



**Memorandum No. 17-137**

**City Attorney's Office**

**To:** Honorable Mayor and Commissioners

**From:** Cynthia A. Everett, City Attorney, and Paul G. Bangel, Senior Assistant City Attorney<sup>1</sup>

**Date:** September 21, 2017

**Re:** Senate Bill 8-A – Medical Use of Marijuana

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**Question presented:**

Whether Section 381.986, Florida Statutes (2017), ("Senate Bill 8-A"), prevents the City from implementing Ordinance No. C-17-09, which amended several zoning district uses contained in the City's Unified Land Development Regulations to add medical cannabis dispensing facilities, amended Section 47-20, Parking and Loading Requirements, and added Section 47-18.46, Medical Cannabis Dispensing Facilities.

**Short Answer:**

Senate Bill 8-A preempts the regulation of cultivation, processing and delivery of marijuana by medical marijuana treatment centers to the State. Exceptions to the preemption permit the City to implement and enforce Ordinance C-17-09 with the exception of limiting the number of dispensing facilities based on population and limiting dispensing facilities to one per City Commission district.

**Discussion:**

On June 23, 2017, Governor Rick Scott approved Senate Bill 8-A, an act relating to medical use of marijuana. The legislation provides a unified regulatory structure for the implementation of Article X, Section 29 of the Florida Constitution, allowing the use, production, and distribution of medical marijuana. The law further preempts the regulation of cultivation, processing, and delivery of marijuana by medical marijuana treatment centers to the State. The term "Medical Marijuana Treatment Center" is defined in the Florida Constitution as follows:

"Medical Marijuana Treatment Center" (MMTC) means an entity that acquires, cultivates, possesses, processes (including development of

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<sup>1</sup> D'Wayne M. Spence, in his former capacity of Assistant City Attorney, contributed substantially to the drafting of this legal opinion.

related products such as food, tinctures, aerosols, oils, or ointments), transfers, transports, sells, distributes, dispenses, or administers marijuana, products containing marijuana, related supplies, or educational materials to qualifying patients or their caregivers and is registered by the Department.

Art. X, §29(b)(5), Fla. Const.

City of Fort Lauderdale Ordinance C-17-09 was adopted on May 16, 2017, and became effective on May 26, 2017. The ordinance added medical cannabis dispensing facilities to the list of permitted and conditional uses provided in Section 47-6.11, Boulevard Business District, Section 47-6.12, General Business District, Section 47-6.13, Heavy Commercial/Light Industrial Business District, added medical cannabis dispensing facilities to Section 47-20, Parking and Loading Requirements, and created Section 47 18.46, Medical Cannabis Dispensing Facilities.

The preemption set forth in subsection 381.986(11), Florida Statutes (2017), is applicable to the City of Fort Lauderdale. Accordingly, the City may not adopt regulations regarding the cultivation, processing, or delivery of marijuana by a medical marijuana treatment center except as provided in Subsection 381.986(11), Florida Statutes (2017).

Subsection 381.986(11) provides as follows:

**PREEMPTION.**—Regulation of cultivation, processing, and delivery of marijuana by medical marijuana treatment centers is preempted to the state except as provided in this subsection.

(a) A medical marijuana treatment center cultivating or processing facility may not be located within 500 feet of the real property that comprises a public or private elementary school, middle school, or secondary school.

(b)1. A county or municipality may, by ordinance, ban medical marijuana treatment center dispensing facilities from being located within the boundaries of that county or municipality. A county or municipality that does not ban dispensing facilities under this subparagraph may not place specific limits, by ordinance, on the number of dispensing facilities that may locate within that county or municipality.

2. A municipality may determine by ordinance the criteria for the location of, and other permitting requirements that do not conflict with state law or department rule for, medical marijuana treatment center dispensing facilities located within the boundaries of that municipality. A county may determine by ordinance the criteria for the location of, and



other permitting requirements that do not conflict with state law or department rule for, all such dispensing facilities located within the unincorporated areas of that county. Except as provided in paragraph (c), a county or municipality may not enact ordinances for permitting or for determining the location of dispensing facilities which are more restrictive than its ordinances permitting or determining the locations for pharmacies licensed under chapter 465. A municipality or county may not charge a medical marijuana treatment center a license or permit fee in an amount greater than the fee charged by such municipality or county to pharmacies. A dispensing facility location approved by a municipality or county pursuant to former s. 381.986(8)(b), Florida Statutes 2016, is not subject to the location requirements of this subsection.

(c) A medical marijuana treatment center dispensing facility may not be located within 500 feet of the real property that comprises a public or private elementary school, middle school, or secondary school unless the county or municipality approves the location through a formal proceeding open to the public at which the county or municipality determines that the location promotes the public health, safety, and general welfare of the community.

(d) This subsection does not prohibit any local jurisdiction from ensuring medical marijuana treatment center facilities comply with the Florida Building Code, the Florida Fire Prevention Code, or any local amendments to the Florida Building Code or the Florida Fire Prevention Code.

Counties and municipalities are preempted from regulating the cultivation, processing, and delivery of marijuana by marijuana treatment centers, but may adopt ordinances banning or determining criteria for location and permitting of medical marijuana treatment center dispensing facilities. Such ordinances may not limit the number of dispensing facilities, charge a greater fee to a medical marijuana treatment center than pharmacies, or permit a medical marijuana treatment center dispensing facility to be located within 500 feet of real property that comprises a public or private elementary school, middle school, or secondary school. In addition, counties and municipalities may not enact ordinances for permitting or for determining the location of dispensing facilities that are more restrictive than their ordinances permitting or determining the location of pharmacies.

The provision of subsection 381.986(11)(b)2, Florida Statutes that provides that a "county or municipality may not enact ordinances for permitting or for determining the location of dispensing facilities which are more restrictive than its ordinances permitting or determining the locations for pharmacies licensed under chapter 465" does not affect the City because Ordinance C-17-09 predates the enactment of Senate Bill 8-A. The general rule is that a substantive statute will not operate retrospectively absent clear



legislative intent to the contrary, but that a procedural or remedial statute is to operate retrospectively. *Arrow Air, Inc., v. Walsh*, 645 So.2d 422 (Fla.1994); *Alamo Rent-A-Car, Inc., v. Mancusi*, 632 So.2d 1352 (Fla.1994); *City of Lakeland v. Catinella*, 129 So.2d 133 (Fla.1961).

However, inasmuch as, pursuant to Subsection 381.986(11)(b)1, a municipality that does not ban dispensing facilities may not place specific limits, by ordinance, on the number of dispensing facilities that may locate within that municipality, Subsection 47-18.46.C.3, Code of Ordinances of the City of Fort Lauderdale, Florida, which provides for a limitation on the number of dispensing facilities based on population and limits one facility within each City Commission district, may not be enforced because it will place a limit on the number of dispensing facilities that are permitted to locate within the City.<sup>2</sup>

As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.

§166.021(1), Fla. Stat. (2017).

It is our understanding that, as of this date, there is one application for medical cannabis dispensing facility use pending before the City of Fort Lauderdale.<sup>3</sup> It is also our understanding that different municipalities have read Senate Bill 8-A in different ways. In addition, there has been some debate over the retroactive versus prospective application of the legislation. One attorney who has reviewed this issue opined that “there is a high probability that if a city does enforce a local marijuana zoning ordinance it will be caught up in litigation. In addition, the legislature which meets in January is very likely to revisit this issue.”

Therefore, we recommend that the City Commission adopt an ordinance placing a one hundred eighty day moratorium on the submittal, processing, approval, and issuance of any licenses, development orders, or permits regarding the location and permitting of medical marijuana treatment center dispensing facilities. Attached is a proposed ordinance which, by copy of this Memorandum, we ask that the City Manager place on the October 17, 2017, agenda for consideration by the City Commission.

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<sup>2</sup> The application of this provision placing limits on the number of dispensing facilities is different from that prohibiting the enactment of ordinances for permitting or determining the location of dispensing facilities that are more restrictive than those regarding licensed pharmacies because in the former, the law does not prohibit the *enactment* of ordinances but rather prohibits *placing* specific limits on the number of dispensing facilities, albeit by ordinance, which is what the City ordinance does going forward.

<sup>3</sup> We were informed that three other applications were previously filed with the City's Sustainable Development Department, but have been withdrawn.

**Conclusion:**

City of Fort Lauderdale Ordinance C-17-09 amended the City's Unified Land Development Regulations to identify zoning districts in which a medical cannabis dispensing facility use would be permitted and provide for other permitting requirements such as parking, hours of operation, odor and air quality, and a distance separation. To that extent, the ordinance is consistent with the provisions of Senate Bill 8-A, and can be implemented and enforced. However, the limitation on the number of dispensing facilities based on population and the limitation of one facility per city commission district contained in Section 47-18.46.C.3 fails because such limitations are prohibited by Florida law.

Inasmuch as there appears to be some disagreement on the correct implementation of Senate Bill 8-A, and the Florida legislature may revisit the issue in its next legislative session, it is our recommendation that the City Commission adopt an ordinance placing a one hundred eighty day moratorium on the submittal, processing, approval, and issuance of any licenses, development orders, and permits regarding the location and permitting of medical marijuana treatment center dispensing facilities in the City of Fort Lauderdale.

cc: Gustavo Ceballos, Assistant City Attorney  
Lee R. Feldman, City Manager  
John C. Herbst, City Auditor  
Jeffrey A. Modarelli, City Clerk  
Anthony G. Fajardo, Sustainable Development Director  
D'Wayne M. Spence, Community Redevelopment Agency Manager

Attachment



ORDINANCE NO. C-17-

AN ORDINANCE OF THE CITY OF FORT LAUDERDALE, FLORIDA, ESTABLISHING A MORATORIUM ON THE SUBMITTAL, PROCESSING, APPROVAL, AND ISSUANCE OF ANY LICENSES, DEVELOPMENT ORDERS OR PERMITS REGARDING THE LOCATION AND PERMITTING OF MEDICAL MARIJUANA TREATMENT CENTER DISPENSING FACILITIES FOR A PERIOD OF ONE HUNDRED EIGHTY (180) DAYS FROM THE DATE OF ADOPTION OF THIS ORDINANCE; PROVIDING FOR LEGISLATIVE FINDINGS, INTENT AND PURPOSE; PROVIDING FOR SEVERABILITY; REPEAL OF CONFLICTING ORDINANCE PROVISIONS; AND PROVIDING FOR AN EFFECTIVE DATE.

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WHEREAS, on November 8, 2016, Florida voters approved an amendment (hereinafter "Amendment 2") to Article X of the Florida Constitution, which went into effect on January 3, 2017, excluding from criminal or civil liability or sanctions under Florida law the use of medical marijuana by a qualifying patient and certain activities of caregivers, physicians or Medical Marijuana Treatment Centers, their agents or employees, in compliance with Amendment 2; and

WHEREAS, pursuant to Article VII, Section 2 of the Florida Constitution and Chapter 166, Florida Statutes, the City of Fort Lauderdale is authorized and required to protect the public health, safety and welfare of its residents and has the power and authority to enact regulations for valid governmental purpose that are not inconsistent with general or special law; and

WHEREAS, on January 18, 2017 the City of Fort Lauderdale established a 180-day moratorium (Ordinance No C-17-01) on the submittal, processing, approval and issuance of any licenses, development orders or permits in the City of Fort Lauderdale for any use that involves the cultivation, processing, dispensing or retail sale of cannabis, to allow City staff time to thoroughly research and analyze impacts to the City, its residents and its visitors and to develop land use regulations for any use that involves the cultivation, processing, dispensing or retail sale of cannabis; and

WHEREAS, on May 16, 2017, the City of Fort Lauderdale adopted Ordinance C-17-09 which amended the Unified Land Development Regulations (hereinafter "ULDR") of the City of Fort Lauderdale to add medical cannabis dispensing facilities, amended Section 47-20, Parking and Loading Requirements, and added Section 47-18.46, Medical Cannabis Dispensing



Facilities; and

WHEREAS, on June 23, 2017, Governor Rick Scott approved Senate Bill 8-A, an act relating to medical use of marijuana, providing a unified regulatory structure for the implementation of Article X, Section 29 of the Florida Constitution, allowing the use, production, and distribution of medical marijuana, and preempting the majority of the regulation of cultivation, processing, and delivery of marijuana by medical marijuana treatment centers to the State; and

WHEREAS, portions of the amendments to the ULDR under Ordinance C-17-09, which was adopted by the City of Fort Lauderdale on May 16, 2017, may be interpreted as inconsistent with Senate Bill 8-A and consequently may have to be amended; and

WHEREAS, the purpose of this moratorium is to allow City of Fort Lauderdale staff time to thoroughly research and analyze impacts of the new regulations under Senate Bill 8-A and to recommend if necessary, amendments to the ULDR to be consistent with Senate Bill 8-A's preemptions; and

WHEREAS, the City of Fort Lauderdale Commission finds it to be in the best interests of the citizens of Fort Lauderdale to establish a moratorium on the submittal, processing, approval, and issuance of any licenses, development orders, and permits regarding the location and permitting of medical marijuana treatment center dispensing facilities in the City of Fort Lauderdale until \_\_\_\_\_, 2018;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COMMISSION OF THE CITY OF FORT LAUDERDALE, FLORIDA:

SECTION 1. That the foregoing "WHEREAS" clauses are hereby ratified and confirmed as being true and correct and are hereby made a specific part of this Ordinance. These clauses represent the legislative findings of the City Commission. It is the purpose and intent of this Ordinance to promote the health, safety and welfare of the residents and visitors of the City of Fort Lauderdale, Florida.

SECTION 2. For purposes of this ordinance, "cannabis" means all parts of any plant of the genus *Cannabis*, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture or preparation of the plant or its seeds or resin.

SECTION 3. The City Commission hereby imposes a temporary moratorium on the submittal, processing, approval, and issuance of any licenses, development orders and permits regarding the location and permitting of medical marijuana treatment center dispensing facilities in the City of Fort Lauderdale. Said temporary moratorium shall be for a period of one hundred eighty (180) days in order to allow City staff time to thoroughly research and analyze impacts of the new regulations under Senate Bill 8-A and to recommend amendments to the ULDR to be consistent with Senate Bill 8-A's preemptions. The provisions of this ordinance shall not apply to any applications or permit approvals which were filed on or before \_\_\_\_\_.

SECTION 4. That all ordinances or parts of ordinances, or resolutions or parts of resolutions in conflict herewith be and the same are hereby repealed to the extent of such conflict.

SECTION 5. If any clause, section or other part or application of this ordinance shall be held by any court of competent jurisdiction to be unconstitutional or invalid, such unconstitutional or invalid part or application shall be considered as eliminated and so not affecting the validity of the remaining portions or application remaining in full force and effect.

SECTION 6. This ordinance shall become effective immediately upon its passage.

PASSED FIRST READING this the \_\_\_\_ day of \_\_\_\_\_, 2017.

PASSED SECOND READING this the \_\_\_\_ day of \_\_\_\_\_, 2017.

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Mayor  
JOHN P. "JACK" SEILER

ATTEST:

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City Clerk  
JEFFREY A. MODARELLI