

Local Governments and Recreational Adult-Use Cannabis in New York State

Overview

On March 31, 2021, New York State enacted the Marijuana Regulation and Taxation Act (MRTA), which, among other things, legalized recreational adult-use of cannabis in New York. The legislative intent of MRTA was to regulate, control and tax cannabis, generate significant new revenue and make substantial investments in the communities and people most impacted by cannabis criminalization.¹ For example, MRTA expunged the criminal records of many low-level marijuana offenders and offered these individuals entrepreneurial opportunities within the cannabis industry. Now, more than two years after its passage, some retail cannabis locations are open for business, with new locations opening every few weeks in recent months.

The implementation of MRTA and the operation of an adult-use cannabis market presents new and unique issues for local governments, particularly for the cities, towns and villages that will have marijuana retail dispensaries and consumption sites located within their jurisdictions. The purpose of this report is to provide a brief background on MRTA and an overview of the financial and operational implications the Act may have for local governments as the industry develops.

Background

Upon the passage of MRTA, New York became the 15th state in the nation to legalize the recreational use of cannabis.² MRTA regulates the lawful possession and use of marijuana for adults 21 and over and establishes a plan for the creation of a regulated and taxed industry for the growth, manufacture, delivery and sale of cannabis products.³

Even prior to MRTA, the State had amended the Penal Law in 2019, effectively “decriminalizing” the possession of small amounts of cannabis, thereby reducing the legal punishment and punitive damages associated with certain marijuana offenses.⁴ (As early as 2018, New York City had taken measures to shift its overall marijuana enforcement policies in an effort to reduce the number of arrests made for individuals found to be publicly consuming marijuana.⁵) The State has also allowed cannabis to be used for medical purposes, through a State-run program, since 2014.⁶

Oversight and Regulatory Agencies

Among other things, MRTA created the Cannabis Control Board (CCB) and the Office of Cannabis Management (OCM).⁷ CCB serves as the approval and oversight body of the OCM and is responsible for approving the regulatory framework for New York’s marijuana industry, including issuing applications and licenses to cannabis businesses, per OCM’s recommendations. OCM is responsible for implementing the regulations adopted by CCB, including, but not limited to, the production, licensing, packaging, marketing and sale of marijuana, and processing of marijuana licenses.⁸

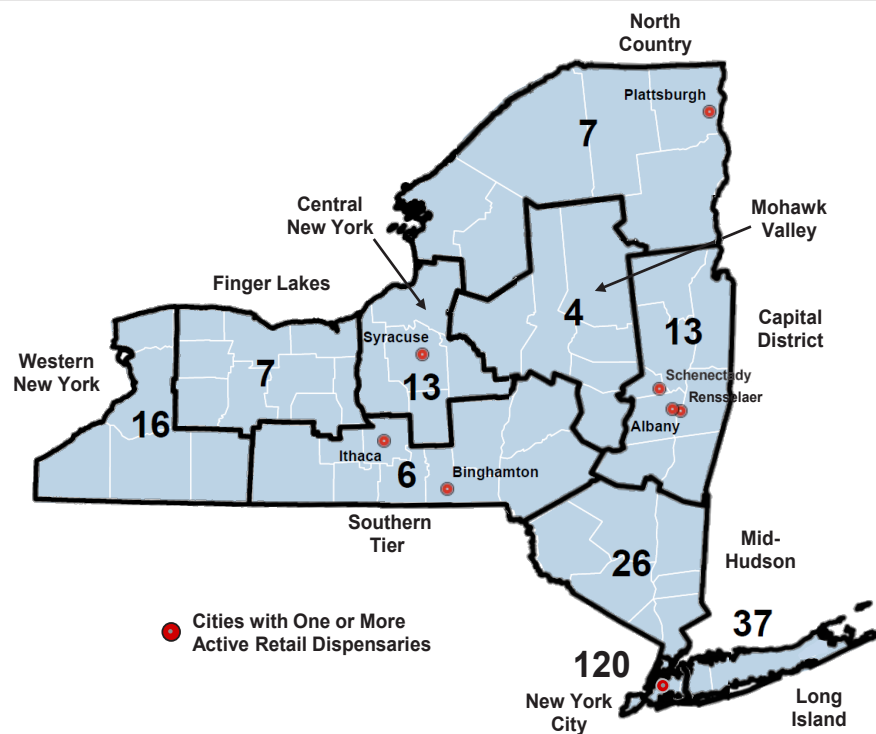
Conditional Licenses

Although regulations for some cannabis business licenses are still being finalized, conditional licenses are currently being issued for three types of marijuana businesses: cultivators, processors and retail dispensaries.⁹ OCM has issued nearly 280 conditional licenses to allow hemp growers to cultivate cannabis for the recreational adult-use market.¹⁰ In addition, 40 processors have been granted conditional licenses to distribute marijuana products to duly licensed adult-use retail dispensaries.¹¹ Both types of conditional licenses were originally set to expire on June 1, 2023, but were extended for an additional year, until June 1, 2024.¹²

Currently, OCM only grants Conditional Adult-Use Retail Dispensary (CAURD) licenses for retail distribution to business and nonprofit applicants that meet additional criteria meant to promote MRTA's social and economic equity justice goals.¹³ OCM provides all qualifying criteria for eligibility on its website.¹⁴

As Figure 1 shows, OCM has issued a total of 255 CAURD licenses as of the release of this report, concentrated largely in New York City and Long Island.¹⁵ A preliminary injunction stemming from a federal lawsuit filed in September 2022 temporarily enjoined OCM from issuing CAURD licenses in the Central New York, Finger Lakes, Mid-Hudson and Western New York regions. The injunction was narrowed in April 2023, allowing OCM to issue CAURD licenses in all regions with the exception of the Finger Lakes. On June 1, 2023, the court approved a settlement agreement that, among other things, terminates the injunction, and the case was dismissed.¹⁶

FIGURE 1
Number of Conditional Adult-Use Retail Dispensary Licenses Issued in New York State by Region



Source: New York State Office of Cannabis Management (OCM).

Notes: There are six licenses that have been awarded to operators for which a location has not been provided; therefore, these licenses are not included in the regional counts above. There are currently 15 active retail dispensaries in the State: eight in New York City and one each in Albany, Binghamton, Ithaca, Plattsburgh, Rensselaer, Schenectady and Syracuse. Of the active licenses, five offer temporary delivery only until a retail storefront is established.

So far, only 15 of these licensees are “active,” meaning the retail dispensary is open for business: eight in New York City and one each in Albany, Binghamton, Ithaca, Plattsburgh, Rensselaer, Schenectady and Syracuse.¹⁷

Local Government Impact

Opting Out

MRTA allowed towns, cities and villages to request that CCB prohibit the granting of retail dispensary licenses and/or on-site consumption licenses within their jurisdictions, by passing a local law, subject to permissive referendum, prior to December 31, 2021.¹⁸ (In the case of a town, requesting such a prohibition would only apply to the area of the town outside any village that did not pass such a law.) Once the deadline had passed, local governments could no longer request such a prohibition.

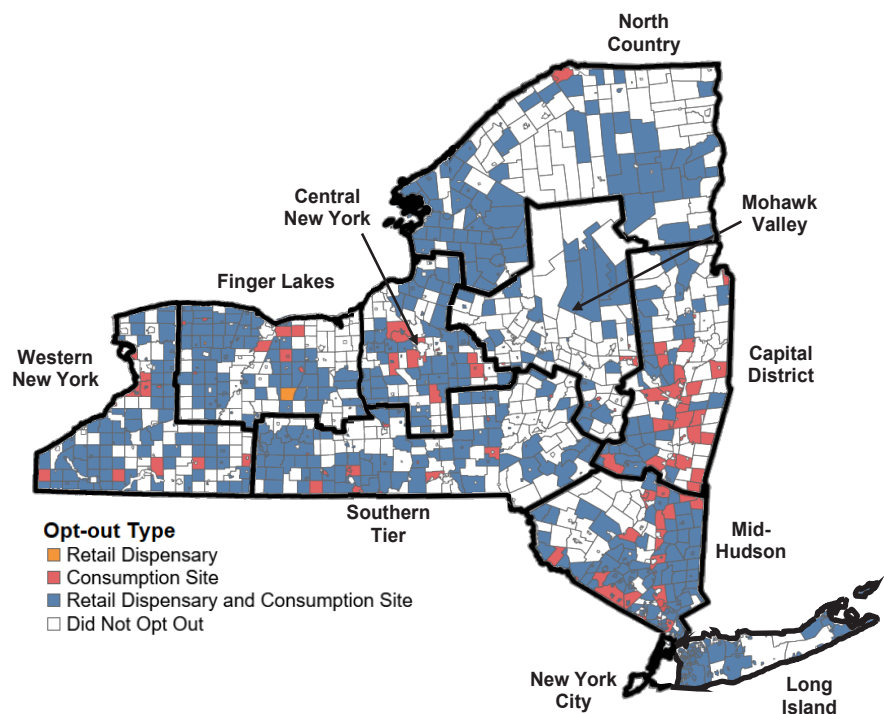
Municipalities that adopted local laws requesting to “opt out” before the deadline can opt back in at any time by repealing their local law. According to the Rockefeller Institute of Government, this limited opt-out window, as well as the lack of clarity on the licensing requirements and other rules and regulations for marijuana retail businesses, may have created an incentive for some communities to opt out in the first instance, pending further discussion or gaining a better sense of what the recreational marketplace would look like.¹⁹

As shown in Figure 2, more than half (845 out of 1,528) of municipalities in New York State opted out of hosting retail dispensaries or consumption sites, or both. Nearly 86 percent of these local governments opted out of allowing both types of cannabis businesses, although 118 (14 percent) opted out of hosting consumption only.²⁰

Regionally, Long Island had the highest percentage of municipalities that opted out (83 percent of total), followed by the Mid-Hudson region (71 percent); the Mohawk Valley region had the lowest percentage (30 percent). Opting out of consumption sites alone was particularly common in the Capital District, where 21 percent of all municipalities made this choice. New York City is a single market and an entire region and did not opt out.

FIGURE 2

Cities, Towns and Villages in New York State that Opted Out of Allowing Retail Dispensaries and/or Consumption Sites by Region

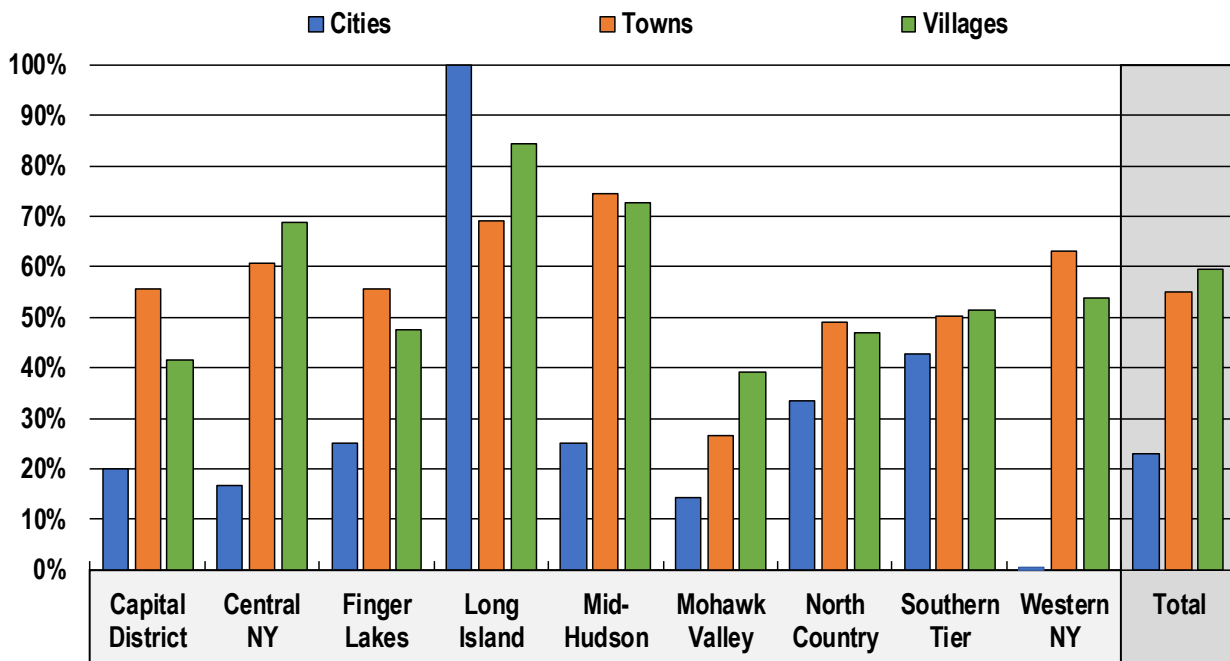


Source: OCM.

Notes: A municipality that opted out of allowing retail dispensaries and/or consumption sites before December 31, 2021 can, at any time, opt back in by repealing the local ordinance.

As Figure 3 shows, by type of local government, villages were most likely to opt out of at least one form of hosting (60 percent), followed by towns (55 percent), while cities were least likely (23 percent). Regionally, there is some variation to this. For example, all categories of local governments on Long Island had high opt-out rates (including both of its cities), whereas Western New York showed a particularly stark contrast between its cities (none of which requested to opt out) and its towns (over 60 percent of which requested to opt out).

FIGURE 3
Percentage of Municipalities in New York State that Opted Out of Allowing One or More Type of Cannabis Business by Class and Region



Source: OCM.

Notes: A municipality that opted out of allowing retail dispensaries and/or consumption sites before December 31, 2021 can, at any time, opt back in by repealing the local ordinance. New York City is excluded from the chart above because it is a single market that did not opt out of hosting any type of cannabis business.

Local Control of Cannabis Businesses

Except for the opt-out provisions discussed above, municipalities are preempted by the State from adopting any laws, rules, ordinances, regulations or prohibitions related to, among other things, the operation and licensure of adult-use cannabis businesses. However, cities, towns and villages may pass local laws and regulations governing the time, place and manner of operation of retail dispensaries and consumption sites, provided such law or regulation does not make the operation of such dispensaries or sites unreasonably impracticable, as determined by CCB. For instance, these municipalities can pass local laws and regulations pertaining to local zoning and the location of such cannabis businesses, the hours of operation and adherence to local building codes.²¹

Example of Local Zoning Regulations

The City of Binghamton in Broome County is home to the third operational licensed cannabis dispensary in the State and the first located outside of New York City.²² In October 2022, Binghamton amended its zoning ordinance to allow certain cannabis businesses to operate in certain zoning districts.²³ Generally, Binghamton's zoning ordinance classifies each cannabis business operating within its jurisdiction on the basis of its respective commercial activity, including retail (i.e., dispensary or delivery), on-site consumption, or industrial (e.g., cultivator, distributor and processor), and regulates the location of the business on the basis of its classification.²⁴ In other words, these regulations restrict where all or some of the cannabis businesses can operate within Binghamton.

For example, Binghamton's zoning ordinance prohibits cannabis businesses from operating in residential zoning districts, certain medical districts, and certain neighborhood office and commercial districts, and permits cannabis businesses (depending on their respective classifications) to operate in certain business, commercial and industrial districts.²⁵

Adult-Use Cannabis Tax and Revenue Distribution

MRTA imposes an excise tax on adult-use cannabis at every level of the distribution chain. Distributors pay a tax based on the number of milligrams of THC in the product. Two additional taxes are then imposed on the retail sale price, one for 9 percent (for New York State) and one for 4 percent (for local governments). All taxes eventually get reflected in the price paid by the consumer.²⁶ Taxes are remitted to the New York State Department of Taxation and Finance (Tax and Finance) on a quarterly basis.²⁷

Of the three excise taxes, the revenues from the 4 percent tax are distributed to the counties, cities, towns and villages in which the retail dispensary is located. Tax and Finance is responsible for certifying the amount of tax, penalties and interest attributable to retail sales of cannabis products within New York City and the counties outside the City and paying such amounts (less any amounts reserved for refunds and reimbursements) to the Office of the New York State Comptroller (OSC). In turn, OSC is responsible for distributing the local tax revenue to New York City and the counties, which it anticipates doing in the month following the end of the previous quarter.²⁸

Each county is entitled to retain 25 percent of the 4 percent excise tax, and within 30 days of receipt of such revenue, the county is responsible for distributing the remaining 75 percent to the cities (excluding New York City), towns and villages in proportion to the sales of adult-use cannabis products by retail dispensaries within such municipalities. If a town and a village within the town both allow adult-use sales, the county is responsible for distributing the revenue attributable to those sales to the town and village based upon the proportion agreed to by the town and village. If no such agreement exists, the county is required to evenly divide and distribute the revenue to the town and village.²⁹

As noted, there are currently 15 active cannabis retail dispensaries in New York. Since some of those dispensaries only recently opened their doors, the amount of local tax revenue generated from cannabis sales, thus far, has been minimal. However, tax revenues will increase as existing retailers begin to make sales and new establishments come online.

Looking Forward

New York's recreational adult-use cannabis industry represents a new legalized industry and, as such, its development is a complicated endeavor with many moving parts and participants. Both the timing and the magnitude of the financial, operational and societal impacts are unclear and merit close monitoring and a willingness on the part of all stakeholders to work together to ensure that the goals of the act are met and the benefits envisioned are realized.

Local governments that have not opted out may soon see new cannabis retail or consumption businesses now that regulations are in place and licenses are being issued. Local officials should be aware of the potential new challenges and benefits from these businesses, including the local tax revenue they generate, and familiarize themselves with their role in the process. OCM has information for local officials on their website, at <https://cannabis.ny.gov/local-government>. OSC will continue to monitor the effects of retail adult-use cannabis sales on municipal finances and to emphasize the importance of transparency throughout the continued growth of the State's legal and regulated cannabis marketplace.

For more information, guidance and additional resources on adult-use cannabis for local governments, go to OSC's website at www.osc.state.ny.us/local-government/resources/adult-use-cannabis-auc.

Notes

- ¹ Marijuana Regulation and Taxation Act (MRTA) § 2. The New York State Office of Cannabis Management (OCM) uses the term “cannabis” instead of the term “marijuana.” For more information, see “General Information,” at <https://cannabis.ny.gov/adult-use-information>.
- ² Luis Ferre-Sadurni, “New York Legalizes Recreational Marijuana, Tying Move to Racial Equity,” *New York Times*, March 31, 2021, at www.nytimes.com/2021/03/31/nyregion/cuomo-ny-legal-weed.html.
- ³ Laws of 2021, Chapter 92.
- ⁴ Laws of 2019, Chapter 131, amended certain provisions of the New York State Penal Law.
- ⁵ “Mayor de Blasio, Commissioner O’Neill Unveil New Policy to Reduce Unnecessary Marijuana Arrests,” *New York City Police Department*, June 19, 2018, at www.nyc.gov/site/nypd/news/pr0619/mayor-de-blasio-commissioner-o-neill-new-policy-reduce-unnecessary-marijuana-arrests.
- ⁶ Laws of 2014, Chapter 90, created, among other provisions, Title V-A in Article 33 of the New York State Public Health Law.
- ⁷ MRTA, Article 2, Section 7 and 8.
- ⁸ OCM, “About the Office of Cannabis Management,” at <https://cannabis.ny.gov/about-0>.
- ⁹ For more information on the cannabis business regulations that have been approved, or are currently being proposed, see OCM, “Proposed and Revised Rulemaking and Regulator History (All),” at <https://cannabis.ny.gov/proposed-revised-rulemaking-and-regulatory-history-all>.
- ¹⁰ OCM, “List of AUCC Licenses,” accessed on June 22, 2023, at <https://cannabis.ny.gov/adult-use-conditional-cultivator>.
- ¹¹ OCM, “List of AUCP Licenses,” accessed on June 22, 2023, at <https://cannabis.ny.gov/adult-use-conditional-processor>.
- ¹² Laws of 2023, Chapter 135, amended MRTA, Sections 68-c and 69-a.
- ¹³ MRTA § 87(1)(3).
- ¹⁴ OCM, “CAURD FAQ,” at <https://cannabis.ny.gov/caurd-faq>. Licensed retail cannabis operators are also granted “delivery authorization,” which permits them to, among other things, make delivery sales directly to cannabis consumers. For more information, see OCM, *CAURD: Delivery Guidance*, at https://cannabis.ny.gov/system/files/documents/2023/05/caurd-delivery-guidance_0.pdf.
- ¹⁵ OCM, “CAURD Licenses,” accessed on June 22, 2023, at <https://cannabis.ny.gov/conditional-adult-use-retail-dispensary>. There are six licenses that have been awarded to operators for which a location has not been provided; therefore, these licenses are not included in any regional counts.
- ¹⁶ *Variscite N.Y. One, Inc. v. New York*, 1:22-cv-1013 (GLS/DJS) (N.D.N.Y. Jan. 31, 2023). On June 1, 2023, a settlement between OCM and the plaintiff, Variscite N.Y. One, Inc., was approved by the federal court and the case was dismissed. According to the resolution, OCM agrees to issue one adult-use license to the plaintiff when those licenses become available, in exchange for the lawsuit being dismissed and the injunction being terminated, which allows the conditional adult-use cannabis retail dispensary licenses to be issued in the Finger Lakes region.
- ¹⁷ OCM, “Dispensary Location Verification,” accessed on June 22, 2023, at <https://cannabis.ny.gov/dispensary-location-verification>. Currently, 5 of the 15 active licenses offer temporary delivery only until a retail storefront is established.

Notes

- ¹⁸ MRTA § 131(1). The local laws prohibiting OCM from issuing retail dispensary and/or on-site consumption licenses are subject to permissive referendum.
- ¹⁹ Heather Trela, “To Opt In or Opt Out – That is the Question for NYC Municipalities,” *Rockefeller Institute of Government*, October 29, 2021, at <https://rockinst.org/blog/to-opt-in-or-opt-out-that-is-the-question-for-nys-municipalities/>. According to the tracking data, as of June 8, 2023, a total of 19 local governments have either passed a referendum that reverses their initial opt out, or voters overturned the opt out, for allowing a retail dispensary and/or consumption site, of which 11 of them did so after the legal deadline. For more information, see “Marijuana Opt-out Tracker,” at <https://rockinst.org/issue-areas/state-local-government/municipal-opt-out-tracker/>.
- ²⁰ OCM, “OCM Local Opt Out Data,” accessed on June 8, 2023, at <https://cannabis.ny.gov/ocm-local-opt-out-data>.
- ²¹ MRTA § 131(2). For more information on Local Control and Preemption, see OCM, *What is in the Law: Local Governments*, at <https://cannabis.ny.gov/system/files/documents/2021/09/cannabis-management-fact-sheet-9-21-local-government-06.pdf>.
- ²² “Mayor Kraham Announces First Retail Cannabis Location,” *City of Binghamton*, February 8, 2023, at www.binghamton-ny.gov/Home/Components/News/News/279/15.
- ²³ Ordinance No. 022-142 amending the Code of the City of Binghamton, Chapter 410.
- ²⁴ Chapter 410 of the City of Binghamton's Code.
- ²⁵ Ordinance No. 022-142 amending the Code of the City of Binghamton, Chapter 410.
- ²⁶ Tax Law § 493. For more information on the State and local taxes imposed on sales of adult-use cannabis, see OCM, *What is in the Law: Taxation and Revenue*, at <https://cannabis.ny.gov/system/files/documents/2022/04/cannabis-management-fact-sheet-taxation-03.pdf>.
- ²⁷ Tax Law §§ 493 and 495.
- ²⁸ OSC anticipates that most of the revenue associated with these payments will be distributed in January, April, July and October after adult-use cannabis retailers have filed their quarterly tax returns and remitted payment of taxes due to the New York State Department of Taxation and Finance. However, distributions may be made in other months, depending on when returns are filed.
- ²⁹ Tax Law § 496-b(2) and OCM, *What is in the Law: Taxation and Revenue*.

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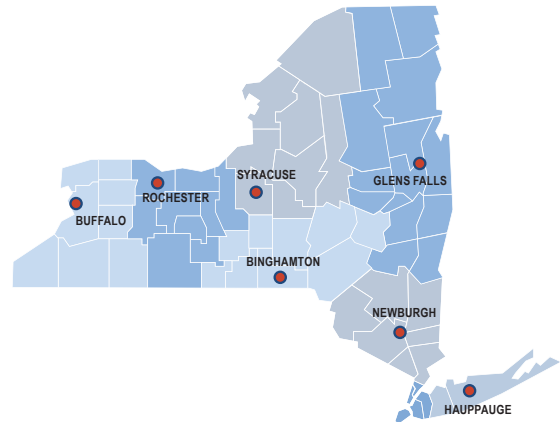
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