

Adult-use marijuana: Common questions answered

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In November 2016, Maine became the ninth state to legalize the use of recreational marijuana. Now, after more than 18 months of deliberation in the state Legislature, Maine has a workable regulatory structure in place for commercial sale of recreational (now "adult use") marijuana. To help municipalities sort through what this means for them, here is a list of some of the more common questions that Maine Municipal Association's Legal Services Department has received from municipal officials.

This article intended to provide a broad overview of the issue. If you would like additional information, details to these and other marijuana-related questions can be found on MMA's website (www.memun.org), at the "Marijuana Resources" section. MMA Legal Services is also available to answer member questions directly, so please get in touch.

Q. What's legal and what's not?

A. Adults 21 years of age or older may legally acquire, possess and consume up to 2.5 ounces of marijuana and up to five ounces of marijuana concentrate for personal use. They may also cultivate up to three mature and 12 immature marijuana plants at their home, or on someone else's property with written permission. Adults may give away up to the allowable amount of adult use marijuana, marijuana products, or plants, but "gifting" marijuana in exchange for a service or other compensation is prohibited (no "free" marijuana for a bag fee or included with a hotel room charge).

Consumption of marijuana or marijuana products in public places or in vehicles on a public way (by drivers or passengers) is prohibited, as is home extraction of marijuana concentrate using inherently hazardous substances.

Commercial cultivation, manufacturing, testing and retail of adult use marijuana in Maine is also now legal. The Adult Use Marijuana Act authorizes a licensing process for adult use marijuana establishments, but, since the state has yet to establish rules governing the licensing process, it will be several months before any adult use marijuana establishment is operational.

The law expressly prohibits retail sale of adult use marijuana by vending machine, delivery service, internet-based sales, or drive-through window.

Q. What is an “adult use marijuana establishment”?

A. There are four general types of adult use marijuana establishments: 1) “Cultivation facilities,” authorized to grow and process marijuana for sale in adult use stores; 2) “Products manufacturing facilities,” authorized to extract components of the marijuana plant to make marijuana products such as tinctures and edibles; 3) “Testing facilities,” authorized to test marijuana and marijuana products for contamination, potency, and safety; and 4) “Stores,” authorized to sell adult use marijuana and marijuana products to consumers.

Cultivation facilities are further divided into four tiers, based on the square footage of plant canopy. There is also a fifth category of cultivation facility called a “nursery cultivation facility.” Nurseries may only cultivate up to 1,000 square feet of plant canopy, but they are authorized to sell immature plants, seedlings, and seeds directly to consumers without a separate store license.

Q. What about marijuana social clubs?

A. Marijuana social clubs are not allowed under the Adult Use Marijuana Act. Although considered, they were ultimately eliminated because they were too controversial.

Q. Can adult use marijuana establishments operate in our municipality now?

No. Adult use marijuana establishments cannot operate in any municipality until that municipality says they can. Under the Adult Use Marijuana Act, the default is prohibition – it is up to each municipality to decide if it wants to allow some or all types of adult use marijuana establishments within its jurisdiction. Commercial cultivation, production, testing and sale of adult use marijuana also cannot begin until the state finalizes its licensing process.

Q. Do we need marijuana moratorium and/or prohibition ordinances to delay or prohibit commercial marijuana activity in our municipality?

A. No. Under the current law, municipalities are not required to do anything unless they want to authorize commercial adult use marijuana activity within their jurisdiction.

The original recreational marijuana law, enacted by statewide referendum in 2016, required municipalities to enact ordinances to restrict or prohibit the operation of adult use marijuana establishments within their jurisdiction. The current law does the opposite: It prevents the operation of an adult-use establishment until the legislative body of a municipality votes to authorize that type of establishment. This is commonly referred to as the “opt-in” approach to local regulation. Now that municipalities have the ability to “opt-in” to commercial adult use marijuana activity, local ordinances prohibiting or imposing moratoriums on such activity are no longer necessary.

Q. How may a municipality authorize the operation of adult use marijuana establishments?

A. Municipal authorization of adult use marijuana establishments requires a vote of the legislative body (town meeting or town or city council). General authorization can take various forms, depending on the extent to which the municipality wants to regulate such establishments locally. If the municipality wants to take a “hands-off” approach, its legislative body can approve a simple ordinance or warrant article generally authorizing the operation of some or all types of adult use establishments, leaving the rest to the state licensing process and market forces. If the municipality wants to take a more active role in regulating the location, number, and operation of adult use marijuana establishments, it may enact ordinances to that effect.

Q. May municipalities regulate adult use marijuana establishments?

A. Yes. Municipalities have broad home rule authority to enact local requirements by ordinance. Municipalities may limit the type, number, and location of establishments, impose performance standards, and require licensing fees. Municipalities may choose to amend existing licensing, land use or zoning ordinances, or enact a stand-alone ordinance governing the operation of adult use marijuana establishments within the municipality.

Q. Can municipalities regulate personal use and cultivation of adult use marijuana locally?

Regulation and enforcement of personal use, possession, and consumption of adult use marijuana is reserved to the state.

However, the law does allow for limited local regulation of personal adult use cultivation. Municipalities may limit the number of plants cultivated on property within the municipality, provided the local limit is not more restrictive than what the state allows (three mature plants and 12 immature plants per adult). Municipalities may also apply other land use regulations – like odor control ordinances – to personal cultivation, but are not allowed to prohibit, zone or charge a license fee for the activity.

Q. When will the state start issuing adult use marijuana establishment licenses?

A. It will be some time before the state can issue licenses. The Department of Administrative and Financial Services (DAFS), the agency tasked with overseeing the licensing process, will first need to promulgate rules, which by its estimation will take at least nine months. In addition, the rules developed by DAFS will be major substantive rules, meaning once the rules are finalized, they will also need to undergo a legislative review. This will likely delay state licensing until at least summer of next year.

Q. How does state licensing work, and what role does the municipality play?

A. Individuals and businesses must first submit a license application to DAFS to obtain a conditional license. A conditional license is not a license to operate – applicants cannot begin operation until they are issued an active license. An active license cannot be issued until the municipality where that establishment will operate confirms it has opted in to operation of that type of establishment and has issued all applicable local approvals. Municipal officers are responsible for providing such confirmation to DAFS on a certification form developed by DAFS.

Conditional licenses expire after one year and cannot be renewed. An applicant must receive all the necessary local approvals before the conditional license expires, otherwise they will need to reapply for another conditional license. Municipalities have 90 days to submit its certification form. The municipality can request an extension if it needs more time to complete local approvals. If the municipality fails to respond within the allotted timeframe, the local certification is deemed denied, and the applicant can appeal the municipality's denial to Superior Court.

Q. Does the Adult Use Marijuana Act authorize state revenue sharing with municipalities?

A. No. The law imposes new sales and excise taxes on adult use marijuana, but these tax revenues belong to the state – there is no state tax-revenue sharing with municipalities provided for in the law.

Q. Can municipalities impose a local tax on Adult Use Marijuana?

A. No. Under the Maine Constitution, the exclusive power of taxation is reserved to the state Legislature. Municipalities can only levy taxes if expressly authorized to do so by state statute. There is no municipal authority in the Adult Use Marijuana Act to assess or collect sales or excise tax on adult use marijuana (personal property taxes and real property taxes still apply).

Q. Does the Adult Use Marijuana Act allow local regulation of medical marijuana storefronts?

A. No. The Adult Use Marijuana Act only governs the state and local regulation of adult use marijuana. Medical marijuana is governed by a different statute, the Maine Medical Use of Marijuana Act (22 M.R.S. § 2421 et seq.). Recent amendments to the medical marijuana laws now make clear that municipalities can regulate registered caregivers and caregiver operated retail stores.

Q. We have medical marijuana retail stores in our municipality. Does this mean we have already opted in to adult use stores too?

A. No. Medical marijuana retail stores and adult use marijuana stores are completely different establishments, and a marijuana store or dispensary operated for medical purposes cannot automatically transition into an adult use store. A dispensary or registered caregiver operating a retail store for medical purposes is prohibited from switching to retail sale of adult use marijuana until the municipality has opted in to the operation of adult use marijuana stores, and the caregiver or dispensary has obtained a license to sell adult use marijuana.

Adult Use VS. Medical Marijuana

It is often assumed by local officials that any local ordinance regulating adult use marijuana activities can apply to medical marijuana. This is not the case. Under state law, adult use marijuana and medical marijuana are governed by two separate statutes, the Adult Use Marijuana Act (28-B M.R.S. §§ 101-1504) and the Maine Medical Use of Marijuana Act (22 M.R.S. §§ 2421-2430-B). Each statute contains distinct language on local authority to regulate marijuana used and distributed for each particular purpose. If a municipality wants to regulate medical marijuana, it cannot rely on local ordinances related to adult use marijuana to do so. Instead, municipalities must look at the Maine Medical Use of Marijuana Act to see to what extent medical marijuana can be regulated locally, and then enact separate ordinances specific to Medical Marijuana.