

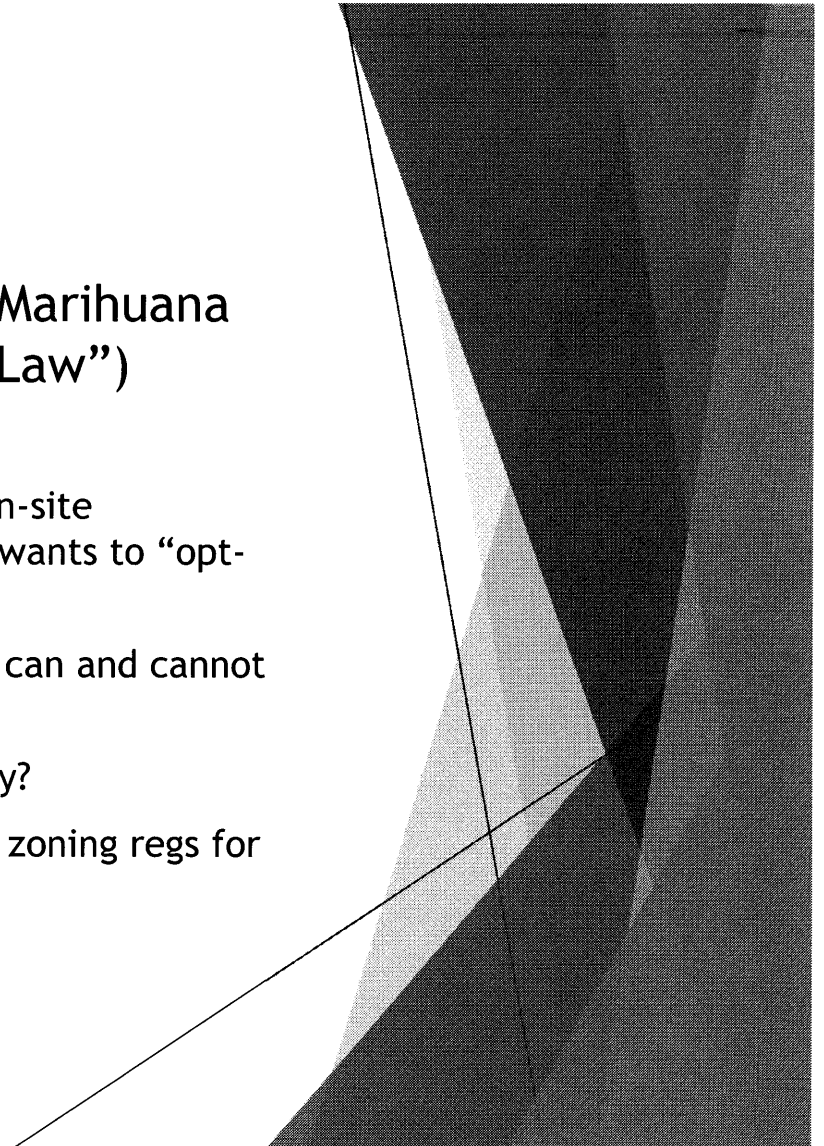
Zoning & Planning Considerations for Legal Cannabis Uses in NYS

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Today's Discussion

- ▶ Zoning & Planning Considerations in Light of the Marihuana Regulation & Taxation Act (“MRTA” or “Cannabis Law”)
 - ▶ What is actually legal as of today?
 - ▶ Municipal “opt-outs” from adult-use retail dispensaries and on-site consumption locations: What can a municipality do if it now wants to “opt-in”?
 - ▶ Municipal rulemaking for cannabis uses: What a municipality can and cannot do to regulate cannabis uses with local laws/regulations
 - ▶ Adult-Use License applications: Do municipalities have *any* say?
 - ▶ Recommendations if your municipality is considering updated zoning regs for cannabis uses.



The MRTA: What is Legal as of Today?

People 21 and over can:

- ▶ Possess up to 3 ounces of cannabis on their person, or up to 24 grams of concentrated cannabis (e.g. edibles, wax, vape oil)
- ▶ Possess up to 5 pounds of cannabis at their personal residence or grounds.
- ▶ Purchase Cannabis for personal use from fully licensed, adult-use dispensaries.
- ▶ Grow cannabis for personal use
 - ▶ An individual can grow up to six (6) plants at one time (3 mature, 3 immature)
 - ▶ Households can have up to twelve (12) total plants at one time (6 mature, 6 immature) regardless of number of 21+ ppl.
- ▶ Smoke cannabis anywhere people can smoke tobacco, except in the following places:
 - ▶ Private automobiles
 - ▶ Retail tobacco shops
 - ▶ Vape shops
 - ▶ Cigar bars
 - ▶ Outdoor dining areas of food service establishments
 - ▶ On federal property
- ▶ Smoking cannabis in public can be further restricted by local regulation.

Local Opt-Outs

Cannabis Law s.131 allowed municipalities to “opt-out” of allowing retail cannabis dispensaries and/or locations that allow on-site cannabis consumption by passing a local law asking CCB to not issue such licenses within the municipality.

- ▶ As of September 24, 2024, OCM has a list of **841** municipalities that timely opted out of dispensaries, commercial on-site consumption, or both.
- ▶ Ability to opt-out expired on **December 31, 2021**.
- ▶ **What if your municipality didn't opt-out?**
 - ▶ There was no need to affirmatively “opt-in”. So, if your muni did nothing, adult-use dispensaries and commercial on-site consumption locations are allowed, and you can no longer opt-out.
- ▶ **What if your municipality opted out in 2021, but now wants to allow cannabis retail sales?**
 - ▶ You are allowed to repeal your opt-out local law at any time
 - ▶ If you repeal and “opt back in”, you cannot reverse course and opt-out again.

Municipal Rulemaking for Cannabis Uses

► What Municipalities CANNOT do:

- Cannabis Law s. 131(2) : “All county, town, city and village governing bodies **are hereby preempted** from adopting any law, rule, ordinance, regulation or prohibition pertaining to the **operation or licensure** of registered organizations, adult-use cannabis licenses or cannabinoid hemp licenses.”

► What this means:

- Municipalities **cannot** require a separate, local license for any cannabis uses
 - **Note:** Requiring a **special use permit** should still be OK as long as conditions are reasonable (more on this later).
- Municipalities **cannot** enact a zoning ban prohibiting such uses

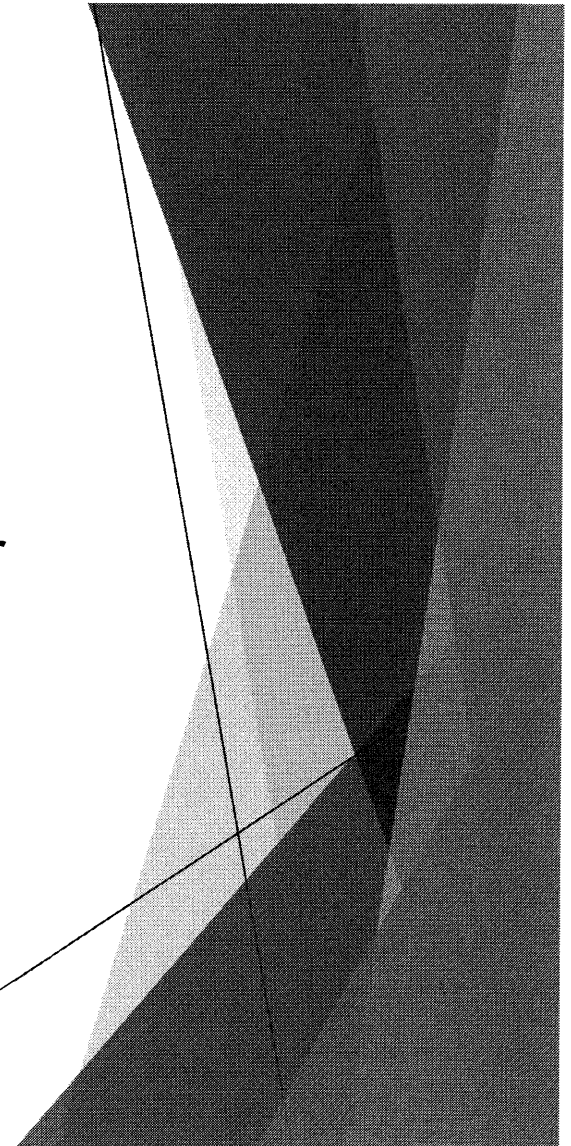
Municipal Rulemaking for Cannabis Uses

► What Municipalities CAN do:

- Cannabis Law s. 131 (2) ALSO states: “Towns, cities and villages may pass local laws and regulations **governing the time, place and manner of the operation of licensed adult-use cannabis retail dispensaries and/or on-site consumption**, provided such law or regulation does not make the operation of such licensed retail dispensaries or on-site consumption sites **unreasonably impracticable** as determined by the CCB.”

► What this means:

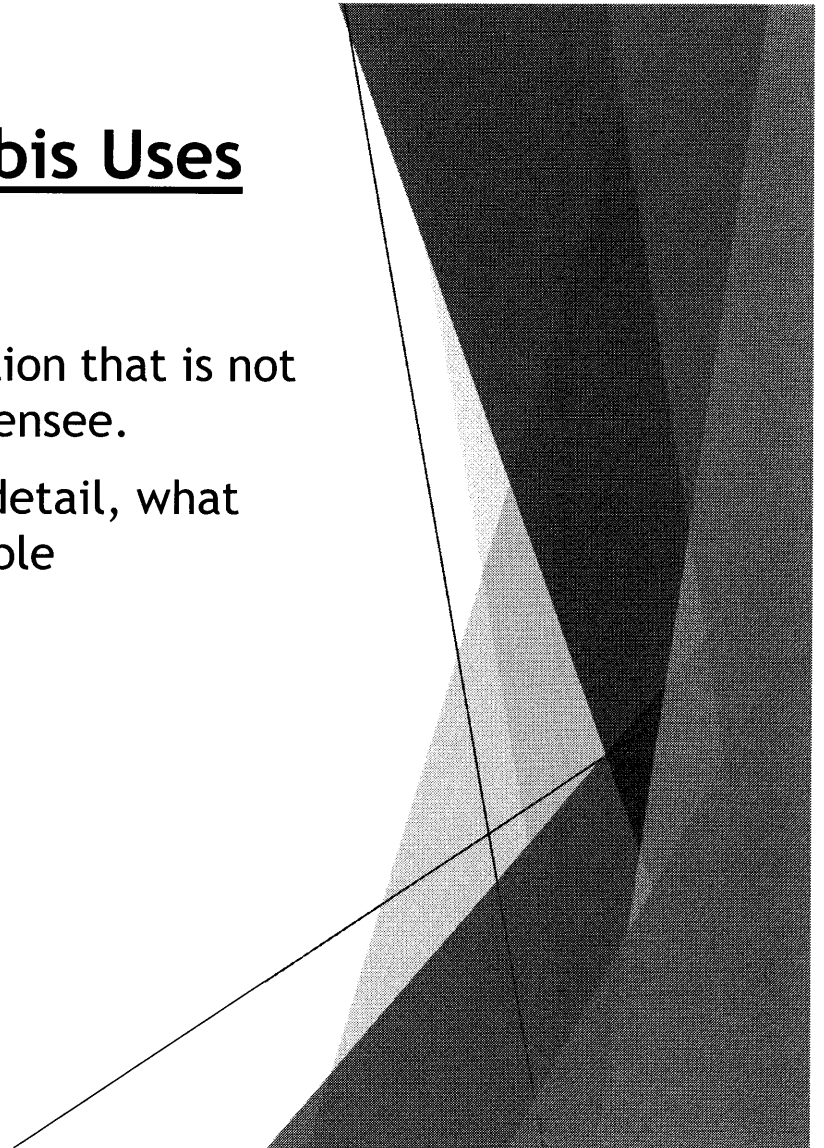
- Cannabis retailers must comply with **reasonable**, local time/manner/place zoning regulations



Municipal Rulemaking for Cannabis Uses

► What Municipalities CAN do:

- Pass Any time/place/manner local law or regulation that is not “unreasonably impracticable” to a cannabis licensee.
- Albany has finally issued regulations explain, in detail, what kinds of local restrictions are/are not unreasonable
- 9 NYCRR Part 119 contains these regulations.



Municipal Rulemaking for Cannabis Uses

DISTANCE RESTRICTIONS (9 NYCRR 119.1)

- ▶ Municipalities cannot pass a local law allowing a dispensary or on-site consumption location to be located:
 - ▶ on the same road and **within 200 feet** of the entrance of a building occupied exclusively as a **house of worship**;
 - ▶ on the same road and **within 500 feet** of the entrance of a building occupied exclusively as a **school**; or
 - ▶ on the same road and **within 500 feet** of a structure or its grounds occupied exclusively as a **public youth facility**
 - ▶ **Public Youth Facility** = a location owned by a government subdivision or agency where the primary purpose is to provide recreational opportunities or services to children or adolescents.

NOTE: If a cannabis business is now closer than these distances from any of the uses mentioned above, but was licensed to operate **prior** to the existence of such a use, the cannabis business is **grandfathered**.

Municipal Rulemaking for Cannabis Uses

RESTRICTIONS ON FEES (9 NYCRR 119.1)

- ▶ Municipalities cannot pass a local law that:
 - ▶ Imposes a special fee that is specific to cannabis businesses or a particular licensee;
 - ▶ Imposes a fee on adult-use retail dispensaries or on-site consumption locations, unless the municipality had a local law in effect prior to March 31, 2021 that impose similar fees on liquor stores and/or bars/restaurants that serve liquor for on-site consumption.
 - ▶ Imposes a tax or a fee on the cultivation, processing, manufacturing, distribution or sale of cannabis, other than any usual and customary fees associated with similarly situated businesses;

Note: Municipalities also cannot craft separate agreements (e.g. Host Community Agreements) with a cannabis business in which the municipality receives special benefits, or imposes any special obligations on a licensee.

Municipal Rulemaking for Cannabis Uses

RESTRICTIONS ODOR CONTROL RULES (9 NYCRR 119.1)

- ▶ Municipalities cannot pass a local law that:
 - ▶ Sets a standard for ventilation or odor control for an indoor area of an on-site consumption business, unless the same standard is also applicable to all indoor areas of businesses which allow the smoking or vaping of tobacco
 - ▶ Sets a standard for ventilation or odor control for any outdoor area of an adult-use on-site consumption location,
 - ▶ **EXCEPTION:** Municipalities can require a buffer of **up to 20 feet** between an area of an on-site consumption location that is outdoors, and an adjacent public road.

Municipal Rulemaking for Cannabis Uses

DENSITY RESTRICTIONS (9 NYCRR 119.4)

- ▶ **The State fully regulates density/proximity between cannabis businesses as follows:**
 - ▶ No dispensary can be located within a 1,000-foot radius of another dispensary in a municipality with a population over 20,000 people.
 - ▶ No dispensary can be located within a 2,000-foot radius of another dispensary in a municipality with a population under 20,000 people.
 - ▶ There appear to be no distance restrictions between on-site consumption locations if there are 3 or fewer locations in a municipality, however...
 - ▶ No on-site consumption license will be granted for any premises that is within five 500 feet of three (3) or more existing on-site consumption locations that are already licensed and operating
 - ▶ CCB has the ability to vary from these standards if it “would promote public convenience and advantage”.

Municipal Rulemaking for Cannabis Uses

TIME RESTRICTIONS (9 NYCRR 119.2)

- ▶ Cannabis Law regulations prohibit the following hours of operations:
 - ▶ **Dispensaries** cannot be open between the hours of 2 a.m. and 8 a.m.
 - ▶ **On-site consumption locations** cannot be open between the hours of 4 a.m. and 8 a.m.
 - ▶ **Note:** Municipalities can restrict total hours of operation to a **maximum of 70 hours per week**, but cannot set hours of operation below that total unless the licensee agrees to it.
- ▶ **All other reasonable hours of operation restrictions are fine.**

Municipal Rulemaking for Cannabis Uses

PLACE/MANNER RESTRICTIONS (9 NYCRR 119.2)

- ▶ Municipalities CAN pass/enforce laws/regulations for cannabis businesses that are related to:
 - ▶ Hours of operation, subject to limitations on previous slide.
 - ▶ The appearance & architectural features of the building if it is located within historical districts
 - ▶ Parking
 - ▶ Traffic control for vehicles and pedestrians
 - ▶ Restrictions on offensive odor and smoking marijuana in public, pursuant to the Clean Indoor Air Act (**Public Officers Law art. 13-E**), except as preempted under section 119.1
 - ▶ Restrictions on noise
 - ▶ Restrictions on distances between cannabis retailers and churches, schools, and other sensitive receptors

State-Level Licensing: Do Municipalities Have Any Say?

► YES!

- Municipalities are required to be notified by all potential applicants for cannabis retail licenses between 30 and 270 days prior to filing an application with NYS.
- The notification must contain a variety of info about the applicant, his/her business entity, proposed location, etc. (see 9 NYCRR 119.3).
- Upon receiving the notification, the muni has 30 days to submit comments to OCM explaining their support of or opposition to the application.
 - Muni can obtain a 30-day extension to submit comments if needed
 - This is a good opportunity to let OCM know about any specific local zoning regulations or state-level regulations that may apply to/prohibit the license from being issued.

Zoning & Planning for Cannabis Uses:

Uniformity in Zoning

What is Uniformity in Zoning?

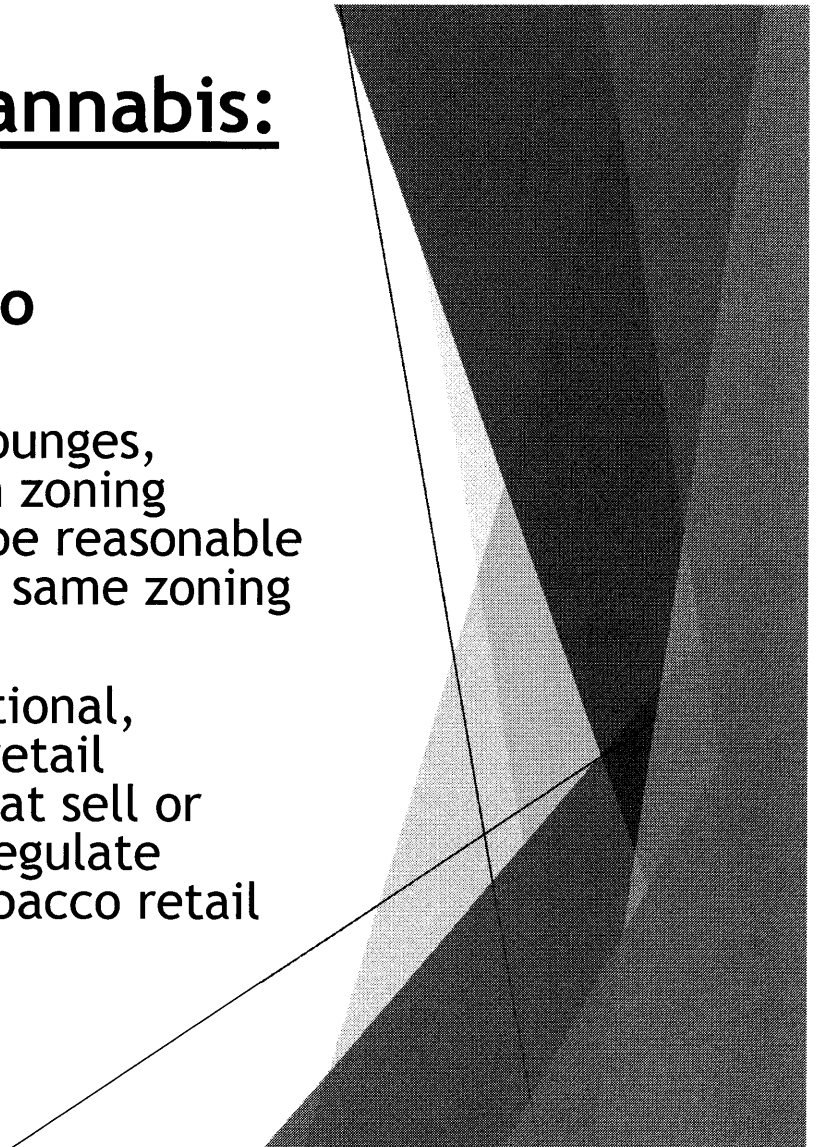
- ▶ The Town Law, Village Law and General City Law all state that a municipal board can divide the municipality into zoning districts “and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, structures or land. **All such regulations shall be uniform for each class or kind of buildings, throughout such district but the regulations in one district may differ from those in other districts.**”
- ▶ Courts have interpreted this statutory language to mean that “The uniformity requirement is intended to assure property holders that **all owners in the same district will be treated alike and that there will be no improper discrimination.** The likelihood of overreaching is thus reduced because the legislative body pre-approves the uses permitted in a district without reference to particular owners” (*Matter of Augenblick v Town of Cortlandt*, 104 AD2d 806, 814 [2d Dept 1984] [Lazer, J., dissenting], *revd. on dissenting mem.*, 66 NY2d 775 [1985]).
- ▶ That said, the uniformity requirement can be bent if the legislative record sets forth a reasonable basis for different treatment among similar parcels within a district.

Zoning & Planning for Legal Cannabis: Uniformity in Zoning

How Does Uniformity in Zoning Apply to Cannabis Retail Uses?

Example: If your zoning code allows bars, cigar lounges, tobacco/vape shops or liquor stores within certain zoning districts, subject to certain regulations, it would be reasonable for a licensed cannabis retailer to expect that the same zoning laws and regulations apply to them as well.

- **However**, if the legislative body can provide rational, evidence-based distinctions between cannabis retail establishments and other types of businesses that sell or serve intoxicating substances, it is possible to regulate cannabis retail uses differently than alcohol/tobacco retail uses.



Zoning & Planning for Legal Cannabis:

Potential Municipal Action Items

- ▶ Update zoning code and regulations to address cannabis retail uses, utilizing the express directives of 9 NYCRR part 119.
- ▶ Where part 119 doesn't give an express limitation, use zoning uniformity principles.
- ▶ Update no-smoking policies to cover cannabis
- ▶ Consider whether CIAA adequately addresses municipal concerns with respect to smoking cannabis in public
- ▶ If opposed to a particular application, utilize notification and comment period to notify OCM of your concerns.
- ▶ Visit <https://cannabis.ny.gov/> regularly to stay abreast of CCB meetings, regulations and additional guidance.

Questions?

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