CLACKAMAS COUNTY BOARD OF COUNTY COMMISSIONERS

Study Session Worksheet

Presentation Date: August 19, 2014 Approx Start Time: 2:30 Approx Length: 1 hour

Presentation Title: Marijuana Update.

Department: Admin, Counsel

Presenters: Dan Chandler, Nate Boderman

Other Invitees: Mike McCallister

WHAT ACTION ARE YOU REQUESTING FROM THE BOARD?

Direction on the following questions:

1. Should the County lift the current moratorium on medical marijuana dispensaries, and replace it with time, place and manner restrictions, and if so, when?

2. What process should the County follow in obtaining citizen input on time place and manner restrictions?

3. What are the key regulatory issues involved in time, place and manner restrictions for medical marijuana as well as recreational marijuana?

4. Should the County license marijuana facilities, potentially along with other businesses?

EXECUTIVE SUMMARY:

Medical Marijuana
On March 19, 2014, Governor Kitzhaber signed Senate Bill 1531 into law. The law gave local governments the authority to impose "time, place and manner" regulations on medical marijuana dispensaries, but stops short of authorizing local governments to institute permanent bans on these facilities.

The bill required that the Oregon Health Authority license medical marijuana dispensaries and imposed a number of siting requirements:

1. Must be located in an area that is zoned for commercial, industrial or mixed use or as agricultural land.

2. May not be located at the same address as a marijuana "grow site."

3. Must not be located within 1,000 feet of a public or private elementary, secondary or

career school attended primarily by minors.

4. Must not be located within 1,000 of another medical marijuana facility.

The bill did, however allow local governments to impose up to a one-year moratorium on medical marijuana dispensaries, provided the moratorium was adopted by May 1, 2014. Most local governments around the state imposed moratoriums, with a few notable exceptions, including the City of Portland. The City of Salem adopted a fairly strict time, place and manner ordinance.

On April 24, 2014, the Board of Commissioners adopted Ordinance 01-2014, imposing a one-year moratorium on medical marijuana facilities in the County.

Recreational Marijuana – Measure 91
Last month, the Secretary of State directed that Measure 91 be placed on the November ballot. The measure gathered far in excess of the required number of signatures. If it passes, Measure 91 will legalize recreational marijuana in Oregon. Recreational marijuana would be subject to regulation by the Oregon Liquor Control Commission, or OLCC.

Local governments would retain the ability to impose "time place and manner" restrictions within constitutional limits, but cannot impose a tax or fee beyond state tax that would be imposed on growers—$10 an ounce on leaves and $35 an ounce on flowers. Some cities believe that there is local authority to impose a sales tax on marijuana, provided it is adopted in advance of the measure.
http://www.wweek.com/portland/article-22868-dont_bogart_that_tax.html

What Local Control Remains?
While the question is not beyond dispute, local governments have the authority to further regulate dispensaries through business licenses, zoning laws and development permits, and to enforce violations of those ordinances with civil penalties.

Is there any advantage to passing an ordinance on recreational marijuana prior to passage of the recreational marijuana statute?
Counsel's review has concluded that there would be no advantage to the County in passing recreational marijuana regulations in advance. However, as noted above, at least some jurisdictions are of the opinion that they may pass a sales tax on recreational marijuana provided they do so before the measure passes.

FINANCIAL IMPLICATIONS (current year and ongoing):

Adoption of a moratorium will require County Counsel staff time and resources to draft an ordinance, solicit feedback and conduct public hearings. However, no new funding is being sought.

The legalization of recreational marijuana will have a host of impacts. A portion of taxes raised will go to the County. However, enforcement and training costs will increase.

For example, K9 units in some jurisdictions are being retrained or retired early due to the changes in marijuana enforcement.

Passage of the recreational marijuana measure would yield some tax revenue to the County, at least initially. However, after the first year, taxes would be distributed in accordance with the number of recreational marijuana facilities in each jurisdiction.

LEGAL/POLICY REQUIREMENTS:

1. The attached memorandum from Nathan Boderman lays out some of the issues in Measure 91, the recreational marijuana measure.

2. The attached memorandum from Mike McCallister addresses time place and manner restrictions from a land use planning perspective.

PUBLIC/GOVERNMENTAL PARTICIPATION:

As I am sure the BCC recalls, there was substantial testimony at the time the moratorium was adopted, both pro and con. When and if the BCC directs, staff anticipates will convene a citizen work group to address and make recommendations as to appropriate time place and manner restrictions.

OPTIONS AND RECOMMENDATIONS:

1. Should the County lift the current moratorium on medical marijuana dispensaries, and replace it with time, place and manner restrictions, and if so, when?

Options
There are at least three options available:

a. Begin the process now to lift the moratorium.

b. Wait and see whether the recreational measure passes.

c. Extend the moratorium into next year, potentially to see whether the legislature allows an extension.

Recommendation
Staff recommends Option b. This will allow the County to evaluate marijuana commerce as a whole, and avoid duplication of effort in responding separately to medical and recreational marijuana. Waiting will also allow the County to continue to learn from the experience of other jurisdictions. The countervailing issue is that at least some local entrepreneurs have personal investments at risk as a result of the moratorium

2. **What process should the County follow in obtaining citizen input on time place and manner restrictions?**

Options

a. Rely on the normal citizen involvement process of business meetings and town halls.

b. Convene a work group to try to make recommendations.

Recommendation

Staff recommends Option b, recognizing that consensus may be difficult to obtain on an issue as divisive as marijuana use.

3. **What are the key regulatory issues involved in time, place and manner restrictions for medical marijuana as well as recreational marijuana?**

Options

Staff believes the key issues are:

Spacing
Which zones are appropriate?
Hours of operation
Protection of youth and children.
Funding
Screening of operators and potential law enforcement veto.

Recommendation

That the BCC raise any additional issues they wish staff to consider in developing time place and manner regulations.

4. **Should the County license marijuana facilities, potentially along with other businesses?**

Options

a. License marijuana facilities only.

b. Adopt an overall business license program, which could include marijuana facilities.

c. Adopt an overall business license program, and preclude licenses for activities that are illegal under state or federal law.

d. Avoid licensing altogether.

Recommendation
Staff recommends options b,c or d. Granting a special license for an activity that violates federal law raises a host of issues, and creates a legal risk for anyone involved.

ATTACHMENTS:

1. Memorandum from Nate Boderman

2. Memorandum from Mike McCallister,

3. News clippings and material from the League of Oregon Cities.

SUBMITTED BY:
Division Director/Head Approval _____
Department Director/Head Approval _____
County Administrator Approval _____

For information on this issue or copies of attachments, please contact Dan Chandler @ 503-742-5394

Fiscal Impact Form

RESOURCES:
Is this item in your current work plan and budget?

☐ YES
X NO

START-UP EXPENSES AND STAFFING (if applicable):

ONGOING OPERATING EXPENSES/SAVINGS AND STAFFING (if applicable):

ANTICIPATED RESULTS:
N/A

COSTS & BENEFITS:

Costs:

	Item	Hours	Start-up Capital	Other Start-up	Annual Operations	Annual Capital	TOTAL
Total Start-up Costs							
Ongoing Annual Costs							

Benefits/Savings:

	Item	Hours	Start-up Capital	Other Start-up	Annual Operations	Annual Capital	TOTAL
Total Start-up Benefit/Savings							
Ongoing Annual Benefit/Savings							

July 17, 2014

To: Commissioner Jim Bernard

From: Mike McCallister, Planning Director

cc: Stephen Madkour, County Counsel
Nate Boderman, Assistant County Counsel
Dan Chandler, County Administration
Mary Jo Cartasegna, Policy Coordinator
Matt Ellington, County UnderSheriff
Gary Schmidt, PGA
John Foot, District Attorney

RE: Medical Marijuana Facilities / Moratorium

The following information is being prepared for consideration at the July 21, 2014 meeting to discuss medical marijuana facilities (MMF), the existing moratorium and time, place and manner (TPM) restrictions. I will be out of the office and unable to attend the meeting.

The Moratorium: The BCC adopted a moratorium on medical marijuana facilities effective April 24, 2014. The moratorium is in effect until May 1, 2015. During the proceedings for the moratorium the Board expressed interest in adopting time, place and manner restrictions (TPM) for medical marijuana facilities prior to May 1, 2015.

Current State Regulations: Registration of medical marijuana facilities is authorized by the Oregon Health Authority (OHA) pursuant to recently adopted administrative rules. To qualify for registration, a medical marijuana facility:

1. Must be located in an area that is zoned for commercial, industrial or mixed use or as agricultural land.
2. May not be located at the same address as a marijuana "grow site."
3. Must not be located within 1,000 feet of a public or private elementary, secondary or career school attended primarily by minors.
4. Must not be located within 1,000 feet of another medical marijuana facility.

The OHA is responsible to ensure compliance with the siting standards relative to proximity to schools and other medical marijuana facilities.

Other requirements to obtain a registration from OHA for a MMF include:

1. The person responsible for (PRF) a dispensary has not been convicted of certain crimes (i.e

criminal records check).
2. The MMF must include certain safety and security measures (security systems, video security) and a safe.
3. Child resistant safety packaging for infused products

State law authorizes local governments to adopt reasonable time, place and manner restrictions for medical marijuana facilities. "Reasonable regulations" include reasonable limitations on the hours of operation, reasonable limitations on where a medical marijuana facility can be located and reasonable conditions on the manner in which a medical marijuana facility may dispense medical marijuana.

County Regulations: Medical marijuana facilities are authorized in all commercial and industrial (subject to square footage limitations) zoning districts as a retail use (similar to a pharmacy or drug store). The Zoning and Development Ordinance does not include "time" (hours of operation) or "manner" regulations of other similar retail uses.

Time, Place and Manner Restrictions – What are they?

1. "Time" restrictions can include limitations on the number of days, days of the week, operations on holiday and hours of operation.

2. "Place" restrictions are much more variable. Restrictions could include limit MMF to certain zoning districts (i.e. only in General Commercial), geographic areas of the county and / or separation distances from schools, parks, public services (libraries, etc.) and other types of uses (i.e. limiting access to children).

3. "Manner" restrictions include regulations on dispensing medical marijuana.

Maritime Café Proposal: I have had two meetings with Mario Mamone who owns Maritime Café. Evidently, this facility (on McLoughlin Blvd) has temporarily ceased operation. Mr. Mamone has asked the County to consider a proposal to adopt TPM restrictions and lift the moratorium for MMF in existence at the time of the moratorium. The concept is a "pilot project" of sorts until the moratorium in May 2015. I have attached a copy of the proposal from Mr. Mamone. Highlights of the proposal include a requirement for a business license, limitations on hours of operation, sign requirements and a right for the county to inspect the business operation.

Other On-Going Considerations:

1. Signatures for a ballot measure have been submitted to the State to legalize recreational use of marijuana for adults. This author believes a ballot measure will pass. If so, adult recreational use of marijuana would be regulated by the OLCC (like liquor). Pursuant to the initiative, administrative rules would be adopted to regulate recreational marijuana. In any case, if recreational marijuana is approved, the number of retail outlets will likely far outnumber medical marijuana facilities (Seems like Washington is authorized to approve over 4,000 retail operations for recreational marijuana).

The initiative grants authority to OLCC to regulate licensure of recreational marijuana establishments. Section 25-30 of the initiative sets forth the procedures generally associated with the grant or denial of establishment licenses, as well as extensions, cancellations, or suspensions of licenses.

Sections 58-62 of the initiative provide local jurisdictions the right to adopt time, place and manner regulations on the nuisance aspects of these establishments (much like taverns, etc.). It also provides the local jurisdiction the option to entirely prohibiting recreational marijuana facilities where the question is put to the electors in a general election.

2. Marijuana is still subject to the Federal CSA.

3. The establishment and siting of medical marijuana facilities generally continues to be litigated throughout the State, which means the issue will continue to be dynamic. The City of Cave Junction has sued the State of Oregon over the question of whether the medical marijuana dispensary program directly conflicts with the Federal CSA.

Public Participation:

During the proceedings for the moratorium the Board expressed an interest in establishing a focus group of interested parties to participate in a discussion of TPM restrictions. That issue should be vetted appropriately. At the same time, there are a number of resources available, including work being completed by other cities and counties identifying TPM restrictions that the County could use to identify a list and range of restrictions.

Moratorium Options:

1. No action alternative. Moratorium expires May 1, 2015. MMF would be allowed to upon approval of a registration from the OHA.

2. Relax moratorium prior to May 1, 2015 and allow medical marijuana facilities which existed at the time of the moratorium to operate subject to TPM restrictions adopted by the County.

3. Adopt TPM restrictions for medical marijuana facilities to become effective upon adoption or May 1, 2015 whichever comes first.

Time, Place and Manner Restrictions Options:

1. Do not adopt TPM restrictions. Siting of MMF would be subject to approval of OHA, County zoning ordinances and building code requirements.

2. Adopt TPM restrictions into the County Code. This could include an option to require a "Business License" for MMF.

3. Adopt "time and place" restrictions, but not "manner" restrictions. I do not believe the County should attempt to codify "manner" restrictions because the OHA has regulations in place and the County does not have the expertise (or staffing resources) to enforce such regulations.

Policy Considerations (I am sure there is many more....)

1. Are TPM regulations appropriate for medical marijuana facilities when other similar retail uses are not subject to the same regulations?

2. Are the existing TPM restrictions adopted by the OHA sufficient to appropriately regulate MMF? Will County TPM restrictions add value to regulating the appropriate location and operation of MMF?

3. What is the appropriate time to consider TPM restrictions? Now, or this fall after the outcome of the ballot measure?

4. Should the County adopt TPM restrictions for medical marijuana facilities when in fact retail outlets for recreational marijuana (if approved) may far outnumber medical marijuana facilities and not be subject to TPM restrictions? Or said another way, if the County adopts TPM restrictions should they apply to both MMF and facilities selling recreational marijuana?

5. What resources are required to enforce TPM restrictions, if adopted?

6. What level of public outreach is appropriate prior to consideration of TPM restrictions?

CLACKAMAS COUNTY

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MEMORANDUM

TO: Commissioner Jim Bernard

FROM: Nate Boderman, Assistant County Counsel

CC: Stephen Madkour, County Counsel

Mike McCallister, Planning Director

Dan Chandler, County Administration

Mary Jo Cartasegna, Policy Coordinator

Matt Ellington, County UnderSheriff

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DATE: July 17, 2014

RE: Recreational Marijuana Initiative

The following is a summary of the recreational marijuana initiative referenced in Mike McCallister's memo dated July 17, 2014. While a comprehensive look at the initiative is not particularly germane to our core task of looking at possible time, place and manner regulation of medical marijuana facilities, this memo will at least provide some context on the related issue of recreational marijuana regulation, which may become an issue this committee is eventually asked to address.

At last check, the organizers of the effort had submitted over 145,000 signatures, far exceeding the 87,000 needed to qualify for the ballot.

The initiative is roughly organized into seven main components, which are as follows:

- General Introductory Provisions

- Powers and Duties of the OLCC
- Purchaser's Qualifications
- Licensing and license procedures
- Taxes and Distribution of Revenue
- General Prohibitions
- Local regulation
- Enforcement and Penalties

What follows is a brief summary of certain provisions of the initiative, which is formally referred to as the "Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act". This is not intended to be a comprehensive look at the Act, but rather a summary of the more relevant, and interesting provisions of this particular initiative.

General Introductory Provisions

The most noteworthy portion of this section clarifies that the Act does not exempt a person from federal law. Additionally, the Act specifically does not affect the medical marijuana program.

Powers and Duties of the OLCC

The powers and duties imposed on the OLCC through this Act roughly tracks with the responsibilities the OLCC already has in its oversight of liquor.

OLCC will be responsible for purchase, sale, processing, transportation and delivery of marijuana. OLCC will also be responsible for licensing the sale, processing and production of retail marijuana. OLCC will be responsible for collecting taxes and duties, as well as regulating the advertising of marijuana. Finally, OLCC will be responsible to investigate and to assist in prosecution of violations.

Purchaser's Qualifications

As with alcoholic beverages, the Act sets specific restrictions on the minimum age a purchaser's must be to buy marijuana (21 years old), and has authority to limit the amount that any person may purchase at any one time.

Licensing and license procedures

OLCC must begin accepting applications for licenses by January 4, 2016. Licenses are related to either:

- production (growing, cultivating)
- processing (conversion of marijuana to products or extracts), or
- sale (separate licenses for retail and wholesale activities).

The Act sets forth comprehensive procedures associated with evaluating license requests and appeals of those decisions. It appears many of the same factors used to consider liquor licenses will be used for the marijuana licenses. This group may find it particularly interesting that the OLCC may refuse to issue a license if they deem there are sufficient licensed facilities in the locality.

Taxes and Distribution of Revenue

Marijuana producers are taxed as follows:

- $35/oz for marijuana flowers
- $10/oz for marijuana leaves, and
- $5 per immature marijuana plant.

Counties and cities are specifically prohibited from imposing taxes on marijuana.

The taxes, after withholding for certain expenses, are distributed as follows:

- 40% to the common school fund
- 20% to the Mental Health Alcoholism and Drug Account
- 15% to the State Police Account
- 5% to the Oregon Health Authority to establish and drug and alcohol prevention and treatment program
- 10% to Oregon cities to assist with law enforcement, and
- 10% to Oregon counties to assist with law enforcement.

Each 10% share to local government is allocated amongst the cities and counties based on relative population until July 1, 2017, at which time the methodology for distributing the revenue shall be based on the relative number of licenses issued for each jurisdiction.

General Prohibitions (no prizes, can't posses plants, etc.)

This section discusses the wide range of prohibitions against the selling and acquisition of marijuana. This section prohibits activities such as use of marijuana in a public place, growing in plain view, and purchase of marijuana by a person under 21 years of age.

Local regulation

As discussed in Mike's memo, the Act grants local jurisdictions the right to adopt time, place and manner regulations on the nuisance aspects of these establishments. While OLCC could adopt certain siting restrictions (much like the Oregon Health Authority did with medical marijuana facilities), the Act nevertheless explicitly provides the ability for local jurisdictions to regulate the operation of these facilities as they see fit (within constitutional limitations, of course).

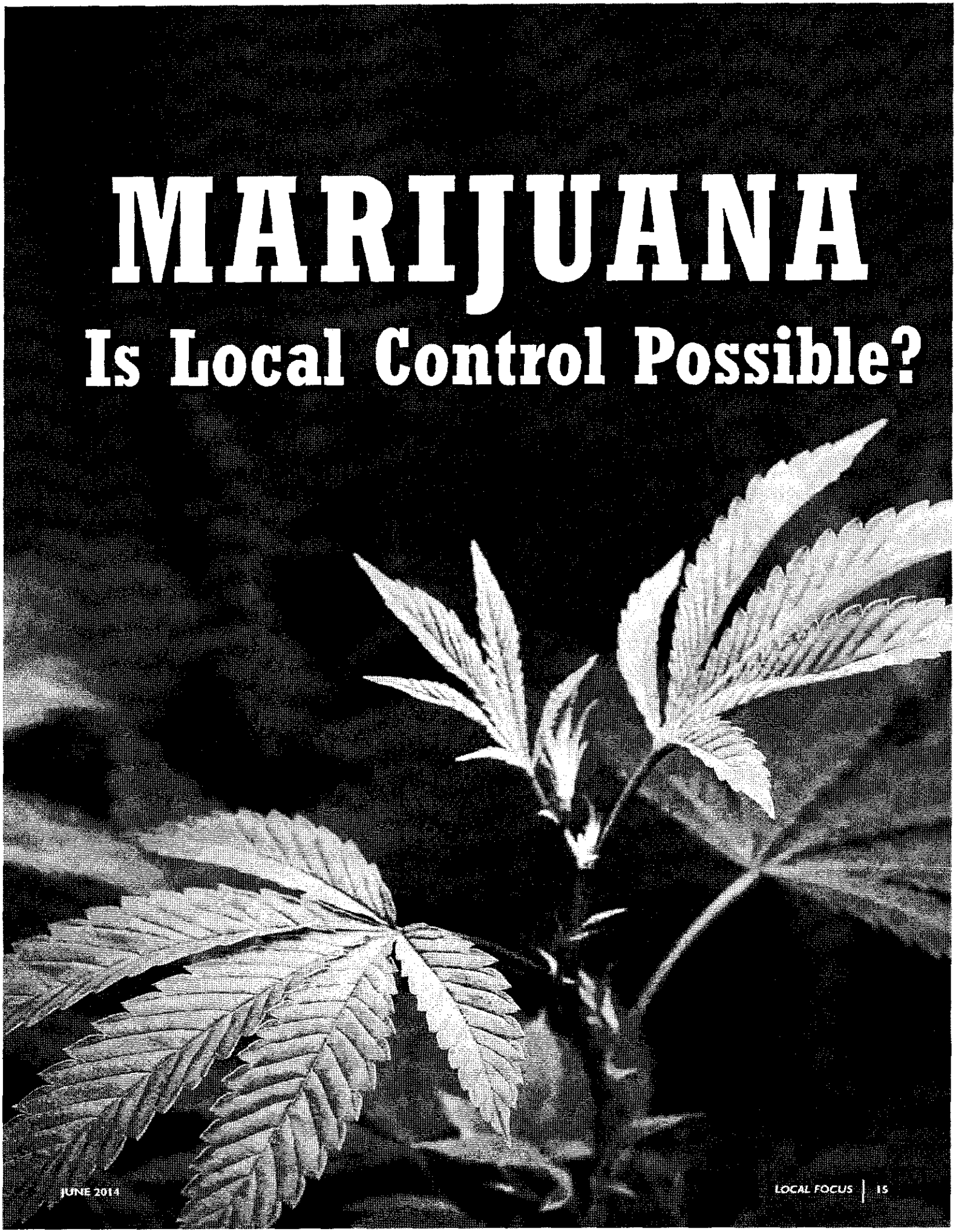
The Act also provides the local jurisdiction the option to entirely prohibit recreational marijuana facilities where the question is put to the electors in a general election. While local jurisdictions cannot ban the possession or use of marijuana, they can ban the licensed facilities from operating within their jurisdiction.

Enforcement and Penalties

This section includes a number of revisions of definitions, primarily to remove marijuana as a controlled substance and to revise current laws with regards to penalties associated with marijuana production, sale and possession. This section also sets forth the enforcement and the penalties associated with unlawful possession, production, processing and sale of marijuana.

MARIJUANA

Is Local Control Possible?



An Overview of Oregon's Medical Marijuana Program

By Sean O'Day, LOC General Counsel

On November 3, 1998, Oregon voters approved Ballot Measure 67 allowing the medical use of marijuana in Oregon within specified limits. Codified at ORS 475.300-475.346 and known as the Oregon Medical Marijuana Act (OMMA), the law protects medical marijuana users who comply with its requirements from state criminal prosecution. Although the Oregon Legislature has made some modifications to the act, the program remains largely the same as it did when the voters adopted it almost 15 years ago.

In the beginning, the program existed in relative obscurity. During its first year, from May 1, 1999, to May 1, 2000, the program served approximately 600 registered patients. By July 2010, it reached more than 45,000 registered patients. Today, there are nearly 60,000 registered patients, and more than 30,000 registered caregivers. The increase in the number of people participating in the program, along with the emergence of medical marijuana dispensaries, has brought the program and related issues to the forefront of public policy discussions in city halls all across the state.

To aid local elected officials in those discussions, this article provides an overview of the Oregon Medical Marijuana Program (OMMP), including the development and recent enactment of legislation relating to dispensaries. The article also explores the roles and functions of local government with respect to the OMMP, including that of a regulator and discusses the current state of the law with respect to local control.

The Purpose and Evolution of the Oregon Medical Marijuana Program

The Oregon Medical Marijuana Program began with the adoption of the OMMA by the voters in 1998. Since that time, the Legislature amended the OMMA in 1999, 2005, 2007, and most recently in 2013. Other than the development of a dispensary program, the basic structure and purpose of the OMMA has largely remained the same since its initial adoption. The goal of the OMMA is to permit, without fear of prosecution, small amounts of marijuana for patients with debilitating medical conditions when a doctor has concluded that the use of marijuana can help with those conditions.

The Contours of the OMMA

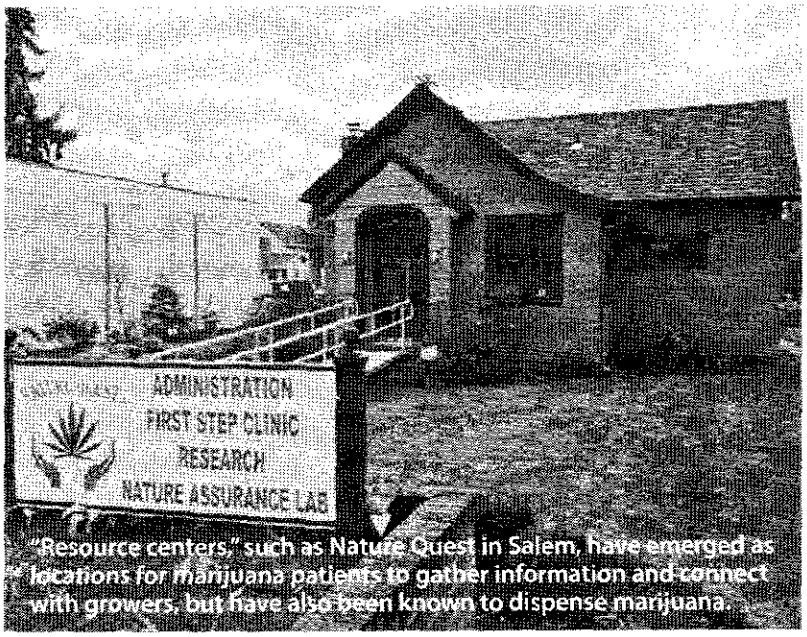
To accomplish its goals, the OMMA requires the Oregon Health Authority to establish a registration process for medical marijuana patients, their primary caregivers and their growers. The OMMA exempts individuals holding a registry identification card from state criminal penalties, so long as the individuals act in accordance with the limits set out in the act. Individuals need not be a cardholder in order to enjoy the benefits of the act, however. The OMMA also provides as a defense to a criminal charge of possession or production of marijuana that the person is engaging in the medical use of marijuana with the limits set out in the act under the recommendation of a physician.

To either obtain a registry card, or be eligible to assert an affirmative defense, patients must have a "qualifying medical condition" diagnosed by an Oregon licensed physician who agrees that the use of medical marijuana could help mitigate the patient's symptoms after conducting a thorough physical exam and reviewing the patient's medical records. The Oregon Health Authority maintains the list of qualifying medical conditions.

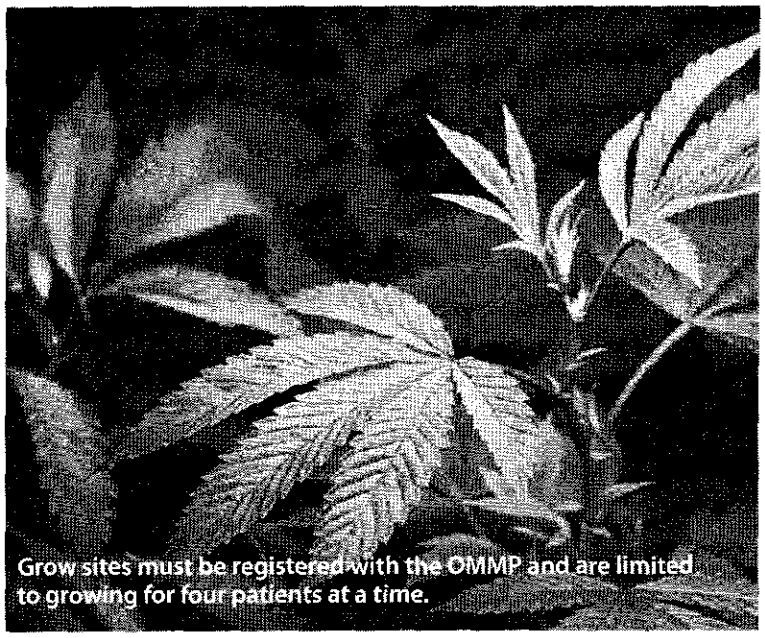
Once registered, patients are issued a medical marijuana card. Patients are required to carry with them their current OMMP Registry ID cards when possessing medical marijuana away from home or their grow site. Patients are not allowed to cultivate or consume medical marijuana in public view, drive under the influence of medical marijuana, share medical marijuana with anyone who is not currently registered with the OMMP, sell medical marijuana or give it to a minor.

When they register, patients may also register a primary caregiver. Patients may have only one primary caregiver at any time. A primary caregiver may possess marijuana for his or her patient and assist the patient with the use of the medical marijuana.

Patients registered with the OMMP are allowed to create a grow site at only one address. Patients may grow for themselves or designate a grower. A patient's grow site must be registered with the OMMP. The registration must include the address of the site and the name of the person responsible for the site. If patients elect to have someone other than themselves grow marijuana, the patients or their designated primary caregivers may reimburse the person responsible for their grow sites for the costs of supplies and utilities associated with the production of marijuana. No other costs associated with the production of marijuana, including the cost of labor, may be reimbursed. A person responsible for a grow site may produce marijuana for no more than four patients at a time. All grow sites must display a grow site registration card for each patient for whom marijuana is being produced.



"Resource centers," such as Nature Quest in Salem, have emerged as locations for marijuana patients to gather information and connect with growers, but have also been known to dispense marijuana.


Grow sites must be registered with the OMMP and are limited to growing for four patients at a time.

The OMMA legalizes the possession and delivery of medical marijuana for a registered patient, the patient's primary caregiver, and/or an individual designated by the patient to grow medical marijuana for the patient. There are, however, limits on how many plants and how much usable medical marijuana each patient is allowed. The OMMA places the following limitations on possession:

- *Patient:* Six mature marijuana plants, 18 seedlings and 24 ounces of usable marijuana.
- Registered grow site: Six mature marijuana plants and 24 ounces of usable marijuana for each patient or caregiver for whom the marijuana is being produced. Limited to growing for four patients at any given time.

The Emergence of Dispensaries and HB 3460

With the growth in participation, over time facilities began to emerge where medical marijuana patients gathered to obtain information and connect with potential growers. Often termed "resource centers," these facilities also were known to dispense marijuana. Because the original act did not contemplate these types of facilities, the legality of their operations was suspect. Wanting to develop a program that would identify where these types of facilities were and could be located, and to ensure safe access, in 2013 the Legislature adopted HB 3460 (codified at ORS 475.314).

Among its provisions, HB 3460 directed the Oregon Health Authority to establish a registration system for medical marijuana facilities (commonly referred to as dispensaries). HB 3460 grants criminal immunity to persons working for a registered medical marijuana facility. The bill also restricts the location of a medical marijuana facility to property that is zoned either commercial, industrial, mixed use or agricultural, and provides that a facility cannot be at the same location as a grow site, or within 1,000 feet of a school (elementary, secondary or career attended primarily by minors) or within 1,000 feet of another medical marijuana facility.

Unlike the original OMMA, which prevented the purchase of marijuana beyond the reimbursement of certain expenses, HB 3460 allows a dispensary operator to reimburse a grower for the normal and customary costs of doing business, including costs related to transferring, handling, securing, insuring, testing, packaging and processing usable marijuana and immature marijuana plants and the cost of supplies, utilities and rent or mortgage. Similarly, a dispensary is permitted to seek reimbursement for immature plants and medical marijuana products based on its normal and customary costs of doing business.

The Role of the Federal Government

The use of medical marijuana is still illegal under federal law. The Controlled Substances Act (CSA) classifies marijuana as a Schedule I drug, making it illegal under federal law to manufacture, distribute or dispense. The Schedule I classification means the federal government has concluded that the drug has a high potential for abuse (undefined term in the act), has no currently accepted medical use in treatment, and lacks accepted safety protocols for use of the drug under medical supervision. Thus, the OMMA neither protects marijuana plants from seizure nor individuals from prosecution if the federal government chooses to take action against patients, primary caregivers or growers under the Controlled Substances Act.

Notwithstanding the federal ban, as of the date of this article, 20 states and the District of Columbia have legalized certain marijuana-related activity. In light of those developments, U.S. Department of Justice (DOJ) Deputy Attorney General James M. Cole issued a memorandum (the "Cole Memo") to all United States Attorneys providing updated guidance to federal prosecutors concerning marijuana enforcement under the CSA. The Cole Memo guidance applies to all of DOJ's federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.

(continued on page 18)

Medical Marijuana Overview

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The guidance makes it clear that DOJ is committed to prosecuting enforcement of the CSA, but that, as a general matter, federal resources in states with medical marijuana laws should not be focused on individuals who are "in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." The memo further states, however, that federal resources should be focused on:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

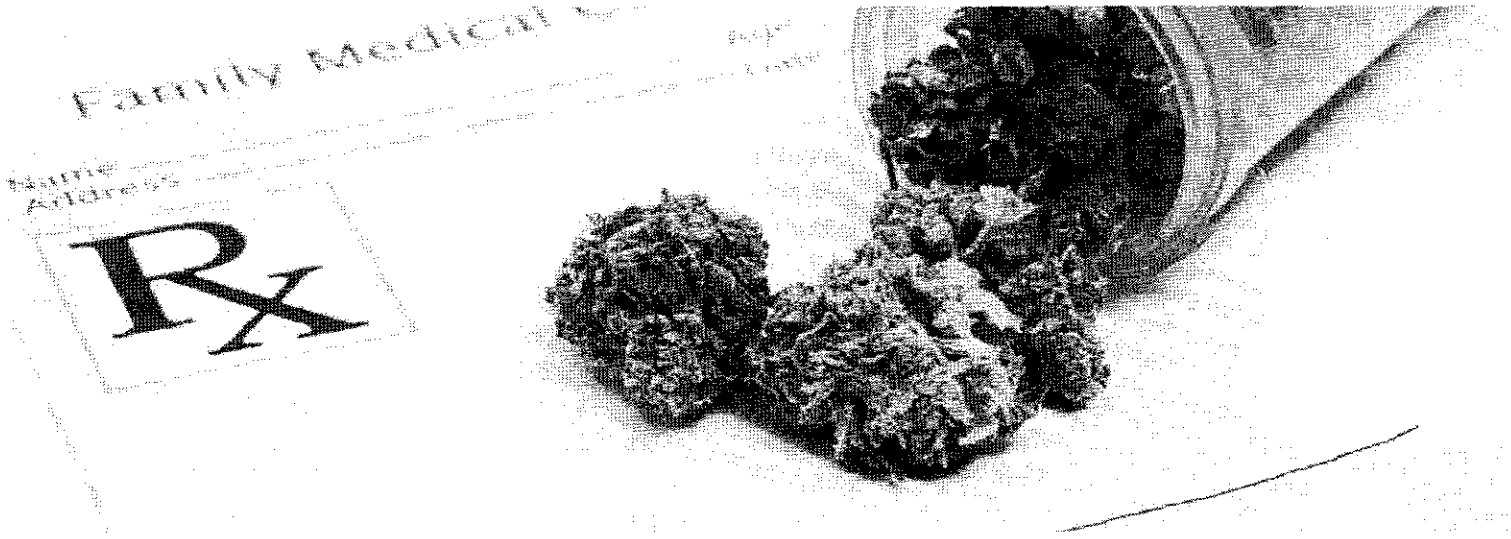
The Role of Local Government

Local governments interact with the OMMA in three general capacities: as an employer; as law enforcement; and as a regulatory body.

As an employer, a local government might have employees who are patients registered with the OMMP. There are a myriad of issues that might arise if an employee is a registered OMMP patient. As such, cities should consult their attorney before inquiring whether an employee is an OMMP patient or taking any other action related to an employee's use of medical marijuana. Nonetheless, cities should understand that the OMMA expressly provides that nothing in the law shall be construed to require an employer to accommodate the medical use of marijuana in any workplace. In addition, the Oregon Supreme Court held in the case *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries* that Oregon employers do not have to accommodate an employee's use of medical marijuana under Oregon's disability and discrimination laws.

A local government also interacts with the OMMA in its capacity as a law enforcement body. Local law enforcement personnel may take any action they believe is necessary to enforce the criminal laws of the state, including violations of the OMMA or the state's criminal laws relating to use and possession of marijuana. As part of this process, local law enforcement personnel may verify with the Oregon Health Authority at any time whether a particular patient, designated primary caregiver, person responsible for a grow site, or grow site location is registered with OMMP by calling the 24-hour LEDS (Law Enforcement Data System). In addition, the OMMA expressly states that possession of a medical marijuana identification card or a primary caregiver card does not alone constitute probable cause to search the person or property of the cardholder.

Further, the OMMA provides that usable marijuana and paraphernalia used to administer marijuana that is seized shall be returned immediately upon a determination by the district attorney in whose county the property was seized that the person from whom the property was seized is entitled to the protections found in the OMMA. However, law



Marijuana patients must have a "qualifying medical condition" diagnosed by an Oregon licensed physician who agrees that the use of medical marijuana could help mitigate the patient's symptoms.

enforcement officials who return usable marijuana are at risk of prosecution under the CSA. In the case of *State v. Ehrensing*, the Oregon Court of Appeals concluded that seized marijuana need not be returned to a cardholder whose case was dismissed for lack of speedy trial because: the OMMA's provision did not allow return under that type of circumstance, and return would have violated federal law. Similarly, in a publicly shared opinion, the attorney general has advised the Oregon State Police to seek an appeal of any court order requiring the return of seized marijuana to a cardholder on the grounds that the return provisions of the OMMA are preempted by federal law. It stands to reason that such advice is equally applicable to local law enforcement.

Finally, local governments interact with the OMMA as a regulatory body. While some jurisdictions are allowing dispensaries and grow sites to operate under the terms of HB 3460 (2013), others are considering or have imposed additional regulations up to and including a ban on such activities. Medical marijuana advocates have taken issue with such regulations and argue that HB 3460 (2013) prevents local governments from enacting restrictions on medical marijuana facilities. In addition, they argue that SB 863, passed in the 2013 special session and intended to preempt local regulation of genetically-modified organisms, also preempts local regulation of medical marijuana.

Partially to address those arguments and to provide time to study these issues, the Legislature adopted SB 1531 during the 2014 short session. This bill does essentially two things. First, it reaffirms a city's authority to adopt reasonable time, place and manner restrictions on medical marijuana activities. Second, SB 1531 removes criminal immunity from any person operating a medical marijuana facility in a jurisdiction that has adopted a moratorium on medical marijuana facilities, provided the moratorium was adopted prior to May 1, 2014 (with an end date not to exceed May 1, 2015).

Applying home rule principles, the League believes that in addition to the options set out in SB 1531, cities have the authority to further regulate dispensaries through business licensees, zoning laws and development permits, and to enforce violations of those ordinances with civil penalties. Nonetheless, medical marijuana advocates maintain that cities are preempted from doing so. Consequently, cities should work closely with their attorneys to fully understand the extent the city may regulate issues related to medical marijuana and to assess the risk of having to defend its authority to adopt local regulations.

Editor's Note: *Because of the complexities and nuances of the OMMA and its interaction with federal law and other state laws, this article is necessarily general and is not intended to provide legal advice. This article should not serve as a substitute for competent legal counsel. City officials should consult with their city attorney in accordance with their city's policies for doing so, to ensure that you fully understand these laws.* ■

Enforcement Options:
A Roadmap for Cities

SB 1531 established a May 1 deadline to adopt a one-year moratorium on medical marijuana dispensaries, and 145 cities have officially done so. Even though the moratorium period has begun, there are still several actions any city can take with regard to the dispensaries. At the League's Marijuana Workshop last month in Portland, Eugene City Attorney Glenn Klein outlined five current options that arguably exist for cities. Not all attorneys agree that these options are available, and the city charters or city codes in some cities would not authorize some of these options. Consequently, it is critical that a city discuss with its city attorney whether an option may be available and what the potential legal risks are of proceeding with that option.

Ban

Cities can simply take formal action to ban the existence of medical marijuana dispensaries. According to Klein, SB 1531 "did not preempt a city's home rule power to enact a ban." However, he also noted that there are "many out there who disagree" with his interpretation of the bill, and as a result, a city enacting a ban is risking a legal challenge and the potential for substantial costs.

"If someone sues the city over a ban and succeeds, then the city might have to pick up their legal costs too," Klein noted.

There is a banning option that carries slightly less risk, Klein says. "A city could ban any business which necessarily violates federal or state law," he said. In addition, cities with a business license program can adopt an ordinance stating it will not issue a license to any business that operates in violation of federal or state law.

License

Most cities have the ability to license or adopt a licensing program. Therefore, as part of an existing licensure program, a city could require a license for a medical marijuana dispensary. Alternatively, cities that do not have a formal licensing program could adopt a business license requirement specifically for dispensaries. By adopting a license requirement, a city can more easily employ certain regulations such as background checks.

On the other hand, this option does carry its share of risk for cities.

Klein says that by granting a license, a city would "give a business permission to conduct an operation that violates federal law." Could this potentially lead to federal prosecution? Klein says that's unknown, but not out of the realm of possibility. Another consideration is that in just two years a new president will occupy the White House, and federal policies could change. Still further risk involves the potential loss of federal funding for grants. Klein notes that many federal grants typically have several pages of conditions that must be met, including the requirement that a recipient is compliant with federal law.

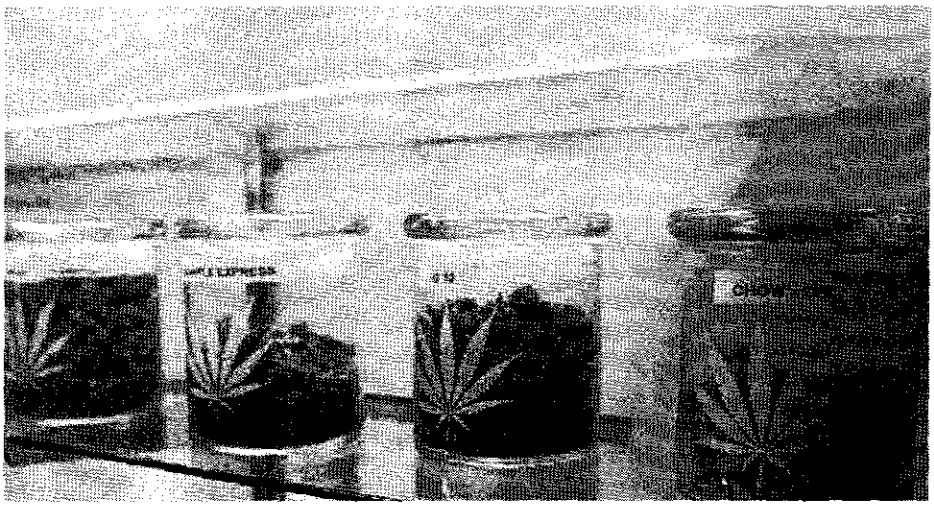
Regulate

Klein says it is "absolutely clear" that cities are not preempted from adopting "reasonable regulations" with regard to medical marijuana dispensaries. "Some tried to argue that SB 1531 only allows cities to adopt regulations by May 1, but the bill is clear; the May 1 deadline only applies to outright bans."

But what are reasonable regulations? Klein says eventually this could be decided in the courts. But in the meantime, there are statewide examples of cities adopting analogous regulations such as geographic limits, specific hours of operation, and prohibition on the types of products dispensaries can sell.

In addition, a city has the option to exclude dispensaries in certain zones as defined by its zoning code. According to Klein, the city of Eugene's code treats a dispensary as a "specialty retail" business, which is authorized only in commercial zones, and not in industrial zones. So in this case, even though state law would allow a dispensary in an industrial zone, local zoning code would not. Eugene also requires a conditional use permit in some of its commercial zones.

"The worst thing a city can do in this case is adopt regulations without having first figured how they will be enforced."
– Glenn Klein, Eugene City Attorney



Another option would be for a city to expand the existing 1,000-foot buffer that further defines where a dispensary can locate. "A city could apply the buffer to include areas where children may congregate, such as a day care center, a library or a transit center," Klein said.

A city can also enforce regulations on the dispensaries' hours of operation. Klein cites the example of jurisdictions which have copied the Oregon Liquor Control Commission's guidelines for liquor store operations: 10:00 a.m. to 7:00 p.m. "These jurisdictions decided, 'If it's reasonable for liquor stores, it's reasonable for dispensaries,' so they adopted that limitation."

Klein says cities face two main risks if they choose to pursue regulations on dispensaries, one legal and the other operational. "The first is litigation over whether they are reasonable," he said. The bigger risk, depending on the nature of regulations adopted, is that enforcement may be an "administrative nightmare."

"I've seen city councils elsewhere in the state adopt regulations that sounded really good, but were nearly impossible to enforce. The worst thing a city can do in this case is adopt regulations without having first figured how they will be enforced."

Tax

Klein says he's not aware of any jurisdiction that has adopted a gross receipts tax on dollars received by a medical marijuana dispensary. "But nothing I'm aware of prohibits a jurisdiction from doing this," he notes. "Cities have home rule authority, and I think they can."

Wait and See

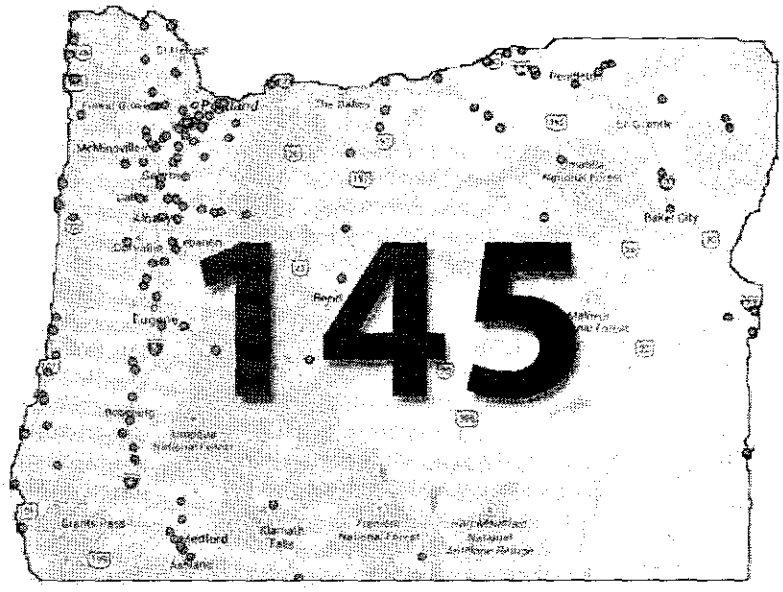
For cities like Eugene, which did not formally adopt a ban, Klein says this option boils down to waiting to see if problems develop, then presenting those problems to the city council, along with some options for how to resolve them.

He says that for cities taking this approach, the best course of action for city councils is to have staff "monitor the situation for problems and know its okay to come to you with potential solutions."

Final Caution – Consult City Attorney

During his remarks at the League workshop, Klein implored cities to talk to their city attorney before pursuing any course of action. He cited two very important reasons:

"First, there are a lot of grey areas here, and you as policy makers need to be aware of the risks. Your city attorney can help you assess those risks and decide whether to move forward. The other reason is that your charters are different, and therefore your city codes may be different. One city may be able to do something that another city can't." ■



SB 1531 allowed cities and counties to adopt a one-year moratorium on medical marijuana dispensaries and 145 cities have done so. In addition, five cities have instituted a ban on moratoriums:

- Jacksonville
- Hermiston
- Medford
- Oakridge
- Tualatin

For a list of cities with moratoriums, visit the League's medical marijuana webpage at ***www.orcities.org/marijuana.***

Marijuana Q & A

What advice would you have for Oregon local governments as they are looking at various trends going forward, with respect to medical marijuana, and if it comes to pass, recreational?

Chris McKenzie, Executive Director, League of California Cities

My most cogent advice is that you want to get the medical marijuana part done right. Doing that, you will learn a lot in the event retail or recreational use comes along. That means if you haven't taken the steps to do the moratorium, invest time in thinking about what local regulations you want to have. The experience you have there is going to be helpful if your voters approve full retail activity.

Kevin Bommer, Deputy Director, Colorado Municipal League

Oregon is a strong local control state. That has to be enshrined in anything you do going forward. You have to get the house in order regarding medical marijuana, especially if you are going to link medical and recreational together like we did here in Colorado. Medical might be the logical ones to apply. That helps on the regulatory side because these are known entities, to state and local regulatory and law enforcement agencies. They know who these operators and employees are. To the extent that medical works, if retail is going to happen it has a better chance if medical is not a mess.

What are the impacts on cities regarding marijuana tourism?

Bommer – If you Google "Colorado Marijuana Tourism" you'll be surprised at what you see. It's not surprising that it happened, just that more people weren't aware of it. There are entrepreneurs who have opened businesses since Colorado doesn't exclude out-of-state residents from purchasing, only limiting the amount they can purchase (.25 ounces) at a retail store.

Here in Colorado, there are companies that will pick up tourists at the airport, take them on a tour of retail centers and grow facilities, and along the way the tourists can purchase the product if they like. The buses are pretty fancy, and they all have blacked-out windows. This is a growing economy with no particular regulation, other than having to abide by the existing laws and regulations that apply to businesses and individuals.

What does the League see happening next with the Legislature?

Scott Winkels, Intergovernmental Relations Associate, League of Oregon Cities

With regard to the dispensaries and where I think the Legislature will go in 2015, there's some enthusiasm behind cleaning up the land use regulation language in HB 3460, ultimately making it something that resembles the land use code. The Legislature has said they don't want dispensaries in residential areas, and I think that's certainly achievable. I also think the Legislature is going to look at the federal (Cole) memo regarding a robust and vigorous enforcement and regulatory structure. One thing they may do there is require background checks for people who work in the dispensaries.

Another issue is to make sure that police officers have access to a dispensary. This would be the same as we have with a liquor establishment: a police officer would be able to enter a dispensary and conduct an inspection. This is currently not in the state statutes.

Also, the Legislature is going to have to address the conflict between federal law and language in HB 3460 that prevents a dispensary within 1,000 feet of a school. There is a federal law against locating a dispensary within 1,000 feet of "places where minors congregate." This is a significant language discrepancy, and it's my understanding that U.S. attorneys in other states have forced dispensaries to move, even those that are sanctioned, if they were located in proximity to a preschool. For the applicant, local governments, kids and schools, truing up that requirement needs to happen.

How do cities participate in conversations about legalization of marijuana without appearing to be in support of approving legalization?

McKenzie – As we've been working on legislation, we've actually begun to build relationships with people in the marijuana industry. The people we could probably cut a deal with are those who would like to have a well-regulated, responsible business. But there's another dynamic. There's nothing as valuable as having an idea that the public is passionate about. I've been telling my board we need to do some polling about the viability of retaining our local authority, specifically to decide whether to opt-in or to add on regulations. If Californians find out there is a stealth retail measure that preempts local control, and we can get that

message out, then we can take some of the ground away from the other side. If we do our polling early enough and it verifies what we think it will say, we can start having some advanced public dialogue with the other side. Not because we want to help draft their measure. I want to send the message that we're open to that conversation, but if they cross the local control line we will do everything we can to obstruct their success. So you have to do it from a collaborative position, but also one of strength, so that you can be a much better non-opponent. Their goal is to keep us out of that election. They'll do that by making sure our members get to decide if the activity happens in their city.

Candice Bock, Government Relations Advocate, Association of Washington Cities

This has been a big challenge, and it prompted us to actually create a legislative policy position we called "actively neutral." With 281 cities, we had representation on both sides of the issue. Some cities were feeling like they should be able to say they wanted nothing to do with marijuana, while some said the system only works if everyone is allowed their fair share. So we worked with our board and legislative committee on a policy direction that preserved our number one goal: maintain local control and existing regulatory authority over anything, not just marijuana.

As an association of cities, we don't get involved in initiatives or political campaigns, so we don't typically engage with groups that are putting together initiatives. We couldn't be involved in a formal fashion, but we wanted to have input on how these groups can work best with local governments.

In terms of long-term effects of marijuana – THC levels are going up. Do you see issues with potency of the product?

Tom Burns, Director of Pharmaceutical Purchasing, Oregon Health Authority

Certainly the potency has gone up over the years. But this is not an OHA issue. We will label it, and the patient will know the potency. But that's something the market will develop and bear. Unfortunately, there's been no testing, so we don't know if a THC of 51 or 21 produces effects the same way the product affects a disease in the body. This might be something the FDA takes up someday.

(continued on page 24)

Illegal? Yes.

Scott Kerin from the U.S. Attorney's office speaks at the League's Marijuana Workshop.

Scott Kerin leads the drug unit in the U.S. Attorney's office in Oregon. He says he regularly fields questions from Oregon local governments regarding the legality of medical marijuana dispensaries.

"I have been asked repeatedly: 'If we allow dispensaries to set up, are we aiding and abetting a federal crime?'," Kerin noted during his presentation at the League's Marijuana Workshop.

"Technically, yes."

Kerin added that what he wanted local governments to take away from his remarks was that marijuana is "still illegal under federal law." He said cities need to know if they engage in any activity that is in violation of federal law, there could be consequences.

"There's a risk that a district attorney's office or the federal government will take an interest, and someone will be subject to prosecution," he said.

To provide some guidance for local governments as they make decisions about dispensaries, Kerin outlined the "enforcement priorities" of the U.S. Department of Justice, which help determine how his office allocates resources for enforcement and prosecution. Specifically, he cited eight priorities that are outlined in a memorandum issued by the Department of Justice on August 29, 2013, commonly referred to as the Cole Memo *(see OMMA article, page 16)*. These priorities are where the department is currently focusing its efforts.

Kerin noted that there is always the possibility these priorities and related policies could be subject to change "as elections occur and new administrations take office."

He encouraged attendees to not only consider the Cole Memo, but to make sure any regulatory structure enacted is robust and vigorous, and that it has an enforcement mechanism behind it.

"If that happens, you're less likely to draw the attention of law enforcement," he said.

Marijuana Q&A

continued from page 23

Looking at reasonable limitations, what about 1,000 feet within a park? Is this reasonable under time, place and manner restrictions?

Sean O'Day, General Counsel, League of Oregon Cities

Given children congregate in a park, that's a reasonable regulation. Keep in mind, however, that's something you'd be adopting at the local level and you'd be using civil enforcement as your way of enforcing that should a dispensary get a license and begin operating. If that, coupled with the existing 1,000-foot rules in state law, result in effectively a ban, then you have two types of legal issues. First, is this reasonable? The second is preemption, and do you have the authority to impose this ban? Understand that a dispensary which violates these 1,000-foot rules loses its criminal immunity. So you have different types of enforcement depending on the rules you enforce locally and how the dispensary complies with state law.

No public consumption, including growing, is allowed in public. Is a backyard considered public? What about a greenhouse?

Rob Bovett, Legal Counsel, Association of Oregon Counties

Oregon law says it can't be seen from a public vantage point. Someone could be growing or using marijuana in their backyard as long as where they're doing it is not visible from a public vantage point. In that way Oregon is different from other states.

With respect to dispensaries, why not just do it through pharmacies?

Bovett – The federal Controlled Substances Act. Oregon, like other medical marijuana programs, doesn't provide for physicians to prescribe marijuana. They only issue recommendations. The reason is the federal Controlled Substances Act. Every prescriber is licensed by the Drug Enforcement Agency (DEA) to prescribe. If they actually issued a prescription for marijuana, which is a Schedule 1 controlled substance, they would have their ticket pulled and they would no longer be able to prescribe anything. The same is true for pharmacies—all are DEA-licensed facilities. If they dispense a Schedule 1 controlled substance, they would lose their license. That's not to say using pharmacies wouldn't be a good model. If we could get the feds to change their policy, it makes practical sense to have pharmacies dispense Schedule 2 or 3 controlled substances, but until Congress approves that statutory change we can't go there.

As the OHA is sending inspectors out, how are you going to deal with the vastness with respect to population?

Burns – We'll go where the dispensaries are. If a local jurisdiction has a large number of dispensaries, we'll have a lot of inspectors there. It has nothing to do with population. It has everything to do with where the dispensaries are located.

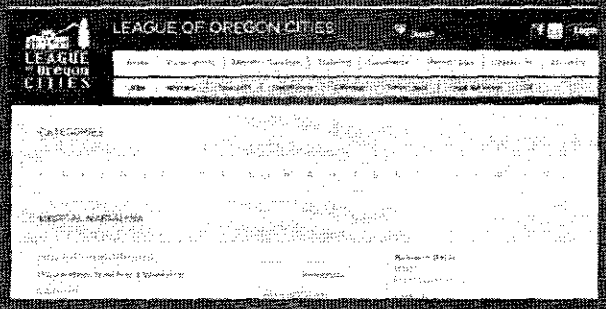
Can a jurisdiction adopt local taxes on sales of marijuana?

O'Day – I think so. Cities should consult with their city attorney though. Right now there's no preemption on that, as we heard earlier from Glenn Klein.

What about a city's ability to cap the number of dispensaries within a jurisdiction, say as low as one or two?

O'Day – Applying a home rule/preemption analysis, I think you can cap it down to zero. Whether or not a cap is reasonable under SB 1531, I think you're probably looking at having to litigate. If a city sets a low cap, and someone thinks it's unreasonable, a city could face a lawsuit. That's why it's so important for city leaders to talk to their city attorney. When you are considering these issues and any form of restriction or regulation you might look at putting out there, it's important to have a candid conversation with your city attorney. Even though they may not be able to give you a clear yes or no about what a court might rule, they can at least help you assess the legal risk and the cost of defending that decision. ■

Online Resources



Visit **www.orcities.org/marijuana** for:

- Presentations from the League's Marijuana Workshop
- A list of cities with moratoriums on medical marijuana dispensaries
- Information on the Oregon Medical Marijuana Act
- OHA rules set out in SB 1531
- Federal guidance regarding marijuana enforcement

Working with the Oregon Health Authority

Tom Burns, Director of Pharmaceutical Purchasing, Oregon Health Authority

The Oregon Health Authority (OHA) was tasked by the Legislature to provide regulatory oversight of the state's medical marijuana dispensary licensing program. OHA Director of Pharmaceutical Purchasing Tom Burns will oversee the dispensary licensing and oversight program, and presented an overview at the League's Marijuana Workshop of the OHA's role and how local governments can work with the OHA in dealing with dispensaries.

Dispensary Oversight

OHA's ability to regulate dispensaries was narrowly written in HB 3460 and requires OHA to provide a license to any applicant who can meet specific basic criteria. However, Governor Kitzhaber also included three guidelines for OHA's regulations in a signing letter: assure public safety, assure patient safety, and enforce rules vigorously. As a result, OHA worked with a rules advisory committee, held over 17 hours of meetings, and published temporary rules to start the licensing program.

Currently, the OHA must grant a license if an application shows a proposed dispensary:

- Is not within 1,000 feet of a school or another dispensary;
- Is in an area zoned for industrial, commercial, agricultural or mixed use;
- Has a security system; and
- Is testing for health hazards.

However, the OHA cannot reject an application if local ordinances ban dispensaries or if zoning codes prevent locating a dispensary at the designated site. As Burns stated: "I may well, as the health authority, issue a license. It's up to you guys to decide if that license is any good in your jurisdiction."

OHA and Your City

In addition to licensing, the OHA is required to inspect dispensaries yearly, and is planning on conducting sting operations when they hear of facilities that are operating improperly. So they need local officials and enforcement agencies to inform them of sites that are violating the licensing rule. For example, if the police notice that the security system is not operational, citizens notice that marijuana is packaged in a way that is enticing to children, or if there is evidence of on-site use of the marijuana, OHA needs cities to inform them.

But, OHA cannot ensure shops are shut down if their license is revoked. OHA may only impose civil penalties; they cannot bring criminal charges. So, they need assistance from local law enforcement and prosecutors. OHA was not given authority to shut the physical doors at a facility that loses its license and, therefore, must work with law enforcement agencies to shut these facilities down. Burns recommended that local governments remain in contact with his office to monitor the dispensaries within your city saying, "We want desperately to work with local law enforcement. We cannot do this ourselves."

Future Rulemaking

Currently, OHA is working on making permanent rules regarding dispensary licensing under HB 3460. They intend to complete this process by July 31. In addition, they are working on finalizing rules relating to edible marijuana products and marketing restrictions required under SB 1531. Copies of all these proposed rules and schedules for submitting testimony can be found at *www.oregon.gov/oha/mmj*. Burns also pointed out that as the program moves forward, the OHA will likely revisit these rules.

As cities look at the various tools available to regulate dispensaries within city limits, working as a partner to OHA in insuring the facility is following the licensing rules should be top of the list. As Burns said: "If they are not following these rules, we will close them down." ■