

The Do's and Don'ts of Leasing Medical Marijuana Dispensaries in Pennsylvania

By Jonathan Grosser

Nearly five years ago, Pennsylvania Governor Tom Wolf signed into law Pennsylvania's Medical Marijuana Act (Act 16). Since that time, the Pennsylvania Department of Health (**DOH**), the agency responsible for issuing licenses under the Act, has issued 50 medical marijuana dispensary licenses, allowing for 150 dispensaries. This has created a whole new class of commercial real estate in Pennsylvania. Medical marijuana dispensaries in Pennsylvania are doing a brisk business. However, this business is not without its risks and challenges.

Regulatory Controls under Act 16

Act 16 imposes extensive controls over the location and physical characteristics of dispensaries. For example, pursuant to Act 16:

- A dispensary may not be located within 1,000 feet of the property line of a public, private or parochial school or a day care center.
- A dispensary may only be situated in an indoor, enclosed and secure facility.
- A dispensary may not exist on the same site as a facility used for growing and processing medical marijuana.

Moreover, many local municipalities impose even more stringent limitations on dispensary properties. In Philadelphia, for example, in addition to the limitations imposed by Act 16, a dispensary cannot be located within 500 feet of (1) a house of worship, (2) a playground, (3) a public library, (4) a recreational center or (5) a public swimming pool.

Therefore, properties that conform to the requirements of Act 16 as well as local requirements tend to be very hard to find and command very high rents.

Prohibitions under Federal Law

Despite the fact that growing, selling and using marijuana (for certain medical purposes) is permitted in Pennsylvania under Act 16, these activities, with very limited exceptions, are still illegal under federal law. Marijuana is classified as a "Schedule 1" drug under the federal Controlled Substances Act (CSA) of 1970. Schedule 1 drugs are defined as drugs with a high potential for abuse, no accepted medical benefit and lack of safety. Penalties for producing, selling and using Schedule 1 drugs include lengthy prison sentences, significant fines and forfeiture of assets used in or obtained through such activities. Despite these prohibitions, the Department of Justice under the Trump administration largely abstained from prosecuting these activities, and the Biden administration has signaled that it intends to take a similar approach.

Mitigating the Risks

To mitigate the risks associated with leasing a medical marijuana dispensary in Pennsylvania, there are a number of proactive steps one can and should take.

- Confirm that the use of the property as a medical marijuana dispensary strictly complies with the requirements of Act 16 as well as all applicable state and local laws and ordinances, including zoning ordinances.
- Research the title to the property to confirm that there are no covenants, conditions and restrictions, or other documents of record, that would prohibit the use of the property as a medical marijuana dispensary.
- Research the title to the property to confirm that there are no mortgages or other loan documents that would prohibit the use of the property as a medical marijuana dispensary.
- Where the property is multi-tenanted, review the other leases at the property to confirm that they contain no prohibitions on the use of the property as a medical marijuana dispensary.

When drafting and negotiating the lease for a medical marijuana dispensary, the parties will want to ensure that the lease includes the following:

<i>From the Landlord's Perspective</i>	<i>From the Tenant's Perspective</i>
<p>The right to terminate the lease if:</p> <ul style="list-style-type: none"> ○ the landlord incurs liability under federal law due to the use of the property as a medical marijuana dispensary ○ there occurs a change in state or local law that makes the continued use of the property as a medical marijuana dispensary illegal ○ the tenant's license to use the property as a medical marijuana dispensary is suspended or revoked for any reason ○ the landlord is subjected to a nuisance claim or any other liability due to the tenant's failure to strictly comply with the requirements of the lease 	<p>The right to terminate the lease if:</p> <ul style="list-style-type: none"> ○ the tenant incurs liability under federal law due to the use of the property as a medical marijuana dispensary ○ there occurs a change in state or local law that makes the continued use of the property as a medical marijuana dispensary illegal ○ the tenant's license to use the property as a medical marijuana dispensary is suspended or revoked for any reason ○ the tenant is subjected to a nuisance claim or any other liability due to a material misrepresentation by the landlord regarding the permitted use of the property
Significant lease security in the form of cash or a personal guaranty	A nuisance clause that permits the tenant's ordinary operations at the property
A thorough indemnification clause	No blanket prohibition against violations of "all applicable laws"
That lease disputes be resolved only by means of mediation or binding arbitration	That lease disputes be resolved only by means of mediation or binding arbitration

It is important that lease security not be provided in the form of a letter of credit. Since letters of credit are issued by banks and banks are largely federally regulated entities, letters of credit may turn out to be unenforceable. Moreover, they will be difficult for this type of tenant to obtain.

It is also important that the parties not be obligated to comply with “all applicable laws” since medical marijuana dispensaries, from the go, violate federal law.

Finally, mediation or binding arbitration is the preferred means of dispute resolution since federal courts will not hear such claims, and state courts may be unprepared to adequately address issues particular to such a new and burgeoning industry.

Conclusion

As stated above, the rewards of leasing a medical marijuana facility are potentially great for both the landlord and the tenant. The risks, however, are equally real. Therefore, careful due diligence and thoughtful lease drafting is required to sufficiently mitigate the risks and materially increase the likelihood of the parties’ success.

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