MARIJUANA IN THE MILE-HIGH CITY

A brief summary of the history of legalized marijuana in Colorado and Denver’s regulatory & enforcement experiences
The National Landscape
How did we get here?

- Starting with California in 1996, 23 states along with the District of Columbia and Guam have legalized marijuana for medical purposes.

- In 2012, Colorado and Washington became the first two states to legalize adult recreational use of marijuana, retail sales, and commercial production of marijuana.

- In 2014, the voters of Oregon, Alaska, and the District of Columbia followed suit.
HOW DID WE GET HERE?

MEDICAL MARIJUANA IN COLORADO

- 2000: Voters passed Amendment 20 to the Colorado Constitution
- Amendment 20 allowed for the medical use of marijuana to persons suffering from debilitating medical conditions and their primary caregivers
- Authorized patients or primary caregivers to possess limited amounts of marijuana
- Distribution of marijuana was still illegal in Colorado
- The world of medical marijuana remained unregulated for another 10 years
RECREATIONAL MARIJUANA
HOW DID WE GET FROM MEDICAL TO RECREATIONAL?

- 2012: Amendment 64 was petitioned onto the ballot and added an amendment to the Colorado constitution legalizing the personal, private use of marijuana
- Passed in Colorado by about 55% of the vote & in Denver by 66%
- Voter turnout: 63.5% of all registered voters (306,884 voters)
- **Allows adults over 21 to:**
  - Possess up to one ounce of marijuana
  - Possess and grow up to six marijuana plants, only 3 of which can be flowering
  - Transfer up to 1oz of MJ between adults without payment
  - Private consumption of MJ
  - Assist another adult in any of these acts
Local control provisions
A64 also gave authority for cities and counties to opt-out of commercial marijuana licensing entirely.
Local control provisions

- A local government may prohibit the operation of retail marijuana establishments within its jurisdiction through an ordinance or an initiated or referred measure.

- In 2014, there were only 72 jurisdictions that allowed RMJ.

<table>
<thead>
<tr>
<th>Colorado Local Jurisdiction Status</th>
<th>Total Jurisdictions</th>
<th>Percent of State</th>
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<tbody>
<tr>
<td>Medical and Retail Banned</td>
<td>228</td>
<td>71%</td>
</tr>
<tr>
<td>Medical Only</td>
<td>21</td>
<td>7%</td>
</tr>
<tr>
<td>Retail Only</td>
<td>5</td>
<td>1%</td>
</tr>
<tr>
<td>Both Allowed</td>
<td>67</td>
<td>21%</td>
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<tr>
<td>TOTAL</td>
<td>321</td>
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Denver Marijuana Landscape

What did all of this mean for Denver?

- **Licensed**
  (medical and retail, taxed and regulated)
  - Grows
  - Stores
  - MIPS
  - Testing Facilities

- **Non-licensed**
  (locations mostly unknown, not supposed to be for profit, not taxed)
  - Illegal Operations
  - Medical MJ Collectives
  - Retail MJ Collectives
  - Caregivers
  - Home Grows
Colorado Marijuana Licensing

Dual Licensing System

- To operate a licensed marijuana business in Colorado, you must have **BOTH** a state license AND a local license.

- The Colorado Marijuana Enforcement Division (MED) licenses and regulates marijuana businesses for the state.

- The Denver Department of Excise and Licenses (EXL) licenses and regulates for the city.
Denver Department of Excise and Licenses

- Issues and regulates all **local licenses**:
  - Denver Medical Marijuana Code
    D.R.M.C. §24-501
  - Denver Retail Marijuana Code
    D.R.M.C. §6-200
Denver Marijuana Landscape
What did all of this mean for Denver?

- Major features of the **Denver Retail Marijuana Code**.
  - Denver chose to allow retail marijuana businesses to operate in the city
  - Established local licensing system in addition to state licensing
  - Established a two-year transition period during which only existing medical marijuana businesses can apply for retail licensing
  - Imposed location limitations, including proximity and zoning restrictions
  - Required public hearings for retail stores, but not “needs and desires” hearings until after January 1, 2016.
Advertising Restrictions.

- Unlawful for any person to advertise MMJ or RMJ where the advertisement is visible to members of the public from any public place.
- Prohibits billboards, signs mounted on vehicles; hand-held or portable signs; handbills, leaflets or fliers handed directly to a person in a public place, left on a motor vehicle, or posted on public or private property without consent of the property owner.
- EXCEPT:
  - Sign on same zone lot as the store/center which exists solely for the purpose of identifying the location of the store/center.
  - Ads in magazines, newspapers, or other periodical of general circulation.
  - Ads which are purely incidental to the sponsorship of a charitable event.
Permitted Locations
How has Denver decided to regulate the location of marijuana businesses?

Department of Excise and Licenses (EXL)
Community Planning & Development (CPD)
**LOCATION, LOCATION, LOCATION**

Two key policy decisions have shaped how Denver has defined the lawful location of MJ businesses:

<table>
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<tr>
<th>(1) <strong>Not</strong> to regulate MJ businesses as a <em>distinct category of land use</em> in the Zoning Code itself.</th>
<th>(2) “<em>Grandfather</em>” locations that existed before licensing regulations were created.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Location restrictions on MJ businesses are entirely reflected in the <em>licensing laws</em>, which in turn cross-reference the Zoning Code.</td>
<td>This became necessary because of the 10 years that had elapsed without any formal regulation by either the state or the city.</td>
</tr>
</tbody>
</table>
PROHIBITED LOCATIONS
Medical and Retail MJ Stores

- Any residential zone district
- Any “embedded retail” districts
- Any location where retail sales are prohibited
- Within 1000’ of any school or child care establishment
- Within 1000’ of any alcohol or drug treatment facility
- Within 1000’ of any other MMJ Center or MMJ Dispensary or any RMJ store

D.R.M.C. 24-508 and 6-211
MJ CULTIVATION FACILITIES

- Both Denver’s retail and medical MJ licensing codes allow licensing for cultivation facilities in any location where “plant husbandry” is a permitted use.

- BUT locations are Grandfathered in if:
  - Applied for plant husbandry zoning permit before 7/1/10
  - Applied for OPC license with State before 8/1/10
  - Evidence that cultivation of MJ started before 1/1/11
Infused Products Manufacturers
Marijuana Infused Products Manufacturer (MIPS) are the commercial kitchens that are making marijuana edibles like brownies, candy bars, drinks.

Both Denver’s retail and medical MJ licensing codes allow licensing for MIPS on any zone lot where “food preparation and sales” or “manufacturing, general” are permitted under the zoning code.

Over the past 18 months, Denver has re-assessed the appropriate location of large extraction facilities...

Now, if the square footage of the solvent-based extraction area is 3000 sf or greater, the MIP must be located in a manufacturing, heavy zone district.
Denver Marijuana Landscape

Denver’s Response to Problems in the Realm of Non-Licensed Marijuana

- Non-licensed
  - Public Consumption
  - Illegal Operations
  - Medical MJ Collectives
  - Retail MJ Collectives
  - Caregivers
  - Home Grows

The “Black Market”

The “Grey Market”

DENVER
THE MILE HIGH CITY
Why do we continue to have problems?

The Black Market

- “Mexican ditch weed” (3-4% THC) = $300/lb
- Colorado-grown MJ (25%+ THC) = $2500/lb (in Colo)
- Colorado-grown MJ on the East Coast = $6000/lb

[Link to Craigslist post]

extra mmj - $1 (lkwd)

Extra meds with donation: $100 halves, $200 Oz. Paperwork must be current with a valid CO id

Edibles! Yummy caramels!
Call or text 303-330-6097

- Location: lkwd
- it's NOT ok to contact this poster with services or other commercial interests

Posting ID: 3660042849   Posted: 2013-03-05, 6:19AM MST
Since January 2014, there have been 32+ hash oil explosions throughout Colorado.

- Eight explosions in Denver
- Seven have been in unlicensed facilities
Given the amount of flammable solvents being used in these extraction processes, these operations are more properly suited for a "Manufacturing – Heavy" zone district and should never be allowed in residential or unregulated locations. Denver is currently revising its zoning code to address this problem.
HASH OIL EXPLOSIONS
The dangers of open blast BHO extractions
It shall be unlawful for any person to process or manufacture marijuana concentrate in the city by any means other than water-based or food-based extraction, except in a licensed medical marijuana-infused products manufacturing facility or in a licensed retail marijuana products manufacturing facility. *(DRMC §38-177)*

- NO solvent-based extractions outside of a licensed facility.
- Except for a small amount of ethanol.
It shall be unlawful for any person who is not licensed to knowingly manufacture marijuana concentrate using an inherently hazardous substance (18-18-406.6, C.R.S.)

It shall be unlawful for anyone who owns, manages, or otherwise controls the use of any premises to allow MJ concentrate to be manufactured on the premises using an inherently hazardous substance”

“Inherently hazardous substance” includes butane and propane, but excludes ethanol

Created a class 2 drug felony

Effective July 2015
Non-licensed Marijuana Grows

What’s this all about?

- **Amendment 20**
  - Patient can grow up to 6 plants (but more if....)
  - Caregiver can grow up to 6 plants for up to 5 patients (but more if....)

- **Amendment 64**
  - Person over 21 can grow up to 6 plants
  - Person over 21 can assist another person grow their plants

- **Denver’s experience**
  - Warehouse space being converted into massive, non-licensed grows
  - Electrical, building, structural, fire, sulfur burns
  - Huge potential for criminal activity and diversion to black market
MASSIVE NON-LICENSED GROWS

What have we seen?

- Illegal Operations
- Crime and Safety Issues
- Physical Hazards
  - Fire
  - Electrical
- Chemical/Environmental Hazards
  - Hash oil explosions
  - Air Quality ($\text{SO}_2$, $\text{CO}_2$)
  - Mold
  - Pesticides
  - Odors
COMPLICATIONS

Dangers in Unlicensed Grows

- **Water** – large amounts (damage)
  - Water + heat + humidity = **MOLD**
- **CO2** – increasing CO2 levels can increase the yield, but...
  - Detached venting
  - CO2 generators/burners/bottles

- **Sulfur** – burned to control powdery mildew
  - When sulfur is burned, it creates sulfur dioxide
  - When sulfur dioxide comes into contact with moisture, it creates sulfuric acid (eyes, lungs, nose)
Unsafe Conditions – Examples

- Unsafe security features to protect product (bars on windows, doors welded shut, barbed wire)
  - Hinders emergency egress
  - Delays fire attack

Steel plating over windows

Blocked exits
Crime – Examples

• These grows generally contain excessive amounts of marijuana.
• This non-licensed marijuana cannot be for sale; can only give it to another person or else it’s illegal distribution.
• Weapons have been found in these grows, as well as “employees” living in them.
Massive Non-Licensed Grows
How did Denver respond?

- Limit the size of non-licensed, non-residential grows to **36 plants** within one zone lot (DRMC §38-178)

- It shall be unlawful for any person, alone or in concert with other persons, to possess or cultivate more than thirty-six (36) marijuana plants on any zone lot in the city, except in a licensed marijuana cultivation facility

- It shall be unlawful for **any person who owns, manages, operates or otherwise controls** the use of any zone lot to allow more than thirty-six (36) marijuana plants to be possessed or cultivated on the zone lot, except in a licensed marijuana cultivation facility

- Defines a zone lot as a minimum of 3,000 square feet
  - To prevent artificial creation of additional zone lots to get around intent of ordinance
Denver’s Zoning Code limits the number of marijuana plants per dwelling unit to 12 plants.

- No matter how many adults over 21 are living there.
- No matter how many patients or caregivers.
- “Dwelling unit” includes detached garages and sheds.
Non-Licensed Grows

What about houses and apartments?

- MJ growing and storage must be in a "completely enclosed structure"
- Cannot grow MJ outdoors
- BUT, even though you can only grow 6 plants for yourself, you can keep on-site the harvest from those 6 plants with no restriction on amount (Am 64)
- In Denver, that harvest would have to be stored in a completely enclosed structure
Non-licensed Grows

Converting homes or detached garages into massive grows

- Public health concerns
- Crime and Safety Issues
- Physical Hazards
  - Fire
  - Electrical
- Chemical/Environmental Hazards
  - Hash oil explosions
  - Air Quality (SO$_2$, CO$_2$)
  - Mold
  - Pesticides
  - Odors
Public Consumption

What is public consumption?

- **Amendment 64**
  - Nothing in this section shall permit consumption that is conducted openly and publicly

- **State statute CRS §18-18-406(5)(b)(I)**
  - Unlawful to openly and publicly display, consume, or use marijuana
  - Drug petty offense subject to $100 fine

- **DRMC §38-175 (major provisions)**
  - Unlawful for anyone under 21 to possess 1oz or less
  - Unlawful for anyone to openly and publicly display or consume 1oz or less
  - Non-criminal violation with max penalties of $150, $500, $999
Public Consumption
What is public consumption?

- **DRMC §38-175**
  - "**Openly**" = unconcealed, undisguised or obvious
  - "**Publicly**" = in a public place or any outdoor location where the consumption is clearly observable from a public place
  - "**Public Place**" = place to which the public or a substantial number of the public have access
    - Includes streets and highways, transportation facilities, schools, places of amusement, parks, and playgrounds
    - ALSO INCLUDES the common areas of public and private buildings or facilities.
Public Consumption
Litigating the Definition in Denver

**Case Law:** *U.S. v. Landsdowne Swim Club*, 713 F.Supp. 785 (3rd Cir. 1990)

**Fact Analysis:**
- DPD Vice Squad
  - Social Media
  - Email
  - Word of Mouth
- Examining the “Selectivity” of the Event
- Successful in Denver County Court with pre trial motions
- Possible violations
Colorado Clean Indoor Air Act

C.R.S. 24-14-203

- Consequence: Class 2 Petty Offense- Fine only
  - Owner of Establishment
  - Person who Smokes in a Non Smoking Area
  - Right to Jury Trial

- Exemptions
  - Workplaces that are not open to the public
  - Have 3 or fewer employees
Amendment 64 defines marijuana as “all parts of the plant of the genus cannabis whether growing or not . . . but does not include industrial hemp.”

“Industrial Hemp” is defined as “the plant genus cannabis . . . with a delta-9 tetrahydrocannabinol concentration that does not exceed three-tenths percent.”

Defendants have claimed that, since the prosecution cannot prove that the THC concentration is above .3%, then the prosecution failed to prove BARD that the substance is, in fact, marijuana as it is now defined under Am. 64.

The DPD crime lab had never developed protocol to determine the THC concentration in any MJ sample because the mere presence of THC in a substance was unlawful before Am. 64.

Over the past 2 years, DPD crime lab has developed protocol to combat the “hemp defense” in criminal prosecutions.
Federal priority to keep it out of the hands of youth. Police have conducted “stings” and just recently 7 stores were caught selling to minors.

In Denver, backyards and patios are considered “private”. Parks, bars, and movie theaters are considered public spaces.

Able to “give away” up to 1 ounce but illegal to sell it outside of a licensed facility.

18 or older for medical marijuana

Police have Drug Recognition Experts that can assess the condition of a driver.

Can purchase if you are a non-resident visiting Colorado but you cannot take it home with you (across State lines).
Denver Fire became aware of pesticides in cultivation facilities

Department of Environmental Health began investigating these concerns and put holds on marijuana plants/product in 11 grows under *DRMC §24-16(1)*

Concern about pesticide contamination that could pose a **risk to public health**

Denver reached out to the state for guidance
Pesticides

- Holds – not immediate condemnation
- Denver worked closely with pesticide program at Department of Agriculture
- Two grows filed lawsuits

- EPA testified from Washington DC at our hearing
- Judge ruled in favor of Denver – we were “absolutely within our authority” to protect public health by placing the holds on this potentially contaminated crop
Pesticides

- As the state works to develop enforcement protocols, Denver continues to take action to protect the public health
- Many challenges on both the state and federal level
- State preemption issues
- Jurisdictional challenges
- Laboratory issues
Marijuana products pulled in Denver in largest pesticide recalls

Nearly 30,000 packages of marijuana-infused edibles in Colorado were voluntarily recalled in the last few days because they contain potentially dangerous pesticides that are banned for use on cannabis.

The moves represent the two largest recalls of infused pot products to date, according to the Denver Department of Environmental Health.
Marijuana remains a Schedule 1 controlled substance under federal law. See 21 U.S.C. § 844(a); cf. Gonzales v. Raich, 545 U.S. 1, 29 (2005).

Beinor v. Indus. Claim Appeals Office, 262 P.3d 970, 977 (Colo. App. 2011) (“Although Colorado's medical marijuana provision may protect claimant from prosecution under Colorado’s criminal laws ... the amendment has no bearing on federal laws, under which marijuana remains an illegal substance.”) (emphasis added).
In a conflict between state and federal law, **federal law wins**


- No one can have a legally protected interest in contraband *per se*

- Contraband *per se* = if its possession constitutes a crime

- Possession of MJ is a crime under the federal CSA

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**Supremacy Clause**

- “This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land... anything in the constitution or the laws of any state to the contrary notwithstanding.”
  - Article 6, section 2
Employment Law: In Coats v. Dish Network, LLC, 303 P.3d 147 (Colo. 2013), the Colorado Supreme Court addressed whether medical marijuana use was “lawful activity” for which an employer could not terminate an employee, see Colo. Rev. Stat. 24-34-402.5, and concluded that

- because activities conducted in Colorado, including medical marijuana use, are subject to both state and federal law . . . for an activity to be “lawful” in Colorado, it must be permitted by, and not contrary to, both state and federal law.

- Conversely, an activity that violates federal law but complies with state law cannot be “lawful” under the ordinary meaning of that term.
...and cannot recover if police destroy your marijuana during a criminal investigation.

With the legalization of marijuana under state law, people have tried to claim that their federal civil rights have been violated when marijuana has been seized and destroyed.

but there is “no federally protected property interest in... marijuana even if that marijuana is legal under Colorado law. Absent a federally recognized property interest in his marijuana, [plaintiff] has not and cannot state a valid claim under the Fourth or Fourteenth Amendments based on the seizure and destruction of his marijuana by the defendants.” Mazin v. True, No. 14-CV-00654-REB-CBS, 2015 WL 1228321, at *2 (D. Colo. Mar. 16, 2015)
Colorado MED Licensing and Regs:

Denver Licensing:
http://www.denvergov.org/businesslicensing/DenverBusinessLicensingCenter/RetailMarijuana
http://www.denvergov.org/businesslicensing/DenverBusinessLicensingCenter/BusinessLicenses/MedicalMarijuanaCenters
Resources

- Colorado Department of Public Health and Environment
  https://www.colorado.gov/pacific/cdphe/categories/services-and-information/marijuana

- Denver Medical MJ Code
  https://library.municode.com/index.aspx?clientId=10257

- Denver Retail MJ Code
  https://library.municode.com/index.aspx?clientId=10257
Resources

- Colorado Medical Marijuana Code
  C.R.S. 12-43.3-101 et seq

- Colorado Retail Marijuana Code
  C.R.S. 12-43.4-101 et seq

- Colorado CDPHE Medical MJ Program
  C.R.S. 25-1.5-106

- Colorado CDPHE MMJ Health Research
  C.R.S. 25-1.5-106.5
Resources

- Denver Marijuana Information website
  www.Denvergov.org/MarijuanaInfo

- Colorado Pesticide Use on Marijuana
  www.colorado.gov/pacific/agplants/pesticide-use-marijuana-production

- Colorado CDPHE Medical MJ Program
  C.R.S. 25-1.5-106

- Colorado CDPHE MMJ Health Research
  C.R.S. 25-1.5-106.5
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