Maine Townsman
The Magazine of the Maine Municipal Association
AUGUST-SEPTEMBER 2016

Cities, towns struggle with medical marijuana caregivers

Growing, medical use of marijuana poses challenges because municipalities have valid concerns about marijuana operations, yet local regulation is limited.

By Edward J. Kelleher

Local officials in Maine have struggled to cope with the emergence of a large and expanding group of "medical marijuana caregivers," who are licensed by the state to grow marijuana for medical marijuana patients. This article highlights and attempts to address some of the more daunting issues that towns are facing.

The Maine Medical Use of Marijuana Act (the "MMJ Act"), authorizes the use of marijuana to treat a variety of legally enumerated "debilitating medical conditions." With a doctor's certification, an individual with one of the qualifying conditions is authorized to grow or purchase marijuana as a means of treatment. Such a person becomes a "qualifying patient." Qualifying patients can grow their own marijuana, or can buy it from one of two sources: one of the eight large licensed dispensaries scattered throughout the state, or from a "registered primary caregiver" (a "caregiver"). Caregivers are individuals with licenses from the Maine Department of Health and Human Services to grow and sell marijuana for up to five qualifying patients (plus themselves, if the caregiver is a qualifying patient). A caregiver can grow up to six flowering female plants per qualifying patient (including themselves), for a total grow of up to 36 plants. Two people who share a household can combine their grows, for a maximum grow size of 72 flowering plants.

The drafters of the MMJ Act could not have foreseen all the ways in which the cannabis industry would change over the last few years. Consequently, the MMJ Act is somewhat ambiguous with respect to the powers of local municipalities to regulate various aspects of the cannabis industry. These ambiguities have resulted in confusion and disputes over the extent to which caregivers are subject to local ordinances and over the power of localities to impose zoning and other rules specifically on caregivers.

Pre-emption

Most broadly, some caregivers assert that the MMJ Act fully preempts the power of local municipalities to impose any regulation at all on caregivers. They rely on two provisions of the Act to reach that conclusion. First, 22 M.R.S.A. § 2423-E(1) provides that a "person whose conduct is authorized under this chapter may not be denied any right or privilege … for lawfully engaging in conduct involving the medical use of marijuana authorized" by the MMJ Act. And second, 22 M.R.S.A. § 2428(10), provides, "(T)his chapter does not prohibit a political subdivision of this State from limiting the number of dispensaries that may operate in the political subdivision or from enacting reasonable regulations applicable to dispensaries. A local government may not adopt an ordinance that is duplicative of or more restrictive than the provisions of this Act. An ordinance that violates this subsection is void and of no effect." This second provision is a subsection of a section dealing with the eight large dispensaries throughout the state.

The caregivers' argument is a claim of express preemption. The provisions of 22 M.R.S.A. § 2428(10) provide the foundation for this preemption argument. However, while the MMJ Act does contain several provisions concerning the operations of caregivers, there are many topics and areas of regulatory focus that the MMJ Act does not address with respect to caregivers. For instance, the MMJ Act is silent with respect to the application of life safety and building code requirements to caregiver cultivation facilities. Although not free from doubt, a court would likely conclude that a claim of express preemption should not stretch so far as to operate to deprive localities from regulating those aspects of caregiver operations to which the MMJ is completely silent. Any such reading of 22 M.R.S.A. § 2428(10) and of preemption doctrine would likely be seen as too broad. Consequently, regulations relating to building permits, site plan review, health and safety standards and zoning and siting would likely not be deemed preempted by the MMJ Act.

Additionally, the MMJ Act contains far more detailed provisions relating to the licensing and operation of dispensaries than it does to similar aspects of caregiver activities. Because dispensaries can have an unlimited number of qualifying patients and an unlimited number of employees, their operations pose a bigger public safety and welfare issue. Thus, dispensaries were a major concern of the legislature, reflected in the detailed statutory scheme applicable to them. In this context, and with 22 M.R.S.A. § 2428(10) being embedded in a section dealing only with dispensary operations, this subsection is best read as applying only to local regulations affecting dispensaries, and not generally to caregivers.

Finally, the provisions of 22 M.R.S.A. § 2423-E(1) make clear that no one can be denied a right or privilege simply as a result of engaging

***Edward "Ted" Kelleher** is an attorney with Drummond Woodsum, practicing out of Portland. Email him at: tkelleher@dwmlaw.com.*

in activity protected by the MMJ Act. However, rights and privileges created under state law are routinely subject to compliance with local regulations; for instance, the right to construct a structure or engage in commercial activities on private property is subject to local zoning, land use and health and safety ordinances. The rights of caregivers are no different.

All this being said, a court would likely find some limits to the power of a municipality to regulate caregivers and qualifying patients. For instance, local regulations adding or removing enumerated debilitating medical conditions, or changing the number patients a caregiver could service or the number of plants grown would clearly be subject to a preemption claim.

Licensure and zoning

A harder case is local licensure requirements for caregivers. To be able to operate legally, a caregiver must apply for and be issued a caregiver registration from DHHS. Issuance of a caregiver registration is subject to various requirements such as a criminal background check. A town could not make a caregiver operation contingent on obtaining a local license that imposed additional licensure requirements. It is, however, conceivable that a town could require a caregiver to obtain a business license that did not impose additional requirements, but simply called for the caregiver to provide basic information about the operation and perhaps a licensing fee.

There has been some confusion as to how to characterize a caregiver's activities for zoning purposes. There are a few emerging themes here. First, if a caregiver is operating out of a primary residence, the emerging view is that the caregiver operation constitutes a home occupation, and should be subject to applicable zoning rules on home occupations. However, if a caregiver is operating in a non-residential space, such as a warehouse or commercial building, the emerging consensus is that a caregiver's activities constitute light manufacturing (contrasted with agriculture). Caregivers grow marijuana in indoor facilities, and much of their activity involves the processing of plant material into usable form by patients. These processing activities involve extensive trimming and sometimes extraction of oils, and the parceling of marijuana into packages sized for purchase. These activities more closely describe a manufacturing activity than they do agriculture. The characterization of caregiver operations is ultimately, however a town's decision, based on the particular text of its zoning ordinance.

The MMJ Act contains extensive confidentiality provisions at 22 M.R.S.A. § 2425(8). In particular, 22 M.R.S.A. § 2425(8)(B) provides that "(A)pplications and supporting information submitted by primary caregivers … operating in compliance with this chapter are confidential." Some caregivers have asserted that this creates an entitlement to operate anonymously, and that any local ordinance that requires a caregiver to disclose her or his name and status as a caregiver to a municipality is thus illegal. These controversies have arisen in the context of the "right, title and interest" requirement for local permits. Some caregivers assert that they are exempt from such a requirement because proving that they have right, title or interest would require disclosing their identity. One such case involving the Town of York is being litigated.

These confidentiality provisions appear to apply to the conduct of DHHS. They are part of a larger section of the MMJ Act governing the issuance of registry cards to patients and caregivers by DHHS, and do not apply by their terms to other governmental entities. The "applications" in question are submitted to and processed by DHHS. Caregivers making a claim to an entitlement of anonymity are in essence asserting that the identity of a caregiver is a part of the application, and is therefore subject to complete confidentiality for all purposes.

This argument is undercut by the provisions of 22 M.R.S.A. § 2423-E(5)(B); this is a provision which describes what a person must do to get the legal protections of the MMJ Act. It says that "(I)f the person is a primary caregiver, [he must] present upon request of a law enforcement officer the original written document designating the person as a primary caregiver by the qualifying patient … and the primary caregiver's driver's license … or a nondriver identification card as described…." Thus, the MMJ Act itself conditions the protections it gives a caregiver on disclosure of the caregiver's identity. A claim to an entitlement to anonymity, thus, does not have support in the text and structure of the MMJ Act.

Conclusion

The continued development of the cannabis industry will surely present more challenges to cities and towns in Maine. A firm understanding the state regulatory regime will be essential to local officials as they work to cope with these challenges. ■