COLORADO COUNTIES, INC.
Educate · Advocate · Empower

DATE: July 11, 2013

TO: County Commissioners, Council Members, Mayors and Staff

FROM: Eric Bergman, Policy and Research Supervisor
Brandy DeLange, Policy Associate

RE: Frequently Asked Questions (FAQs) on Implementation of Amendment 64

The passage of Amendment 64 (which legalizes the personal possession, cultivation and use of recreational marijuana in Colorado and allows for retail sales, cultivation, infused product manufacturing and testing facilities) – and the subsequent legislation that was recently signed by the Governor - has created a rather unique policy conversation in many communities. Around the state, county commissioners, council members and mayors are convening meetings with appropriate staff and stakeholders and talking about possible courses of action. A growing number of counties have already enacted ordinances prohibiting retail sales and cultivation in the unincorporated area, and CCI expects the majority of counties will follow this path of action. Given the widespread interest and need for policy guidance on the issue, CCI staff has drafted a series of frequently asked questions to help inform the ongoing policy debate.

FREQUENTLY ASKED QUESTIONS

1) What is the status of legislative and rulemaking efforts on recreational marijuana regulation in Colorado?

Legislative Update. On March 13, the Governor's Task Force on the Implementation of Amendment 64 issued its final report to the Governor, the General Assembly and Attorney General John Suthers. (The report can be downloaded on the CCI website). A legislative committee comprised of members of both the House and Senate spent two weeks reviewing the 58 recommendations in the report and voted on which policy recommendations to refer to drafting for inclusion in legislation. The General Assembly ended up passing four bills containing the majority of the task force recommendations: HB 1317, HB 1318, HB 1325 and SB 283. Governor Hickenlooper signed these bills into law on May 28.

HB 1317. HB 1317 establishes the framework for state and local government regulation of the adult-use marijuana industry. The act features a dual-approval system where both a state license and local *approval* (not necessarily a license) are required before a recreational marijuana business could open its doors. The act formally defines the term "operating fees" (which appears in Amendment 64 but is not defined) and provides authority for local governments to assess these fees on the industry to recover costs for regulatory program administration.

The act states that only medical marijuana licensees in good standing will be able to apply for a recreational license during the first nine months of the licensing program – which begins October 1, 2013. New applicants will be allowed to apply for a license beginning July 1, 2014. New applicants are allowed to file a "notice of intent to apply" beginning on January 1, 2014, which allows them to begin lining up in advance of July 1.

The act will also require that adult-use marijuana businesses follow the limited "vertical integration" model (currently in use in the medical marijuana industry) for at least nine months, meaning that during that time frame they must grow at least 70% of the product they sell. Beginning on October 1, 2014, marijuana businesses will have the choice to continue following the vertical integration model or move to one that more closely resembles the liquor industry (i.e., the producer/distributor/retailer model).

NOTE: It is important to remember that the language in Amendment 64 allows a local government to place restrictions on the time, place, manner and number of establishments in its jurisdiction. This grant of power allows counties to have complete discretion on a wide number of issues concerning where and how recreational marijuana is grown and sold.

HB 1318. HB 1318 will place a single question on the November ballot regarding two new taxes on recreational marijuana. The first would be a 15% excise tax (which was authorized under the language of Amendment 64) on recreational marijuana. In accordance with the constitution, the first $40 million in proceeds each year from this excise tax would go into the state school construction fund. The second part of the ballot question would ask voters to authorize a 15% state sales tax on recreational marijuana. While the sales tax would be ***authorized*** at 15% if approved, HB 1318 calls for the state to collect only a 10% sales tax through 2016 – at which time the General Assembly would have the ability to adjust this sales tax up or down.

The act also establishes a 15% share back of the state sales tax to those local governments that have retail sales in their jurisdiction. The share back does not preclude a local government from seeking a local sales tax ballot question on recreational marijuana, although there is a question as to whether or not explicit statutory authority to do so exists.

HB 1325. HB 1325 establishes a blood THC limit for driving in Colorado similar to the blood alcohol limit. If a driver is suspected of driving under the influence of drugs and a blood test shows 5 or more nanograms of THC, a permissive inference of intoxication may be made by a jury.

SB 283. SB 283 contains all the recommendations from the Governor's Task Force on the Implementation of Amendment 64 that were unanimously approved for drafting by the joint legislative committee. The act touches on a wide variety of issues, including product labeling, potency, public education programs, adding marijuana to the Colorado Clean Indoor Air Act, creating an "open container" offense for marijuana, and amending state statutes to conform to the legal structure of Amendment 64.

Rulemaking Status. The Department of Revenue must promulgate rules by July 1, which would have been difficult given the various open meeting notice requirements that must be followed during the rulemaking process. The Department announced last week that it will be necessary to issue "emergency rules" (which would be exempt from the various meeting notice requirements) in order to comply with the deadline set forth in Amendment 64. The department will then have to conduct public meetings over the summer before promulgating final rules later this year.

2) Where are the federal authorities on this issue? Are they planning to get involved?

While US Attorney General Eric Holder has yet to issue a formal statement on Amendment 64, he has been in regular contact with both Governor Hickenlooper and Colorado Attorney General John Suthers. What has been gleaned from those conversations is that the feds have two primary concerns: 1) diversion of recreational marijuana out of Colorado to other states; and 2) accessibility of minors to recreational marijuana. The Governor's task force attempted to address both these concerns in the recommendations that were issued in the final report, and the General Assembly subsequently codified many of these recommendations in the series of bills that were recently enacted.

As for adult usage of recreational marijuana, President Obama stated in December that the federal government would not seek to prosecute individuals growing, possessing or using marijuana as long as they were in compliance with the standards set forth in Amendment 64 (which puts limits on the amount that individuals can lawfully possess and grow).

3) If my county has a ban in place (or intends to enact a ban), should we be concerned with what is in the new legislation and/or rulemaking?

While a county that has banned retail sales and cultivation will obviously have less interest in the new regulatory framework, there are still elements of recreational marijuana regulation that will have bearing on county governments. Issues like restriction on personal use by county employees or on county-owned property will be of interest to all county commissioners. County social service directors will want to be aware of licensing consequences for childcare facilities and issues concerning the safety of minors in households where marijuana is being grown. **All counties will need to formally notify the Marijuana Enforcement Division (MED) of their decision regarding the sale and cultivation of recreational marijuana. If a county has adopted a resolution or ordinance enacting a ban, a copy of the resolution/ordinance needs to be provided to the MED.**

4) My county would like to enact a temporary moratorium on recreational marijuana. Is a moratorium permitted under Amendment 64?

A number of commissioners have indicated a desire to place a moratorium on recreational marijuana until they have had a chance to sort out a number of issues and see how the regulation of this nacent industry plays out over the next year or so. A number of county attorneys have opined, however, that the plain language of Amendment 64 may **not** provide for such action. Amendment 64 requires that local jurisdictions either adopt a ban through an ordinance (prohibiting recreational sales and cultivation) or begin accepting applications on October 1. The reality is that enacting a "temporary ban" will basically have the same effect as enacting a moratorium, even if there are important *political* distinctions between the two. At the end of the day, while this issue is largely one of semantics, commissioners are encouraged to consult with their county attorneys before taking action to establish a "temporary time-out" on recreational marijuana.

5) If my county is considering allowing retail sales and cultivation, what is the timeline for making that policy decision?

If a county intends to allow recreational marijuana businesses, it must specify who will be responsible for processing licensing applications by October 1, 2013. This is the date that the state and locals must begin accepting applications (provided the local government in question hasn't

enacted a ban by that time). Under Amendment 64 and HB 1317, local governments are authorized (but not required) to adopt local regulations governing the time, place, manner and number of establishments. A number of counties are intending to rely more on zoning or special use permit approvals than formal licensing programs, and HB 1317 was carefully worded to recognize this need for local flexibility in the application approval process.

Counties that are intending to move forward will need to begin working on regulations this summer in order to be ready by October 1. Most, if not all, jurisdictions will probably need to examine their zoning ordinances and/or land use codes to add definitions for recreational marijuana retail sales, cultivation and infused product manufacturing. CCI will provide updates and examples of local regulatory approaches to keep members up to speed on the status of this new regulatory framework.

6) Can counties set license application fees for recreational marijuana businesses in the same way that they do for medical marijuana businesses?

No. License application fees are capped in the state constitution at $5,000 for new businesses and $500 for medical marijuana facilities wishing to convert to recreational sales/cultivation. These application fees are to be shared 50/50 between the state and the local jurisdiction, assuming a local jurisdiction is planning to issues local licenses. Amendment 64 does allow the Department of Revenue (but not local governments) to increase this license application fee if it can show that it is insufficient to cover the cost of carrying out this regulatory program. HB 1317 requires the state to consult with local governments when considering whether to raise the license application fees to reflect the actual costs of reviewing applications.

7) Are there other fees that counties can assess on recreational marijuana businesses?

Yes. As noted above, Amendment 64 states that local governments can adopt a schedule of "operating fees" for recreational marijuana establishments. The constitution did not define what an operating fee is, however. Accordingly, the task force issued a recommendation that implementing legislation should define operating fees as "fees that may be charged by a local government for costs including but not limited to inspection, administration and enforcement of businesses authorized pursuant to this section." This operating fee definition is now housed in state statute (through HB 1317) and should allow local governments to recoup their administrative and enforcement costs – especially given the relatively low licensing application fees that are now set in the constitution.

8) Can counties ask local voters for a sales tax on recreational marijuana?

While there is nothing in Amendment 64 (or the implementing legislation) that specifically precludes a county from going to the ballot to ask voters for a local sales tax on recreational marijuana, questions have been raised about the existing statutory authority to levy a sales tax on recreational marijuana. Park County is the only county that currently has a sales tax (approved in 2010) on medical marijuana and paraphernalia. Recreational marijuana (like medical marijuana) will be subject to all existing local sales taxes.

As noted above, this November voters will be asked to approve both a new state excise tax (not to exceed 15% initially) upon all recreational marijuana sold and a new state sales tax (authorized at 15%). If established, the first $40 million generated by the excise tax would be credited to the Public School Capital Construction Assistance Fund. There is a 15% share back of the state sales tax to local governments that have retail sales in their jurisdiction.

Counties considering a sales tax question are strongly urged to consult with their county attorneys.

9) What is the status of industrial hemp?

In addition to legalizing recreational marijuana, Amendment 64 also directed the General Assembly to enact legislation governing the cultivation, processing and sale of industrial hemp (which, like marijuana, is currently prohibited by federal law). The Governor's task force issued a recommendation to support SB 241 which directs the Department of Agriculture to promulgate rules (by 2014) to implement the limited cultivation, processing and sale of hemp. As hemp does not contain THC (the psychoactive compound in marijuana), it is not regarded as controversial as marijuana. Under the act, a landowner can plant up to 10 acres of hemp. The crop must be registered with the Department of Agriculture and tested to ensure that it does not contain measurable amounts of THC.

Marijuana regulation continues to evolve and local elected officials are urged to confer with their county attorneys for specific legal counsel before proceeding. CCI will provide more information as it becomes available and counties are urged to go to the CCI website at www.ccionline.org for updates. If you have questions in the meantime, please do not hesitate to contact Eric Bergman at 303.861.4076 or by e-mail at ebergman@ccionline.org.