

Challenges for CRE After Legal Marijuana Vote in MA

BY PAUL C. BAUER

BOSTON — Now that the citizens of Massachusetts have approved ballot question No. 4, the Massachusetts Marijuana Legalization Initiative, we will see increased efforts to license medical marijuana dispensaries in the Common-

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wealth. General marijuana establishments probably will not open until 2018 at the earliest and the Initiative provides a preference for expansion of medical marijuana dispensaries to general marijuana establishments.

Thus, continuing to push forward with dispensaries is in the best interest of marijuana providers as they often will readily convert to full retail marijuana establishments.

For the right properties, owners will find opportunities in leasing to dispensaries, as well as marijuana establishments, but face significant challenges and risks as well. The opportunities are significant. Often, the properties that are appropriate for dispensaries are older, smaller buildings that are not favored by chain retailers or current office users. A dispensary can provide a viable use for these buildings. Just as important, appropriate properties in a community typically are rare. Community regulation of the location of dispensaries and the circumscribed availability of product type further limit the inventory for dispensaries.

This limited availability together with landlord reticence to lease to dispensaries leads to a significant premium in rents for appropriate properties. Rents will be above “market.” In addition there may be opportunities for rents to track revenues at the dispensary. The owner of a property that is appropriate as a dispensary may well face a competitive market among marijuana providers.

At the same time, owners must scrutinize the opportunity to lease to a dispen-



sary with a cautious eye. There are several challenges to these leases that must be evaluated.

First, as Federal law does not recognize marijuana for medical purposes, the technical potential for a Federal forfeiture action exists. Policy changes in the U.S. Department of Justice have decreased the risk of civil asset forfeiture actions, but it remains a theoretical possibility. If a dispensary were to engage in drug activities that continue to be criminal under State law in addition to permitted medical dispensary use, however, landlords would potentially face a civil asset forfeiture action.

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Although typically covered in lease forms, any lease of property for a dispensary must provide strict use requirements to prohibit illegal activities. In addition, it is recommended that the landlord limit cure rights for legal vio-

lations. In administering a dispensary lease, a landlord will want to ensure that it keeps abreast of any legal violations issued by state or local authorities.

Second, licensing and permitting hurdles are very real impediments to opening a dispensary. As a preliminary matter, the parties will need to evaluate whether there are any restrictions under the state and local permitting scheme that are a hard stop for successfully opening a dispensary. Some licensing and permitting is discretionary, but other restrictions may be absolute prohibitions.

Further, the dispensary operator will need to exhibit site control in order to obtain those state and local licenses and permits. This will require that the landlord expend some upfront investment to negotiate a lease or at least some agreement to keep the property available for the operator. More importantly, the property will be off the market for some period of time while the operator pursues the licenses and permits. Some portion of this period of time is likely to be without rent as until there is an operating facility, there is no income. A landlord should evaluate the permitting environment for the dispensary and carefully negotiate the lease

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commencement.

Moreover, just because the dispensary operators and the municipality conclude that the location is ideal for a dispensary, it does not mean that it is the perfect alternative for the property owner. If the building or center has multiple tenants, the presence of a dispensary conceivably could decrease rents for other properties in the building or center. Other tenants of the landlord may have restrictions in their leases or other documents that prohibit leasing for various uses. Often these restrictions may only arguably prohibit a dispensary so landlords will need to review these leases carefully.

Finally, the Initiative provides for limitations on the application of local control to restrict expansion of a dispensary to a full retail facility for legal marijuana sales. A landlord need not agree in a lease with a dispensary to permit this expansion although most dispensaries will not accede to such a demand for a limitation on use. The parties to the lease should fully address this eventuality in the lease so that both parties are fully aware as to the process and limitations on any expansion to a full marijuana facility operation.



Owners that find themselves in the position to place a dispensary at their property have a valuable opportunity for a viable long term tenant. At the same time, it is important for owners to proceed with eyes open towards issues and challenges as we move forward into largely uncharted territory. ■

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