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Land Use and Planning Considerations for the New York State Marijuana Regulation and Taxation Act

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Contributors

Valerie Monastra, AICP
Jonathan Lockman, AICP
Adriana Beltrani, AICP
Jonathan Midler

Editor

Bonnie Franson, AICP CEP, PP

Design

Melinda Stach

1. OVERVIEW OF REGULATION AND LICENSES

Overview of Regulation

The Marijuana Regulation and Taxation Act (MRTA) decriminalizes the use of cannabis (marijuana) by adults and broadens the medical cannabis program in New York. The MRTA establishes a new administrative body, the Office of Cannabis Management, and a new regulatory body, the Cannabis Control Board (CCB), to organize the licensing of facilities and delivery services, and to ensure equity in this new and growing economic sector. To this point, fifty percent of marijuana business licenses will be issued to people from communities impacted disproportionately by the prior enforcement of cannabis, as well as minority and women-owned businesses.

Adult use of cannabis products is to be limited to people 21 years of age or older, mirroring the minimum legal age for alcohol. Marijuana use in public places will be regulated similarly to tobacco use, ensuring air quality and safety measures enacted in the Clean Indoor Air Act are met.

Effective immediately, public possession of up to three ounces of cannabis or 24 grams of marijuana concentrates is permitted. People can store up to five pounds of cannabis at home. A person may cultivate up to six total cannabis plants (consisting of three mature plants and three immature plants) without a license. A total of 12 cannabis plants may be cultivated on the grounds of the private residence (consisting of six mature plants and six immature plants).

The Act allows for the establishment of consumption sites, where cannabis may be used on-site. Retail locations or medical dispensaries may be created where consumers purchase cannabis for use at home. To prevent concentrations of cannabis facilities in the hands of just a few individuals or companies, one individual can own a maximum of three retail locations. Each location must hold its own license. Retail sites or dispensaries must be at least 200 feet away from houses of worship and 500 feet from schools. Advertising or marketing cannot be observed with 500 feet of a school grounds, playground, child day care providers, public park, or library.

Cities, towns, and villages will be able to opt out of having retail sites, dispensaries or on-site consumption facilities within their municipalities upon the adoption of a local law (see Section II, Local Government Regulatory Framework). The implications are described in Section II below.

Taxes will be placed upon cannabis products based on the of the “total Tetrahydrocannabinol (THC)” as defined in the MRTA. Proceeds will be distributed between counties and municipalities (see Section II, Local Government Regulatory Framework).

Types of Licenses

The MRTA establishes a number of licenses related to adult-use cannabis and cannabis products which will be reviewed and issued by the CCB. Local governments can define and regulate the location and siting of retail dispensaries and on-site consumption businesses. All other licensed businesses listed below cannot be individually regulated and must fit within existing defined and regulated uses in a municipality (see Section II, Local Government Regulatory Framework). A detailed summary of each license is provided in Section III.

- Adult-use retail dispensary license (§ 72 of MRTA)
- Adult-use on-site consumption license (§ 77 of MRTA)
- Adult-use cultivator license (§ 68 of MRTA)
- Adult-use processor license (§ 69 of MRTA)
- Adult-use cooperative license (§ 70 of MRTA)
- Adult-use distributor license (§ 71 of MRTA)
- Microbusiness license (§ 73 of MRTA)
- Nursery license (§ 75 of MRTA)
- Cannabinoid hemp processor license (§ 92 of MRTA)
- Cannabinoid hemp retailer license (§ 93 of MRTA)

Role of Cannabis Control Board and Office of Cannabis Management

The MRTA creates the CCB with five members. The Chairperson will be nominated by the Governor and appointed with the advice and consent of the Senate. Two members of the Board will be directly appointed by the Governor. The Temporary President of the Senate and the Speaker of the Assembly will each appoint one member.

An independent administrative office, the Office of Cannabis Management, will be established within the division of alcoholic beverage control, which shall have exclusive jurisdiction to exercise the powers and duties provided by the MRTA.

The Cannabis Control Board shall have the following functions, powers, and duties:

- Discretion to issue or not issue any registration, license or permit provided for in the MRTA.
- Sole discretion to limit, or not to limit, the number of registrations, licenses and permits of each class to be issued within the state or any political subdivision.
- Sole discretion to revoke, cancel or suspend for cause any registration, license, or permit issued.
- To fix by rule and regulation the standards and requirements of cultivation, processing, packaging, marketing, and sale of medical cannabis, adult-use cannabis and cannabis products, and cannabinoid hemp and hemp extract.
- To ensure that such products are not packaged, marketed, or otherwise sold in a way which targets minors or promotes increased use or cannabis use disorders.
- To hold hearings, subpoena witnesses, compel their attendance, administer oaths, to examine any person under oath, and to require the production of any records relative to an inquiry.
- To appoint any necessary directors, deputies, counsels, assistants, investigators, and other employees within the limits provided by appropriations.

- To inspect, at any time, any premises where medical cannabis, adult-use cannabis or cannabinoid hemp and hemp extract is cultivated, processed, stored, distributed, or sold.
- To advise the Office of Cannabis Management and/or Urban Development Corporation in making loans to qualified social and economic equity applicants for licenses.
- Approve any price quotas or price controls set by the Executive Director.
- Approve the Office's social and economic equity plan.

The MRTA also creates a State Cannabis Advisory Board, to assist the Director of the Office and the CCB, with advice and recommendations on the use of medical cannabis, adult-use cannabis and cannabinoid hemp and hemp extract in the state of New York. The State Cannabis Advisory Board shall consist of thirteen voting appointed members, along with a representative from the Departments of Environmental Conservation and Agriculture and Markets, the Office of Children and Family Services, the Departments of Labor and Health, the Division of Housing and Community Renewal, the Office of Addiction Services and Supports, and the Department of Education, serving as non-voting, ex-officio members.

2. LOCAL GOVERNMENT REGULATORY FRAMEWORK

Local governments have an option to opt out of the MRTA by issuing a permissive referendum. This only limits the establishment of retail dispensary and/or on-site consumption businesses within the jurisdiction. Municipalities have until Dec. 31, 2021, to opt out, but can opt back in at any time.

If a local government opts out, it will not benefit from the 4% local tax on retail sales of adult-use marijuana. For local governments with a population of less than a million, the tax dollars will be distributed to the counties. The counties will retain 25% of the tax distribution and the remaining 75% will be distributed to the local governments that have retail dispensaries, proportionate to the sales of adult-use cannabis products within the local government. If a retail dispensary is located in a village within a town wherein both permit cannabis retail sales, then the county shall distribute the disbursement between the town and village as agreed upon by the elective governing bodies, or evenly divide between town and village if no agreement is established.

According to §131 of the MRTA, local governments are not permitted to adopt any law, rule, ordinance, regulation, or prohibition pertaining to the operation or licensure of any other registered organizations, adult-use cannabis licenses or cannabinoid hemp licenses (See section III, Overview of MRTA Licenses). These licenses will be overseen by the CCB in consultation with the Departments of Environmental Conservation, and Agriculture and Markets.

Local Regulatory Controls

As a result of the preemptions in the MRTA, local governments that have not opted out are only able to regulate adult use retail dispensary and on-site consumption businesses. If a municipality opts in and regulates these uses, the laws or local regulations adopted by the local government must not make the operation of licensed retail dispensaries or on-site consumption businesses unreasonably impracticable as determined by the CCB.

→ *Location of Uses*

All local governments will need to determine in which zoning districts these uses will be permitted. Because it appears that the MRTA prevents local governments from adopting regulations that make the operation of licensed retail dispensaries or on-site consumption sites unreasonably impracticable, local governments should ensure that there is availability to locate these businesses within their municipality and that they are not being “zoned out” by severely restricting their location within the municipality or zoning district(s). In addition, local governments need to keep in mind equity issues that might arise if these businesses are only located in certain zoning districts, such as industrial zoning districts, and those zoning districts are located near or within low-income neighborhoods or areas with a concentration of minority residents. Restricting the uses to limited areas within a municipality concentrate these businesses in the community and the benefits and disadvantages of having concentrated or more diffuse business locations needs to be considered. If concern exists that these businesses may saturate an area, the local government could limit the number of businesses by incorporating into the zoning regulations minimum separation distances between businesses.

→ *Distance from Schools and Houses of Worship*

While the current regulations require separation distances of 500 feet from school grounds and 200 feet from houses of worship, local governments can increase these distances within the zoning regulations. However, the distances cannot be so restrictive that it effectively prevents these businesses from being located within the municipality’s borders. Further, the MRTA defines schools based upon the definition of schools in the NYS Education Law. The current definition of schools does not include nursery schools or daycares. Local governments may want to consider expanding the definition for schools and/or add daycares and nursery schools to apply distance restrictions to these facilities.

→ *Hours of Operations*

Local governments can regulate the hours of operation for retail dispensary and on-site consumption.

→ *Other Related Businesses*

Local governments should also consider that marijuana paraphernalia shops and similar uses may want to locate near an adult use retail dispensary or on-site consumption business. Physical separation distances can also be established for these businesses to prevent oversaturation or locations near schools, daycares, nursery schools, and houses of worship.

→ *Lighting and Security*

The adult use retail dispensary and on-site consumption businesses may require additional lighting or security that is not usually requested as part of typical retail or on-site eating and drinking establishments. A local government could review its lighting and security related regulations so that retail dispensary and on-site consumption businesses can incorporate the lighting and security that may be needed for these businesses without adversely affecting neighboring properties, especially those that are residential. Lighting should not encroach onto neighboring properties. Motion detectors or timers should be considered as part of any lighting plan. Fencing that may be required does not need to be chain link or barb wired but could include materials and aesthetics that provide security but do not create a negative visual impact.

The MRTA already restricts adult use retail dispensaries and on-site consumption businesses from being located within 500 feet from a school grounds or 200 feet from a house of worship. In addition, the principal entrance to a retail dispensary must be accessed from the street level and located on a public thoroughfare. On-site consumption must be restricted to a room, and an opening, entrance, or passageway from the consumption room to another room is prohibited unless it is used for employees or is approved by the CCB.

While local government jurisdiction is limited in regulating certain adult-use cannabis or cannabinoid hemp businesses or land uses, the CCB has great latitude in issuing licenses. The MRTA states that the CCB can consider the following in its decision making:

- “the number, classes, and character of other licenses in proximity to the location and in the particular municipality, subdivision thereof or geographic boundary as established by the board”.
- “effect of the grant of the license on pedestrian or vehicular traffic, and parking, in proximity to the location”.
- “the existing noise level at the location and any increase in noise level that would be generated by the proposed premises.
- “the ability to increase climate resiliency and minimize or eliminate adverse environmental impacts, including but not limited to water usage, energy usage, carbon emissions, waste, pollutants, harmful chemicals and single use plastics”.

Applicants seeking adult-use cultivator, processor, distributor, retail dispensary or on-site consumption licenses from the CCB must notify the host municipality of its intent to do so between 30 and 270 days prior to the filing of an application for an adult-use license with the CCB.

Local governments can express their opinion for or against the above listed license applications within their jurisdiction to the CCB. Any such opinion shall be deemed part of the record and the Board shall respond in writing with an explanation of how the recommendation was considered in granting or denying an application.

It is recommended that local governments provide input to the CCB as it relates to the above considerations for decision making. Local governments may consider preparing a response form to be prepared by a local board or staff which reviews the location of the proposed license, and any local land use concerns or considerations for the CCB.

Local Land Use and Planning Considerations

Only adult-use retail dispensaries and on-site consumption businesses may be regulated by local governments. Other licenses are at the discretion of the CCB and those uses would fall within existing land use definitions such as agriculture and manufacturing. The MRTA is silent on any land use requirements for all other licenses except retail dispensaries and on-site consumption.

Local governments that do not opt-out of MRTA may regulate adult use retail dispensary and on-site consumption businesses and should consider the following land use planning matters pertaining to these businesses when drafting local regulations.

→ **Preempted Cannabis Licenses**

Because local regulation of other adult-use cannabis licenses or cannabinoid hemp licenses is preempted, local governments are prevented from developing individualized land use categories to regulate these uses. Businesses that do not fall within the retail dispensary and on-site consumption categories will fall into a general nursery, agriculture, manufacturing, or warehousing land uses and definitions in zoning regulations. However, there are still land use issues that local governments may have to contend with regarding these uses. Some are similar to those identified above and include:

- Lighting and security
- Noise due to manufacturing and processing
- Odor due to processing
- Greenhouse/warehouse or other structures related to the indoor cultivation and processing of the marijuana plant.

Any regulations put into effect to control these preempted uses will affect all businesses that fall within general nursery, agriculture, manufacturing, or warehousing land use categories or definitions within a zoning code. Proposed regulations to address these concerns must be carefully thought out to ensure they apply to all potential uses that might fall within a use definition.

Local governments should utilize mapping tools to assist them in their evaluations and decision making. GIS applications can allow local governments to identify if restrictions such as distance from schools or places of worship will effectively “zone out” these uses. It can also be a useful tool to determine if the proposed locations or locations of these uses could cause a concentration within certain neighborhoods.

3. OVERVIEW OF MRTA LICENSES

Local governments who do not opt out can regulate businesses which receive retail dispensary and on-site consumption licenses. Local governments will be notified if these, or cultivator, processor or distributor licenses are requested within its jurisdiction and may provide an opinion to the CCB as discussed in Section II. A list of the licenses that will be issued by the CCB are described below.

Adult-use Cultivator License (§ 68 of MRTA)

An adult-use cultivator's license authorizes the acquisition, possession, distribution, growing, cultivation, and sale of cannabis from the licensed premises of the grower. Allowed activities include the agricultural production practices of planting, growing, cloning, harvesting, drying, curing, grading, and trimming of cannabis.

Adult-use Processor License (§ 69 of MRTA)

A processor's license authorizes the acquisition, possession, processing, and sale of cannabis from the licensed premises of an adult-use cultivator to licensed processors or distributors. Processing includes blending,

extracting, infusing, packaging, labeling, branding and otherwise making or preparing cannabis products. Processing shall not include the cultivation of cannabis or retail sales.

Adult-use Cooperative License (§ 70 of MRTA)

A cooperative license authorizes the acquisition, possession, cultivation, processing, distribution and sale from the licensed premises of the adult-use cooperative to licensed distributors, on-site consumption sites, registered organizations, or to retail sites, but not directly to cannabis consumers.

Adult-use Distributor License (§ 71 of MRTA)

A distributor's license authorizes the acquisition, possession, distribution, and sale of cannabis from the licensed premises of a licensed adult-use cultivator, processor, adult-use cooperative, microbusiness, or registered organization to sell adult-use cannabis to licensed retailers and on-site consumption sites.

It should be noted that one person may be issued all four types of licenses above to perform all these allowable functions on the same premises. There are no restrictions on where adult-use cannabis cultivator, processor, distributor, or cooperative operations can take place within a municipality.

Adult-use Retail Dispensary License (§ 72 of MRTA)

A retail dispensary license authorizes the acquisition, possession, sale and delivery of cannabis from the licensed premises directly to cannabis consumers.

- Premises cannot be within 500 feet of school grounds.
- Premises cannot be within 200 feet of a house of worship.
- With the exception of delivery or microbusiness licensees, no premises shall be licensed to sell cannabis products, unless said premises is located in a store with the principal entrance at street level on a public street.

Microbusiness License (§ 73 of MRTA)

A microbusiness license authorizes the limited cultivation, processing, distribution, delivery, and dispensing of adult-use cannabis and cannabis products. The size, scope and eligibility criteria of a microbusiness shall be determined in regulation by the CCB in consultation with the Director and Chief equity officer of the Office of Cannabis Management.

Nursery License (§ 75 of MRTA)

A nursery license authorizes the production, sale and distribution of clones, immature plants, seeds, and other agricultural products used specifically for the planting, propagation, and cultivation of cannabis by licensed adult-use cultivators, cooperatives, microbusinesses or registered organizations.

Adult-use on-site Consumption License (§ 77 of MRTA)

An adult-use on-site consumption license authorizes the use of cannabis and cannabis products at the premises by cannabis consumers.

- Premises cannot be within 500 feet of school grounds.
- Premises cannot be within 200 feet of a house of worship.
- Relevant criteria for the Cannabis Control Board to consider in the granting of an adult-use on-site consumption license include:
 - “the number, classes, and character of other licenses in proximity to the location and in the particular municipality, subdivision thereof or geographic boundary as established by the board.”
 - “effect of the grant of the license on pedestrian or vehicular traffic, and parking.”
 - “the existing noise level at the location and any increase in noise level that would be generated.”

Cannabinoid Hemp Processor License (§ 92 of MRTA)

A processor license authorizes one or more specific activities related to the processing of cannabinoid hemp into products used for human consumption, whether in intermediate or final form, and the distribution or sale by the licensee.

Cannabinoid Hemp Retailer License (§ 93 of MRTA)

Retail license authorizes selling cannabinoid hemp, in final form to consumers within the state.