

New York Law Journal

Real Estate Trends

WWW.NYLJ.COM

VOLUME 261—NO. 58

An ALM Publication

WEDNESDAY, MARCH 27, 2019

ZONING AND LAND USE PLANNING

Local Gov't Takes a Hit Under Proposal to Legalize Marijuana

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A significant portion of Governor Andrew M. Cuomo's original fiscal year 2020 budget proposal discusses in detail his idea for a "Cannabis Regulation and Taxation Act," to be known colloquially as the "cannabis law." As proposed, the governor's bill would create and amend existing laws to legalize adult-use cannabis, consolidate governance of all forms of cannabis, and develop a regulatory structure to oversee the licensure, cultivation, production, distribution, sale, and taxation of cannabis within the state.

The governor has conceded that Albany will not be able to reach agreement on the legalization of recreational marijuana in time for it to be included in the budget. It nevertheless appears likely that New Yorkers will see marijuana become legal in the state sometime in the near future. One major reason

for that, of course, is the possibility of the state receiving millions of dollars in tax revenue from the sale of cannabis. The governor's proposal estimates \$83 million in tax revenue in fiscal year 2021, rising to \$184 million in fiscal year 2024, from the sale of cannabis.

Because the governor's cannabis law proposal may very well form the basis of the bill that lawmakers ultimately agree to adopt, its details have been subject to much discussion and review. This column focuses on a distinct aspect of the governor's proposed cannabis bill that is of great significance to local municipalities: The ability—or, more precisely, the inability—of villages and towns to opt out of the law under the bill as proposed.

To be consistent with longstanding notions of local control over land use, and to be responsive to the wishes of local officials and their constituents, the governor and the Legislature should expand the opt out provisions in the governor's bill to make opt out available to villages and towns, as well

as to cities of all sizes, throughout the state.

The Proposed Law

Nearly 200 pages of the governor's budget proposal discuss the Cannabis Regulation and Taxation Act, covering everything from the establishment of a state office of cannabis management (OCM) within the Division of Alcohol Beverage Control to the various kinds of licenses that the state will issue for the cultivation, processing, distribution, and sale of cannabis to cannabis consumers. These licenses include an adult-use cultivator license, an adult-use processor license, an adult-use cooperative license, an adult-use distributor license, an adult-use retail dispensary license, and an on-site consumption license.

The proposed bill explains the kind of information that can be requested in applications for these licenses and the selection criteria the OCM will use to determine to whom licenses are granted, among many other things.

Interestingly, the bill provides that before filing an application for

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licensure as an adult-use cannabis retail dispensary, an applicant must notify the municipality in which the premises are located of the applicant's intent to file such an application. The notification must be made to the clerk of the village, town, or city where the premises are located.

Moreover, under the bill, a municipality may express an opinion for or against the granting of the application. Any such opinion will become part of the record upon which the OCM determines whether or not to grant the application. Local officials do not make decisions on these applications.

whether to grant a license for on-site cannabis consumption at a particular location. These factors include the number, classes, and character of other licenses in proximity to the location and in the particular municipality or subdivision thereof; the effect of the grant of the license on pedestrian or vehicular traffic and parking in proximity to the location; and the existing noise level at the location and any increase in noise level that would be generated by the proposed premises.

The Opt-Out

Although these factors could very well be among those that a local government would consider if it had the power to approve a cannabis license, town and village authorities have no such power. Indeed, Article 6, Section 132, of the governor's bill, which is entitled, "County opt-out; municipal control and preemption," makes it clear that town and village authorities also may not opt out of the law.

That section provides that the provisions of the bill regarding cannabis licenses and related matters "shall not be applicable to a county, or city having a population of one-hundred thousand or more residents, which adopts a local law, ordinance or resolution by a majority vote of its governing body to completely prohibit the establishment or operation of one or more types of licenses...within the jurisdiction of the county or city."

Thus, county governments would have the opportunity to opt-out of the new law by passing a local law, ordinance, or resolution by

a majority vote of their governing body. If a county does not opt out, a city with a population over 100,000 in that county could elect to opt out.

As currently written, this opt-out applies only to counties, and to cities of 100,000 or more residents. Indeed, the bill specifically provides that "all county, town, city and village municipalities are hereby preempted from adopting any rule, ordinance, regulation or prohibition pertaining to the operation or licensure of registered organizations, adult-use cannabis licenses or hemp licenses" (except that the bill permits municipalities to pass ordinances or regulations governing the time, place, and manner of licensed adult-use cannabis retail dispensaries, provided such ordinances or regulations do "not make the operation of such licensed retail dispensaries unreasonably impracticable" as determined by the OCM's executive director "in his or her sole discretion").

In other words, towns and villages, and cities of fewer than 100,000 residents, are unable to opt out of the cannabis law. That provision offends longstanding notions of home rule and local control over property within the jurisdiction of these municipalities.

Home Rule

As the New York Court of Appeals explained in the leading land use case of *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423 (1989), "[m]unicipal home rule in this state has been a matter of constitutional principle for nearly a century." New York's constitutional home rule provision,

In other words, towns and villages, and cities of fewer than 100,000 residents, are unable to opt out of the cannabis law. That provision offends longstanding notions of home rule and local control over property within the jurisdiction of these municipalities.

The bill makes clear that an adult-use cannabis retail dispensary may not be granted a cannabis on-site consumption license for any premises where a license would not be allowed to sell at retail for consumption of alcohol on the premises based on its proximity to a building occupied exclusively as a school, church, synagogue, or other place of worship pursuant to the provisions of Section 105 of the Alcoholic Beverage Control Law.

The bill also has specific provisions regarding the factors that the OCM may consider when determining

N.Y. Const., art. IX, § 2(c), “confers broad police powers upon local governments relating to the welfare of its citizens.” *Jancyn Manufacturing Corp. v. County of Suffolk*, 71 N.Y.2d 91 (1987).

Of course, it is similarly well recognized that although local governments possess broad authority to enact legislation that promotes the welfare of their citizens, they cannot adopt laws that are inconsistent with the Constitution or with any general state law. *See, e.g., Incorporated Village of Nyack v. Daytop Village, Inc.*, 78 N.Y.2d 500 (1991). Put differently, the power of local governments to enact laws is subject to the fundamental limitation of the preemption doctrine, including preemption in a field for which the state Legislature has assumed full regulatory responsibility. *See, e.g., DJL Restaurant Corp. v. City of New York*, 96 N.Y.2d 91 (2001). Under the doctrine of field preemption, “a local law regulating the same subject matter [as a state law] is deemed inconsistent with the State’s transcendent interest, whether or not the terms of the local law actually conflict with a State-wide statute.” *Albany Area Builders Ass’n v. Town of Guilderland*, 74 N.Y.2d 372 (1989).

Preemption is precisely what the governor’s bill appears to be intended to do.

While the Legislature may have the power to prevent local governments from opting out of the cannabis law, many local officials already have expressed their opposition to such a provision. Even though the cannabis law has not yet been

enacted, several towns and villages on Long Island have taken steps opposing the legalization of recreational marijuana. The town of North Hempstead has barred retail sales of marijuana, and the town of Hempstead has approved a one-year ban on recreational sales. Similarly, the village of Munsey Park recently adopted a local law banning the manufacture and sale of marijuana.

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The executives of Nassau and Suffolk Counties also have expressed their opposition to the legalization of marijuana. *See*, “Bellone: Let Suffolk opt out of legalized marijuana,” *Newsday*, March 13, 2019, *available at* <https://www.newsday.com/long-island/politics/steve-bellone-marijuana-suffolk-1.28481086>; “Curran on legalized marijuana: Not in Nassau,” *Newsday*, March 12, 2019, *available at* <https://www.newsday.com/long-island/politics/laura-curran-nassau-1.28431296>.

In addition, in a joint meeting of the Nassau County Village Officials Association (NCVOA) and the Suffolk County Village Officials Association (SCVOA) that took place on March 6, village mayors expressed

concerns about Governor Cuomo’s proposed legislation to legalize the recreational use of cannabis in the state. Among other things, they contended that towns and villages should have the power to opt out just as counties and large cities would have that power. *See*, “Nassau and Suffolk County Village Officials Associations Push for Changes in Governor’s Proposal to Legalize Recreational Use of Cannabis in New York State,” Press Release, *available at* <http://ncvoa.org/wp-content/uploads/sites/96/2019/03/M-Press-Release-FINAL.pdf>.

Conclusion

It is not unheard of elsewhere in the country for local governments to have the ability to opt-out of recreational cannabis laws. For example, Michigan law provides that “a municipality may completely prohibit or limit the number of marijuana establishments within its boundaries.” *See*, [www.legislature.mi.gov/\(S\(2wkk3bpwj10wbzk2tbqw250h\)\)/mileg.aspx?page=getObject&objectName=mcl-333-27956](http://www.legislature.mi.gov/(S(2wkk3bpwj10wbzk2tbqw250h))/mileg.aspx?page=getObject&objectName=mcl-333-27956). Local governments in New York should have the ability to do the same thing.