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Local Governments React to State's Marijuana Law

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Countless business owners, entrepreneurs, and individuals in New York celebrated the state's passage in late March of the Marijuana Regulation & Taxation Act (the MRTA), S.854-A/A.1248-A, both for the economic opportunities it presented and for the fact that it legalized the possession, sale, and growing of marijuana for recreational purposes for anyone 21 years of age and older. By the same token, numerous state officials rejoiced at the new source of tax revenue, in which local municipalities would share.

Recognizing, however, that there remains a not insignificant degree of opposition to the legalization of recreational cannabis, the MRTA offered local officials the opportunity to opt out of certain of its provisions or to regulate, in limited fashion, two of the licenses it created.

After briefly discussing the principal provisions of the MRTA, this column will explain the steps that local government officials may take to limit the MRTA's impact on their community and will review what a number of municipalities across the state already have done in response to the law.

Key Provisions

The MRTA legalized adult-use cannabis (also known as marijuana or recreational marijuana). It established a new Office of Cannabis Management (OCM) governed by a five-member Cannabis Control Board (CCB) to oversee and implement the law. The OCM will issue licenses and develop regulations outlining how and when business can participate in the new industry. (The OCM also will oversee the state's existing medical marijuana program and cannabinoid hemp program, previously regulated by the New York State Department of Health.)

The MRTA created different licenses for businesses interested in participating in the commercial cannabis

industry, ranging from licenses for cultivators, processors, distributors, and retail dispensaries to delivery licenses and on-site consumption licenses. With limited exceptions, businesses generally are prohibited from holding more than one type of license.

The MRTA also enacted three taxes on adult-use cannabis. First, it imposed a tax on the distributor based on the milligrams of the product's total THC (i.e., the main psychoactive compound in cannabis that produces the high sensation). There are different rates of this tax depending on whether the cannabis product is in the form of edibles (e.g., food and beverages), concentrates (e.g., vaporization oil, wax, shatter, and resin), or cannabis flower (e.g., loose flower, pre-rolls, or shake).

The second tax is a state excise tax imposed on the sale of cannabis products by a retail dispensary to a cannabis consumer.

The third tax is a local excise tax imposed on the sale of cannabis products by a retail dispensary to a cannabis consumer. This tax is distributed

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to local governments based on where the retail dispensary is located.

State officials have estimated that the tax revenues from recreational marijuana could reach \$350 million annually—enough to make a significant dent in budget deficits and a good start to recovering from the economic losses resulting from the COVID-19 pandemic.

Yet countervailing views about the wisdom of legalizing cannabis for recreational use led the state to offer two alternatives to local governments.

Local Opt Out

First, towns, villages, and cities can opt out of allowing adult-use cannabis retail dispensaries or on-site consumption licenses from locating within their jurisdictions. (Municipalities cannot opt out of adult-use legalization because possession and use of cannabis by adults 21 years of age or older now is legal in New York State.)

A municipality must pass a local law by December 31, 2021, to opt out of allowing adult-use cannabis retail dispensaries or on-site consumption licenses. If a municipality does not opt out by December 31, 2021, it will be unable to opt out at a future date, according to the MRTA. Importantly, a municipality may opt back in at any time to allow adult-use retail dispensaries and/or on-site consumption licenses by repealing the local law that established the prohibition.

The MRTA permits a municipality to opt out of both retail dispensaries

and on-site consumption licenses or to opt out of just one type of license (e.g., allow retail dispensaries but not on-site consumption licenses). Municipalities may not opt out of other adult-use license types locating or operating within their jurisdiction. Additionally, municipalities may not opt out of medical cannabis or cannabinoid hemp licenses.

If a town passes a local law to opt out, it only affects the area of the town

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outside of any village within the town. Notably, a local law opting out of retail dispensaries or on-site consumption licenses is subject to a permissive referendum allowing voters within the municipality to petition whether or not to approve the local law. *See* N.Y. Municipal Home Rule Law § 24. A local government that opts out of the retail sale of marijuana will not share in tax revenue generated by such sales.

Time, Place, and Manner

Except for the opt out provision described in the section above, municipalities may not adopt any law, rule, ordinance, regulation, or prohibition pertaining to the operation or licensure of adult-use cannabis, medical cannabis, or cannabinoid hemp licenses.

However, towns, villages, and cities may pass local laws and regulations governing the time, place, and manner of adult-use retail dispensaries and on-site consumption licenses, provided such laws and regulations do not make the operation of the license “unreasonably impracticable.” For example, towns, villages, and cities may pass laws and regulations pertaining to local zoning and the location of licenses, hours of operations, and adherence to local building codes.

Given the impending Dec. 31 opt out deadline, local governments throughout the state are considering whether to opt out or otherwise regulate the burgeoning industry within the limits imposed by the MRTA. The next section of this column reviews, as of this writing, what various jurisdictions have done or are considering as reflected in their filings with the New York Secretary of State or local news reports. Some municipalities are fully engaged with the MRTA while others have opted out of the MRTA or are regulating its use by, among other things, prohibiting the use of marijuana in public places such as parks and other public recreational facilities.

Local Actions

Some jurisdictions are welcoming marijuana legalization with open arms. For example, the town of Warwick in upstate New York has converted the grounds of a former state prison into a “cannabis cluster.” Officials in Buffalo reportedly are eagerly awaiting cannabis-related jobs—and the

accompanying tax revenue. Not to be outdone, a deputy mayor in Shamong, New Jersey (another state that recently legalized recreational marijuana), has announced that his goal “is to make Shamong the pot capital of New Jersey.”

After considering whether to exercise the MRTA opt out, the board of the Long Island Town of Riverhead decided not to do so. Of course, many other municipalities will reach the same conclusion, even if they are not as widely reported.

On the other hand, at least two Long Island towns (Islip and Shelter Island) have opted out of the state law. Similarly, the Long Island Village of Nissequogue has opted-out of “licensing and establishing cannabis retail dispensaries and/or cannabis on-site consumption establishments” within its boundaries.

Brookhaven Town has prohibited cannabis stores in its downtown business districts. The Town of Oyster Bay amended its zoning regulations to limit retail sales of marijuana to property zoned for industrial use.

The board of the Village of Pleasantville, finding that its residents “are greatly concerned about the retail sale of marijuana” in the village and that the “small scale” of the village’s commercial district “makes it impossible to locate marijuana retail stores away from children’s walking routes and child-focused facilities,” has decided to “prohibit the retail sale, distribution, or offer of consumption of marijuana in all zoning districts.”

Nassau County has prohibited the smoking and vaping of marijuana on county-owned property. Its new local law provides that, “No person shall smoke or vape cannabis or concentrated cannabis as those terms are defined by §222.00 of the New York State Penal Law on any County-owned property including but not limited to buildings, sidewalks, parking lots, parks, preserves, playgrounds, beaches, campgrounds, or any other county-owned open spaces.”

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A new local law enacted in the Village of Northport provides that, “No person shall smoke a tobacco product; herbal product; marijuana; marijuana derivatives, electronic cigarette; pipe or cigar; vapors; e-liquids; or other smoking devices in an outdoor playground, park, athletic field or beach located within the lands and jurisdiction of the Incorporated Village of Northport.” The new law adds that the prohibition applies to public playgrounds, parks, athletic fields, and beaches but “is not intended to include private property to which the general public does not generally have access or private areas used exclusively for private functions.”

The local law enacted by the board of the Village of Riverside explains that its

intent is to “protect the health, safety and general welfare” of the inhabitants and persons within the village limits “by establishing regulations on smoking of substances and related activities in and near municipally owned buildings, walks, bike ways and parks.” It then states:

The smoking of any substance, including but not limited to Tobacco and Cannabis (also known as Marijuana or Marihuana), using any device and or method, including cigarettes, cigars and pipes, is prohibited on any Village owned walk, sidewalk bike-way, pedestrian pathway, park or playground and within twenty-five (25) feet of any Village owned building. . . .

Conclusion

Local officials in other communities continue to ponder whether to act and, if so, how to do so. Some are seeking residents’ input through surveys or public hearings. Given how much local government officials must consider when weighing how to respond to the MRTA, obtaining their constituents’ feedback may be the most viable and appropriate way to proceed.