

Outside Counsel

Cannabis in NY: Hashing Out the Potential for Preemption of Zoning Laws

On March 31, 2021, then Governor Andrew Cuomo signed the Marihuana Regulation and Taxation Act (MRTA), legalizing adult-use cannabis in New York state. S.B. 854-A (N.Y. 2021). MRTA was passed in an attempt to right past wrongs by the government, specifically involving minority groups and those members of minority communities negatively and disproportionately affected by prior cannabis prohibition.

MRTA directs the Cannabis Control Board (CCB) to prioritize social and economic equity applicants (Equity Applicants) with the goal of awarding fifty percent of adult-use cannabis licenses to Equity Applicants. MRTA §10(2). In New York, a social equity applicant is a person who is: (1) from a minority group, (2) a woman, (3) a disable veteran, (4) a farmer in financial distress and (5) those persons from communities disproportionately impacted by the war on drug. §87. The legislation aims to award licenses in a manner that considers small business opportunities, avoids market dominance, and “reflects the demographics of the state.” §10(2). The state has also set forth a desire to assist Equity Applicants succeed by way of “low-and-zero interest loans, reduced or waived



By
**Elizabeth S.
Kase**



And
**Alexandra
Piscitello**

fees and assistance in preparing applications.” Id.

This fall, the five-member board of New York’s CCB was appointed. However, little else is known about the state’s plans and potential license applicants are anxiously awaiting details of the regulatory framework.

This fall, the five-member board of New York’s CCB was appointed. However, little else is known about the state’s plans and potential license applicants are anxiously awaiting details of the regulatory framework.

Since MRTA was passed, there has been significant buzz about preemption between federal and state law given cannabis’ status as a Schedule I drug, which makes it federally illegal for use, possession and sale. Controlled Substances Act, 21 U.S.C. §812. At the same time, there are arguably even more burning questions

involving the interplay between state and local law and such implications could very well negatively affect the groups that the legislation sets out to empower.

Registered Organizations

The sale and use of medical marijuana in New York state was legalized by the July 2014 Compassionate Care Act and in 2015, New York state began issuing licenses for medical marijuana entities, which are referred to as Registered Organizations (RO). N.Y. Pub. Health Law §§3360-3369. What was anticipated to be a booming industry, was actually a bit of a bust. Doctors, fearful of federal repercussions, shied away from recommending cannabis to patients and a limited number of licenses and shops meant that pricing, now also inclusive of tax, did not make sense outside of the illicit market. Now just 37 shops in New York are run by 10 companies, many owned by multi-state operators (MSO) or multinational corporations. Notably, this leaves very little room in the current landscape for mom and pop shops.

ROs, under MRTA, are eligible to apply for Registered Organization Adult-Use Cultivator Processor Distributor Retail Dispensary licenses, which give ROs the ability to distribute their own products for adult-use purposes in “three of the organization’s medical dispensaries’ premises.” MRTA §68-A.

Zoning, Opt-Out and Taxes

In accordance with MRTA, municipalities are preempted from regulating the operation or licensure of ROs for medical marijuana purposes. However, towns, villages, and cities may opt-out of allowing adult-use retail dispensaries and on-site consumption licenses within their respective boundaries. Towns, villages and cities may not opt out of allowing licensed delivery, nursery, cultivation or microbusiness licensees from operating within their jurisdiction. §131(2).

Each municipality had until Dec. 31, 2021 to opt-out by adopting a local law subject to a permissive referendum. According to the Rockefeller Institute of Government, as of Dec. 3, 2022, of the 1,518 municipalities in New York state, 655 opted out of retail establishments and 751 opted out of on-site consumption. Each municipality may also adopt laws, rules, ordinances, or regulations governing the time, place, and manner of the operation of the licensed retail dispensaries and on-site consumption sites. *Id.*

MRTA establishes a 13% tax on adult-use cannabis sales, 4% of which is split between the county (25%) and municipalities (75%). §493. Where a municipality opts out, they forgo the tax revenue. *Id.*

Potential Preemption

The question begs: For ROs that apply for a Registered Organization Adult-Use Cultivator Processor Distributor Retail Dispensary license, will New York state law preempt local ordinances? More specifically, if a municipality opts out of adult use under state law by adopting a local law, will an RO, equipped with a Registered Organization Adult-Use Cultivator Processor Distributor Retail Dispensary license, still be able to operate within their municipality given the state law? If so, is the municipality then entitled

to the tax revenue—even though they technically opted out?

The answer is hazy at best and we will have to wait until the CCB's rules and regulations are published to clear up any ambiguities.

However, if ROs are permitted to operate as adult-use retailers or on-site consumption facilities in jurisdictions that opted out of those very uses under MRTA, it may defeat the entire purpose of New York's legislation. Not only would it "reward" the big players, including the MSOs that dominate the medical marijuana field, but it could also create a retail monopoly in certain municipalities of which Equity Applicants are now

Because New York is late to the recreational cannabis game, legislators have set forth ambitious goals in getting legal cannabis into the hands of New Yorkers.

forbidden—ironically, because of the opt-out provision. Resultantly, it would further bolster MSOs market share and profit potential, in what analysts' suggest could become a five billion dollar industry by 2026.

New York law supports state preemption where a conflict exists involving any "conduct, safety, health and well-being of persons or property therein." N.Y. Const. art. IX, §2(c)(10). In *People v. Amerada Hess*, 765 N.Y.S.2d 202, 207 (N.Y. Dist. Ct. 2003), a New York court held that a municipality's restrictive covenant, which ran with the land and barred the sale of alcoholic beverages, could not prevent sales, as such sales were legal under state law. Hence, state law preempted the law at the local level.

Additionally, because New York is late to the recreational cannabis game, legislators have set forth ambitious goals in getting legal cannabis into the hands of New Yorkers. However, the state has

been slow in its execution. New York, knowing that the ROs are already set up to do business, could give ROs the green light to operate months ahead of new applicants, including Equity Applicants, of whom likely will not know of their license status—nonetheless have operations up and running—until at least early 2023. Such a move would again disregard small business interests and drive market dominance into the hands of a few larger and better financially positioned players; the diametrical opposite of New York's legislative intent.

In what can be viewed as an ominous foretoken to New York, despite being a \$2 billion industry and the first state in the country to introduce a social equity and economic empowerment component in their 2016 legislation, Massachusetts has fallen short in what it envisioned would be a diverse sector reflective of its communities, and one to serve as a model of restorative justice. As Hadley Barndollar of the Herald News deduced, Massachusetts' cannabis industry is "shaping up to be disproportionately white and male-owned."

Conclusion

However, all hope is not lost for adult-use license applicants in New York. The newly formed CCB is vested with thoughtful veterans of the cannabis industry, and they have the time, resources, and opportunity to reflect on what went wrong in other states, including Massachusetts, and ensure that new applicants, especially Equity Applicants, are not paid only in lip service.