

# LOCAL GOVERNMENT REGULATION OF PERSONAL MARIJUANA GROWS

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Marijuana home grows have sparked growing concern since the passage of medical and retail marijuana in Colorado.<sup>1</sup> A recent report issued by the Denver division of the Drug Enforcement Agency compared residential marijuana grows to “meth houses” of the 1990s.<sup>2</sup> Every community faces the problem of marijuana grows for personal use regardless of whether a municipality allows medical and/or retail marijuana sales.<sup>3</sup> Common issues caused by marijuana home grows include fire hazards from providing electricity to grow lights, mold from watering plants, and the public safety concern of cultivating the drug in a residential area.<sup>4</sup> Grows must be confined to an “enclosed” space consisting of a “permanent or semi-permanent area covered and surrounded on all sides.”<sup>5</sup> The area must also be a locked space “secured at all points of ingress and egress with a locking mechanism designed to limit access.”<sup>6</sup>

Marijuana use and cultivation remains illegal under federal law,<sup>7</sup> but the Colorado Constitution permits adults twenty-one years of age or older to cultivate up to six plants per person for medical or recreational purposes.<sup>8</sup> Six plants per person can become a substantial grow operation when several adults live together. Indoor marijuana plants grow up to six feet tall and every ninety days may yield more than a pound of harvested marijuana each.<sup>9</sup> An exception in the Medical Marijuana Amendment allows a patient or their care-giver to grow *more* than six plants provided a medical necessity.<sup>10</sup> Last year, four doctors had their licenses suspended after issuing excessive plant counts to more than 1,500 patients.<sup>11</sup> The Colorado Legislature attempted to curb the abuse of this loophole by mandating medical marijuana caregivers with more than thirty-six plants

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1. COLO. CONST. art. XVIII, § 14 (codifying Amendment 20); COLO. CONST. art. XVIII, § 16 (codifying Amendment 64).

2. DEA DENVER DIVISION, RESIDENTIAL MARIJUANA GROWS IN COLORADO: THE NEW METH HOUSES? 2 (June 2016), <https://www.dea.gov/divisions/den/2016/den062216.pdf>.

3. *Id.*

4. *Id.* at 3.

5. COLO. REV. STAT. § 18-18-102(14.5) (2016).

6. *Id.* § 18-18-102(16.5).

7. See 21 U.S.C. § 811(b)(1)(A)(viii) (2012).

8. COLO. CONST. art. XVIII, §§ 14(4)(a)(II), 16 (3)(b).

9. DEA DENVER DIVISION, *supra* note 2, at 3.

10. COLO. CONST. art. XVIII, § 14(4)(b).

11. John Ingold, *Four Colorado doctors suspended over medical marijuana recommendations*, DENV. POST (July 19, 2016, 4:42 PM), <http://www.denverpost.com/2016/07/19/four-colorado-doctors-suspended-over-medical-marijuana-recommendations/>.

register and prohibiting patients and caregivers from growing more than ninety-nine plants.<sup>12</sup>

Local governments passed legislation in the form of ordinances to address the public safety concerns presented by marijuana home grows. Cities, towns, and counties rely upon their police power,<sup>13</sup> fire code, building code, and land use authority to regulate marijuana home grows.<sup>14</sup> Common restrictions found in municipal regulation of personal marijuana cultivation operations include:

- limit personal marijuana grows to primary residences;
- limit grows to single family dwellings rather than multifamily structures;
  - cap the number of plants per residence regardless of the number of adults or patient conditions that the plants serve;
  - restrict the number of plants per square or cubic foot or limit square footage in which marijuana may be grown;
  - define types of permissible lights;
- limit grows to inside the primary dwelling rather than outside or in a garage, outdoor shed, or accessory dwelling;
- prohibit odors from being detected by neighboring properties;
- set forth procedures for inspection of personal grows; and
- declare that cultivating marijuana in a manner that does not comply with local regulations constitutes a nuisance that can be abated by local code enforcement officers.<sup>15</sup>

#### LOCAL ORDINANCES

Three local governments, Douglas County, Parker, and Longmont, recently began the process of passing ordinances to regulate marijuana home grows.<sup>16</sup> The media and marijuana activists closely watch this effort to ensure a balance between maintaining public safety and protecting the rights of cannabis users.

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12. S.B. 15-014, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015) (codified by COLO. REV. STAT. §§ 12-1.5-106(e)(I)(A) et seq.).

13. See COLO. REV. STAT. §§ 31-15-401, 11-101(2) (2016).

14. *Id.* § 29-20-104.

15. See generally, FOXFIELD, COLO. MUN. CODE § 16-4-70 (2012); BENNETT, COLO. MUN. CODE § 12-2-550 (2011); BRECKENRIDGE, COLO. TOWN CODE § 9-13-6 (2011).

16. John Aguilar, *Douglas County gets harsh with marijuana growing*, DENV. POST (Aug. 9, 2016, 8:58 PM) [[hereinafter Aguilar, Douglas County](http://www.denverpost.com/2016/08/09/douglas-county-gets-harsh-with-marijuana-growing/)], <http://www.denverpost.com/2016/08/09/douglas-county-gets-harsh-with-marijuana-growing/>; John Aguilar, *Restrictions on private cannabis grows in Colorado stirs legal challenge*, DENV. POST (Sept. 19, 2016, 9:18 PM) [[hereinafter Aguilar, Restrictions](http://www.denverpost.com/2016/09/19/restrictions-on-private-cannabis-grows-stirs-legal-challenge/)], <http://www.denverpost.com/2016/09/19/restrictions-on-private-cannabis-grows-stirs-legal-challenge/>; Karen Antonacci, *Longmont may close pot loophole allowing 'unregulated home grows'*, TIMES-CALL (Sept. 5, 2016, 7:21 PM), [[hereinafter Antonacci, Longmont may close loophole](http://www.timescall.com/longmont-local-news/ci_30331010/longmont-may-close-pot-loophole-allowing-unregulated-home)], [http://www.timescall.com/longmont-local-news/ci\\_30331010/longmont-may-close-pot-loophole-allowing-unregulated-home](http://www.timescall.com/longmont-local-news/ci_30331010/longmont-may-close-pot-loophole-allowing-unregulated-home).

Douglas County passed an ordinance regulating the growing, cultivating, and processing of marijuana in August to address the proliferation of home grows.<sup>17</sup> A major concern of the County involved the common practice of overloading electrical capacity, which increases the risk of a fire.<sup>18</sup> The ordinance contained many of the same provisions as other local government regulations including:

- limiting cultivation to one's primary residence;
- limiting cultivations to 1000 cubic foot volume in the primary residence;
- restricting grows in accessory dwellings;
- prohibiting grows in multi-family or attached developments;
- prohibiting outdoor grows;
- requiring strict compliance with applicable building and fire codes including plumbing, electrical, and mechanical; and
- capping marijuana plants to twelve at any given time in a primary residence.<sup>19</sup>

Douglas County also attempted to limit the effects of cultivation operations on the residential neighborhood by prohibiting the visual observation, light pollution, vehicle or foot traffic, unusually heavy parking, and odor. None of these may be detectable from the exterior of the structure.<sup>20</sup> Further, the ordinance requires that renters obtain written permission from the property owner for the tenants to grow marijuana.<sup>21</sup>

Despite the common tactics to address the dangers of home marijuana cultivation included in the Douglas County ordinance, the *Denver Post* ran a story proclaiming, "Douglas County gets harsh with marijuana growing."<sup>22</sup> The *Denver Post* cited the restriction of twelve plants in any primary residence, the ban of outdoor grows, and the requirement that tenants in rental properties must obtain permission from the property owner before cultivation as the reasons behind proclaiming the law "one of Colorado's toughest marijuana grow ordinances."<sup>23</sup>

The Town of Parker's Council also granted initial approval in September to a pair of ordinances that would similarly restrict personal marijuana grows to twelve plants in an attempt to regulate large-scale marijuana grows in the community.<sup>24</sup> The proliferation of home grows spurred nuisance complaints, odor issues, illegal modifications to electrical and

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17. Douglas Cty., Colo., Regulating the Growing, Cultivating, and Processing of Marijuana, Ordinance No. O-016-002 (2016).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Aguilar, *Douglas County*, *supra* note 16.

23. *Id.*

24. John Aguilar, *Parker punts vote on 12-plant pot limit in homes to next year*, DENV. POST (Oct. 5, 2016, 3:59 PM), <http://www.denverpost.com/2016/10/05/parker-pot-plant-limits-postponed/>.

ventilation systems, and illegal storage of chemicals in residences, which prompted the council's response.<sup>25</sup> The Council ultimately decided not to pass the marijuana ordinance after the threat of litigation against Parker and other cities with similar residential regulations on marijuana cultivation.<sup>26</sup> Instead, the Council intends to research additional regulations on grow lights.<sup>27</sup> Cannabis advocates claim the twelve-plant limit is unconstitutional as it could deprive someone of the right to grow marijuana.<sup>28</sup> Marijuana advocates have not yet filed a legal challenge against any local government regulation of home grows.<sup>29</sup>

The City of Longmont considered passing an ordinance regulating personal cultivation of marijuana in September to address concerns of theft and outdoor grows visible from neighbors' homes.<sup>30</sup> Like many other local governments, Longmont's proposed ordinance includes limiting marijuana grows to primary residences, prohibiting more than six plants per residence, no outdoor grows, prohibiting odor being detected from adjoining properties or the public right-of-way, and requiring the marijuana grow comply with building, fire, electrical, plumbing, and mechanical codes.<sup>31</sup> Further, the ordinance would allow warrantless entry for code enforcement officials to enter during reasonable hours to inspect for code violations "in the case of an emergency involving imminent danger to public health, safety, or welfare."<sup>32</sup> In response to concerns raised about the proposed ordinance, the City Council held a Coffee with Council forum on October 29, 2016 to listen to community feedback.

These discussions between locally elected officials help set precedent for other local regulation of home marijuana grows. The regulation of home grows also complements the discussion to allow local marijuana sales, which remains a hot topic.<sup>33</sup> At least nine Colorado municipalities and three counties had ballot questions to allow or prohibit medical and

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25. Town of Parker, *Council Agenda* (Sept. 19, 2016), <http://www.parkeronline.org/AgendaCenter/ViewFile/Agenda/09192016-274> (introducing A Bill for an Ordinance to Amend Section 11.17.20 of the Parker Municipal Code Concerning Growing Medical Marijuana and A Bill for an Ordinance to Amend Section 11.18.20 of the Parker Municipal Code Concerning Growing Marijuana for Personal Use); see also Aguilar, *Douglas County*, *supra* note 16; Aguilar, *Restrictions*, *supra* note 16.

26. Aguilar, *supra* note 16.

27. *Id.*

28. *Id.*

29. *Id.*

30. City of Longmont, *City Council Agenda* (Sept. 6, 2016), <http://www.longmontcolorado.gov/departments/city-council/agendas-and-minutes> (introducing the proposed changes to LRMC Sec. 9.60.060 Growing, Cultivating, and Processing marijuana for medicinal or recreational uses); see also Karen Antonacci, *Longmont to hold forum on marijuana home grows Saturday*, *TIMES-CALL* (Oct. 19, 2016) [hereinafter, Antonacci, *Longmont to hold forum*], [http://www.timescall.com/longmont-local-news/ci\\_30487495/longmont-hold-forum-marijuana-home-grows-saturday](http://www.timescall.com/longmont-local-news/ci_30487495/longmont-hold-forum-marijuana-home-grows-saturday); Antonacci, *Longmont may close loophole*, *supra* note 16.

31. Antonacci, *Longmont may close loophole*, *supra*, note 16.

32. *Id.*

33. Sam Kamin, *Marijuana at the Crossroads: Keynote Address*, 89 *DENV. L. REV.* 977, 980 (2012).

retail marijuana sales.<sup>34</sup> Twelve municipalities and seven counties sought voter approval for marijuana taxes on their November ballots.<sup>35</sup> In the hierarchy of federal, state, and local marijuana regulation, local ordinances continue to provide key insights to the integration of legalized marijuana into everyday life.

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34. COLO. MUN. LEAGUE, NEARLY 70 MUNICIPAL ELECTIONS TO BE HELD IN NOVEMBER (Oct. 2016), <http://www.cml.org/media/20161017-elections.pdf>.

35. COLO. CTYS., INC., 2016 COUNTY BALLOT ISSUES (AS OF 10/27/16), [http://ccionline.org/download/2016-County-Ballot-Issues\\_ByTopic.pdf](http://ccionline.org/download/2016-County-Ballot-Issues_ByTopic.pdf).