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In potentially lucrative business of recreational cannabis, many real estate issues abound - by Gemma Cashman

November 18, 2022 - Front Section



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It has been six years since the Commonwealth of Massachusetts legalized the sale and purchase of cannabis for recreational usage. While the initial “gold rush” to open adult-use marijuana businesses has subsided a bit, many prospective business owners remain interested in the potentially lucrative cannabis game.

For those considering opening such a business, whether as an owner-operator or as a landlord, in addition to many regulatory hurdles, there are numerous real estate issues to be addressed as part

of the planning process.

Zoning: The most important real estate-based issue is whether or not the proposed use is compliant with local zoning. Several questions to consider when analyzing the proposed use include: Is the growth, distribution, storage and/or sale of cannabis permitted in this municipality? If so, in what zoning district is the proposed use permitted? Can the intended use fall under the umbrella of a different permitted use there, such as general retail or warehousing? Is any use related to cannabis specifically prohibited?

Massachusetts law allows, but does not require, municipalities to pass bylaws and ordinances governing marijuana establishments in their communities. Municipalities may determine that a proposed use falls under an existing use authorized by its existing bylaws or ordinances, or may draft new ordinances or bylaws that restrict the time, place and manner of operations.

Additionally, pursuant to M.G.L. c. 94G, § 3, a municipality may adopt bylaws or ordinances that limit the number of these establishments, but if the city or town voted in favor of Question #4 on the 2016 state election ballot, entitled: “Legalization, Regulation, and Taxation of Marijuana,” it must submit that bylaw or ordinance for approval to its voters at a regular or special election. Any adopted ordinances and bylaws may “impose reasonable safeguards,” according to M.G.L. c. 94G, § 3, as long as they “are not unreasonably impracticable” and comply with state statutes.

Landlords and Leases: At the outset, any landlord should consider making a cannabis business lease contingent upon receipt of all local and state permits. Before entering into a lease, a landlord should consult with an attorney to review state and local regulations and confirm that the proposed use is allowed, and to review the procedure to obtain the necessary permits and/or licenses.

Most leases require the tenant to comply with all applicable laws. Any cannabis-related lease is almost certainly contrary to federal law, which makes it a felony to knowingly open, lease, rent, use or maintain any place for the purpose of manufacturing, distributing or using any controlled substance under the Crack House Statute. This is a hot-button issue right out of the gate.

Regarding rent, regulators may view anything beyond ordinary payments as de facto license ownership, subject to disclosure and vetting, so landlords should review local guidelines before entering into any profit-sharing arrangement. A landlord should also maintain independence from the licensee by avoiding any revenue thresholds, and rent should not be allowed to be paid in cash. The best approach is for landlords to require that rent be paid through an Automated Clearing House account.

Insurance: Lastly, any lease should require evidence of insurance coverage for the entire lease term, with notification to the property owner if the insurance lapses for any period of time. Anyone who leases to a cannabis business should consult with their insurance provider about whether it is prudent to be included as an additional insured on the policy. While this is standard in other commercial lease relationships, a landlord may consider forgoing this requirement to maintain independence from the cannabis use. A landlord should ask whether or not the cannabis-related

use will invalidate the policy or make it more expensive, and should consider passing any costs of increased premium to the tenant.

Recreational cannabis remains a potentially lucrative business opportunity in Massachusetts, but these real estate questions and issues should factor into the process. If prudent planning is applied, it can lay the foundation for potential success.

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New England Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540