MID ATLANTIC
NEW JERSEY-PENNSYLVANIA-DELAWARE-MARYLAND-VIRGINIA REAL ESTATE JOURNAL

April 13, 2018 Volume 30, Issue 7

Southern New Jersey

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Real estate and zoning hurdles facing legalized recreational marijuana retailers

The potential for legalized marijuana in New Jersey is an exciting prospect for many would-be marijuana entrepreneurs eager to become involved. However, a legalized and regulated marijuana industry presents significant real estate and land use challenges creating barriers to entry into this new field.

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As of March 2, 2018, proposed legislation would legalize and regulate the purchase, sale, transportation, possession and use of recreational marijuana and create the Division of Marijuana Enforcement ("DME") to oversee these activities. DME would be responsible for promulgating regulations to establish the maximum number of licensed marijuana retailers. The legislation would delegate authority to municipalities to enact ordinances governing the time, place, manner and number of marijuana establishments, or prohibit them altogether. Municipalities would have input on selection if the number of license applications to DME exceed its limit.

If municipalities do not prohibit marijuana establishments altogether, they will exercise their zoning and police power to regulate the location of these businesses. Some municipalities already have medical marijuana facilities within their borders due to the Compassionate Use Medical Marijuana Act, and some municipalities have already barred them. For example, Upper Freehold Township and Howell passed ordinances forbidding zoning approval for any use that violates federal law. These ordinances effectively prevent any marijuana use (even medical), since marijuana is still illegal federally. Other municipalities have utilized their zoning power to expressly prohibit medical dispensaries, or alternatively to permit them in industrial or commercial locations.

Municipalities may also use their zoning and police power to regulate the "time, place, manner and number of marijuana establishment operations." Because New Jersey's proposed legislation tracks language from Colorado's Amendment 64, and because Colorado is a developed market, it's useful to review how Colorado municipalities have handled these issues. In Denver, dispensaries cannot be located within 1,000 ft. of schools, childcare, drug rehab facilities and city-owned recreational facilities. The City of Thornton added "marijuana store" as a new land use, and established quadrants in the city, with one marijuana store allowed in each quadrant, to be 1,000 ft. from schools, 500 ft. from childcare, drug rehab facilities and 1,500 ft. from each other. Aurora limited the number of stores to 24, required them to be located within commercial or industrial districts and also required them to be located 1,000 ft. from schools and 500 ft. from hospitals/drug treatment centers.

Assuming future New Jersey marijuana retailers find suitable locations that meet zoning requirements, considering New Jersey's dense population and prevalence of schools and other sensitive populations, prospective operators may find themselves limited to commercial or industrial zones due to logistics or zoning. Marijuana retailers and municipal planners will both need to consider master plans and municipal ordinances, as well as whether a retail location in an area populated by warehouses, industrial facilities and tractor trailers makes sense. There may also be challenges finding a leasable location, as landlord mortgage loan agreements typically prohibit activities on leased premises that violate federal law. An additional and perhaps most critical challenge will be to finance the purchase of a location based on the federal illegality of marijuana, as banks are reluctant to take deposits generated from marijuana sales, let alone finance a location in the marijuana business.

In what should be a highly competitive market, intrepid potential marijuana retailers should consider investigating their chosen municipality and potential locations well in advance, so they are prepared to secure a site, if and when legislation is enacted.

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