

Land Use Issues Are Latest Obstacle to New Jersey's Medical Marijuana Program

Opponents Finding Different Ways to Say "NIMBY"

New Jersey passed the Compassionate Use Medical Marijuana Act nearly two years ago on January 9, 2010 but so far not a single dispensary has opened. Critics say the delay has been caused by the Christie administration's opposition to the legislation. Recent events indicate that the opposition is softening as steps have been taken to implement the program. Yet even as the rules for *How* the program will operate are resolved a new question is taking its place – *Where?*

Initially it was believed that the Department of Health and Senior Services ("DHSS") failure to adopt regulations to implement the Act was evidence of the administration's foot-dragging. That ended when DHSS recently announced it has finalized the rules and published them for enactment. On December 5, 2011 Governor Christie appointed John O'Brien the new Director of the program. Mr. O'Brien is a former NJ State Police Assistant Bureau Chief and an expert in criminal records. His law enforcement background is no doubt intended to ensure the integrity of an undertaking which will require ongoing licensing and background checks for all those involved.

With New Jersey finally moving toward putting its medical marijuana program into operation municipalities now face a new concern – where should this use be located? Three towns have recently confronted the issue with differing results.

In October, 2011, the Zoning Board in Maple Shade, NJ was approached by Compassionate Care, one of six growers/distributors selected by DHSS to be the initial providers. The Board was asked whether a medical marijuana dispensary was a permitted use in the Business Development zone. The zone permits "professional, medical and business offices" and "retail sales." The Board decided that the dispensary was neither a medical office, because there would be no supporting medical staff, nor a typical retail store, because the product being sold was too "highly restrictive and regulated." It concluded that the use was inconsistent with the permitted uses in the zone and would therefore not be allowed without a zoning variance.

Montclair, NJ reached the opposite conclusion in November, 2011. When approached by Greenleaf Compassion Center, another DHSS approved provider, town officials determined that a medical marijuana dispensary was no different than a retail store similar to a pharmacy. Greenleaf was told that its proposed dispensary in a storefront in the Central Business District was a permitted use which could open without need of further zoning board approval.

When Upper Freehold, NJ was faced with applications by a grower/distributor to set up cultivation sites in December, 2011 it decided to pass an ordinance to prevent issuance of zoning permits for any use prohibited by federal law. Marijuana is still a

controlled substance under U.S. Code even though the federal government has chosen not to prosecute in the 14 states which allow medical marijuana. If upheld, Upper Freehold's ordinance will enable individual municipalities to bootstrap their opposition to the federal ban and prevent grow sites and dispensaries from locating within their borders.

In addition to the battle over where the dispensaries will be located the growers/distributors also face opposition when searching for a place to cultivate their crop. Greenleaf told Montclair officials that their grow site would be located several miles away in an undisclosed town in Sussex County. Compassionate Care told Maple Shade that they intended to grow the plants elsewhere in Westhampton, NJ. Since grow sites are separate from dispensary sites the providers end up needing two separate zoning approvals to operate.

Land use issues were inevitable given the controversial nature of the law and New Jersey did little to smooth the way. The DHSS regulations practically invite NIMBY concerns by allowing municipalities to enact "reasonable" ordinances to restrict what the Act calls "alternative treatment centers." In order to pre-empt such concerns the Act could have awarded the use special treatment to override local zoning restrictions. It's been done before. Municipal Land Use Law §66.6 declares that child care centers licensed by DHSS are a permitted use in all nonresidential districts. Another tactic would have been for the legislature to add the use to the roster of "inherently beneficial" uses recited in MLUL §4. Inherently beneficial uses receive special treatment in variance applications because they serve the public good and promote the general welfare. Failure to take either of these steps made it easier for towns like Maple Shade to say that a dispensary should not be located in a retail business zone.

Because the Act allows municipalities to pass reasonable restrictions regarding the use it is expected that towns will begin to adopt ordinances to regulate it, such as excluding it in residential zones or requiring minimum distances from schools and churches. All of these attempts to reconcile the use will be for nothing, however, if Upper Freehold's ban is upheld. If each municipality has the option of excluding grow sites and dispensaries the program's statewide availability will be jeopardized. And if Upper Freehold's can thwart New Jersey's medical marijuana program, then the State's efforts to relieve the suffering of terminally ill patients will be at risk. For now it appears that New Jersey's courts and legislative bodies will be sorting through these land use issues for years to come.

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