

Empire State Cannabis Update: Municipality Opt-Outs Are Final—What Now?



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There has been a lot of talk about “opting out” since New York’s Marijuana Regulation and Taxation Act (MRTA) was passed on March 31, 2021. The MRTA set a deadline of December 31, 2021, for the state’s municipalities to decide whether or not they would allow adult-use cannabis retail dispensaries and on-site consumption lounges within their respective boundaries. If a municipality failed to opt out of both of these license types by the year-end deadline, it was automatically opted in for both and could not reverse such a decision. On the other hand, as long as a municipality affirmatively opted out by the deadline, it could change its mind at any time and opt in to retail dispensaries and/or on-site consumption lounges. See MRTA § 131(1).

Now that the deadline has expired, the results are in. According to the SUNY Rockefeller Institute of Government’s [Municipal Opt-Out Tracker](#), 692 of New York’s 1,520 municipalities resolved to prohibit retail dispensaries, while

790 municipalities banned on-site consumption lounges. Given that around half of the state's municipalities have affirmatively chosen to disallow cannabis sales within their borders, what does this mean for municipalities and cannabis entrepreneurs trying to build businesses pursuant to the Cannabis Control Board's (CCB) forthcoming license application process?

Opting Out

First, let's be clear about what opting out does and doesn't mean.

For municipalities, if a municipality has opted out that does not mean the use of cannabis by adults 21+ years old is prohibited. On the contrary, all opt-out means is that a dispensary or consumption site cannot operate within the municipality's borders. Effective immediately upon the passage of the MRTA, adults 21+ were permitted to consume cannabis at their homes and anywhere in public that smoking tobacco is permitted (except in their cars), and may have up to 3 ounces of flower or 24 grams of marijuana concentrate on their person without criminal penalty. See MRTA § 222.05. Further, as a result of a recent regulations published by the CCB, medical cannabis patients are permitted to participate in home cultivation of cannabis and adults 21+ will be permitted to do the same no later than 18 months after the first retail sales in the state go live. See MRTA § 222.15.

For potential licensees, an opt-out is not the death knell if you are seeking to operate a business other than a dispensary or cannabis lounge in the municipality. The MRTA makes clear that, with the exception of opting out of retail or on-site consumption, "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." MRTA § 131(2). Accordingly, municipalities that have opted out cannot also prohibit cultivation, nursery, cooperative, processor, distributor, microbusiness, or delivery licensees from operating within their borders.

Opting In

Just because a municipality has opted in does not mean it is automatically guaranteed a dispensary, on-site consumption lounge, or any type of adult-use cannabis licensed business for that matter (and the corresponding local tax revenue stemming from it). Instead, just like the hopeful adult-use license applicants, municipalities will be at the mercy of the CCB's application process, which intends to limit the number of licenses granted to ensure the success of the state's fledgling cannabis industry. A municipality's chances for an adult-use cannabis business are only as strong as the potential licensee applying for a license.

What does this mean in the short term? If you have not already done so, applicants and municipalities need to sit down with one another to discuss how to present the strongest application to the CCB. Simply put, it is in the applicant's and the municipality's best interests to prove that the applicant has the full support of and has integrated its business within the surrounding community.

This is no better exemplified than in MRTA § 76(1), which requires retail and on-site applicants to notify the municipality they intend to operate in no less than 30, but no more than 270 days prior to submitting an application that the applicant intends to operate its business within the municipality's limits. In response, the municipality is permitted to "express[] an opinion for or against the granting of such registration, license or permit application" and "any such opinion shall be deemed part of the record upon which the [Office of Cannabis Management (OCM)]

makes its recommendation to the [CCB] to grant or deny the application and the [CCB] shall respond in writing to such [municipality] with an explanation of how such opinion was considered in the granting or denial of an application.” See MRTA § 76(4).

This notification requirement and response process alone appears to give municipalities significant influence on the licensing of retail and on-site applicants. And while the notification requirement does not exist for the other types of licenses, this does not mean that the CCB will not consider a municipality’s position in conjunction with a licensing decision for a cultivator, nursery, cooperative, processor, distributor, microbusiness, or delivery license.

On the whole, the less familiarity an applicant and municipality have with one another, the weaker the application may be. With the large number of anticipated applicants, a municipality’s letter expressing its displeasure about an applicant could be the difference between receiving a license or not. Similarly, a letter of neutrality or simple support for an applicant is likely not enough to push an applicant over the line to secure a license as all strong applicants will have at least some community backing. The more the municipality can put its weight behind an applicant with a letter of support combined with a plan to help the applicant accomplish its goals, whether in its social equity or environmental impact plans, zoning, or community integration, the stronger the application will likely be.

Conclusion

If you are a representative of a municipality and feel strongly about securing a cannabis license in your village, town, or city as the case may be, if you have not already done so, make yourself and your fellow lawmakers available to discuss how your municipality can best support potential applicants. If you are a prospective adult-use applicant, introduce yourself to the decision-makers in your municipality, explain the goals of your business, review zoning, and discuss your social equity and environmental impact plans. With application season right around the corner, the sooner these conversations occur, the better off both municipalities and applicants will be. In the end, a successful application may, and most likely will, take a village.

Lippes Mathias’ [Cannabis Practice Team](#) will continue to monitor the developments in New York’s cannabis industry, including when adult-use regulations are published and when applications are expected to be released. If you have any questions, please contact one of our attorneys.

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