normally take effect on the 30th day after adoption, or on a later day provided in the ordinance. The model charter provides an exception to that general rule and allows an ordinance to take effect as soon as adopted, or on another date less than 30 days after adoption, if it contains an emergency clause. Cities that want their ordinance to have immediate effect should review their charter and talk to their city attorney about whether an emergency clause is needed.

Sample Text

This act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this ordinance shall be in full force and effect on _____ [*date*].