



# Get on the Ban Wagon

## Local Cannabis Opt Outs

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New Jersey's election of Phil Murphy as governor has ushered in a 'green rush' of marijuana entrepreneurs anticipating a dramatic expansion of the Garden State's legal marijuana market.<sup>1</sup> A Quinnipiac University poll, conducted in Sept. 2017, revealed that 59 percent of New Jersey residents approved of marijuana legalization.<sup>2</sup> Murphy, who had campaigned on a promise to sign a recreational marijuana bill within his first 100 days in office, joined a Democrat-led, marijuana-friendly Legislature, where Senator Nick Scutari had freshly re-introduced a legalization of recreational marijuana bill.<sup>3</sup> The conventional wisdom was that the out-bound Governor Chris Christie, a vocal marijuana opponent whose administration had frustrated the implementation of the Compassionate Use Medical Marijuana Act (CUMMA), was the only barrier to a robust medical marijuana program and a recreational-use law. With the arrival of the new administration, the New Jersey green rush seemed a *fait accompli*. Industry forecasters were projecting New Jersey to be the East Coast marijuana hub, with a potential for a \$1 billion market within a few years following legalization.<sup>4</sup>

Meanwhile, a quiet backlash was underway that would seem to belie the polling data. Many of the state's local governments, concerned about the prospect of recreational marijuana businesses seeking to conduct operations in their communities, began to enact anticipatory opt-out ordinances. Between Dec. 2017 and late June 2018, at least 18 of the state's municipalities passed local laws banning recreational marijuana businesses from operating within their borders.<sup>5</sup> Another six municipalities have commenced the process toward similar bans. Two more municipalities as well as three coun-

ties—Monmouth, Ocean and Cape May—have passed resolutions condemning or opposing marijuana in some form.<sup>6</sup> Conversely, only three municipalities have signaled their intention to accommodate marijuana businesses.<sup>7</sup>

Organizations seeking to establish alternative treatment centers (ATCs) under New Jersey's existing medical marijuana program have not fared much better. From Oct. 2011 to early 2012, the zoning boards of Maple Shade, Upper Freehold, Westhampton, Plumsted, and Jackson rejected requests from the state's six licensed ATCs to locate their cultivation and/or dispensary facilities within their borders.

### Local Opt-Outs in Other States

State and local conflict on marijuana is certainly not novel to New Jersey. Even in states with broad public support for legalization there are many towns that do not welcome marijuana growers, processors, testing facilities or dispensaries. As states with more developed legal marijuana programs have been grappling with this issue over recent years, a new legislative paradigm is emerging—the 'local option.' These states have included express language in their marijuana legalization laws to provide dissenting localities a path to 'just say no' to commercial marijuana activity. Washington, Oregon, California, Alaska, Nevada, Arizona, Michigan, and Massachusetts have all enacted some variation of the local option.

#### Washington State

Washington State encountered a slew of local opposition when it first legalized adult use via voter Initiative-502 in 2012. I-502 was completely silent on local authority, and many towns passed bans on marijuana businesses as has been seen in New Jersey. Hopeful retailers faced with local opposition responded with a series of lawsuits. Since the initia-

tive was modeled on the state's liquor laws, which explicitly allowed cities and counties to 'go dry,' supporters of the local bans argued they should be allowed to create 'green-free' zones. The Washington attorney general, Bob Ferguson, intervened in these suits, arguing that I-502 did not preempt local opt-outs.<sup>8</sup> Washington courts consistently agreed.

The challenges stifled the full implementation of the program for more than a year, until the Legislature passed a fix bill with a compromise solution: Local governments may opt out, but only those that permit marijuana businesses are eligible to participate in the state tax revenue generated by the program.<sup>9</sup> The result is that Washington has experienced a consistent and steady growth in the program, averaging in excess of \$25 million in monthly excise taxes collected statewide since July 2016, despite several counties still electing to opt out.

#### Oregon

Oregon has the longest track record of any constitutional home rule state permitting recreational use of cannabis. Oregon's enabling legislation, ORS 475B, contains an explicit robust local option that permits localities to ban all marijuana businesses except testing labs. The Oregon Health Authority has facilitated the opt-out process by publishing a simple one-page form to register its decision.<sup>10</sup> As originally envisioned, opt-outs under ORS 475B were only to be permitted in jurisdictions that received 55 percent support or less on the statewide adult-use ballot initiative, but this limitation was eventually dropped in the final bill. Instead, local governments that pass opt-outs are required to refer the ban to voters at the next general election. As of March of this year, a total of 80 cities and 16 counties (out of 36) in Oregon had passed bans, splitting the state dramatically between east (banned) and west (not banned).<sup>11</sup>

## Massachusetts

Likewise, in Massachusetts, home to the East Coast's first adult-use program, local opt-outs have become a popular response in the more conservative counties. Those tracking the measures note that the bans are so easy to pass on the local level that they are typically done with little notice or fanfare. A recent *Boston Globe* study showed that at least 189 of the state's 351 municipalities have barred dispensaries within community limits, and many of those have also banned cultivation and processing facilities.<sup>12</sup> The result is that many of the businesses looking to set up shop cannot find host cities, and the tax revenue that was expected to begin rolling in by July will be limited and delayed.

Notably, Massachusetts law is much more restrictive on local authority to limit *medical* marijuana businesses. This speaks to the importance of patient access to medical marijuana legislative policy.

## Michigan

Michigan is unique because it flips the script and requires affirmative local opt-in under the medical program, pursuant to its 2016 Medical Marijuana Facilities Licensing Act (MMFLA). This has proven to be more controversial than bans for adult-use facilities in other states because it has the potential of limiting the access of a sick patient who cannot travel long distances to visit a dispensary, especially in the more rural and conservative northern and western portions of the state. Furthermore, the opt-in structure allows local jurisdictions to pocket veto and squelch the establishment of businesses in their area without having to bring it for a vote. As of March of this year, the state of Michigan reported that 37 counties have passed opt-in ordinances, under half of the state's 83 counties.<sup>13</sup> Significantly, many of the state's major populous cities and counties have not yet passed

opt-ins, including Detroit, Grand Rapids, Warren, Sterling Heights, Ann Arbor, Flint, Dearborn and Livonia. As a result, many of the state's residents are in restricted zones.<sup>14</sup>

The jury is still out on the effectiveness and desirability of this arrangement, as the state is just now beginning to authorize and license marijuana businesses based on the 2016 bill. However, the percentage of localities deciding to opt out in Michigan and other states raises not only concerns regarding patient and consumer access, but also questions regarding the viability of these state programs.

## New Jersey's Response

How will Governor Murphy and the New Jersey Legislature address the state's recent spate of local marijuana bans? Will they be lured by the political expediency of the local option like other states, or seek to impose centralized rules to achieve coherent geographic and demographic market penetration?

Many factors point toward New Jersey following a 'local-option' strategy. First, the state's home rule legal structure presents hurdles for Trenton mandates. Second, the language of existing and proposed marijuana laws offers little to those hoping for a judicial remedy to local bans. Third, the state's political tradition of local control and the practical realities on this subject suggest that any legislation broadly expanding New Jersey's marijuana industry will require an opt-out right as a condition of passage.

## New Jersey Home Rule

As one of 14 'constitutional home rule' states, New Jersey's legal structure defers broad authority and independence to its 565 municipalities.<sup>15</sup> The constitutions of these 14 states expressly authorize municipalities to govern local affairs, delegate fields of power, and curtail the state's ability to limit or intrude upon such power.<sup>16</sup> These provisions are

self-executing, and no separate charter is typically required.<sup>17</sup>

In this regard, the New Jersey Constitution states:

The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The powers of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law.<sup>18</sup>

Of the 13 other constitutional home rule states, three—California, Oregon and Massachusetts—have legalized marijuana for recreational use. Notably, all three provide local governments with broad, express opt-out rights.<sup>19</sup> This development has drastically limited the permissible zones in those states where commercial marijuana activity may take place.<sup>20</sup>

New Jersey municipalities intending to exclude commercial marijuana activity from their borders have several options. They may seek to institute highly restrictive zoning requirements, impose burdensome regulations on the activity or ban commercial activity altogether, including through use of criminal penalties.

In order to foreclose such local express and effective bans, New Jersey statewide legislation must *preempt* the field.<sup>21</sup> Meeting the preemption test, however, is notoriously difficult. The New Jersey Supreme Court cautioned that preemption only exists when, "upon a survey of all the interests involved in the subject, it can be said with confidence that the Legislature intended to immobilize the municipalities from dealing with local aspects otherwise within their power...."<sup>22</sup> For

example, in *Expo, Inc. v. Passaic*, the superior court permitted the enforcement of a local obscenity ordinance against a go-go bar despite the enactment of a statewide obscenity law that included an expression of intent to preempt local ordinances. The court held that “[e]ven an expression of intent does not necessarily indicate that the entire field has been preempted by the State.” The court found the preemption to be limited to the field of obscene materials only.<sup>23</sup>

Local New Jersey zoning ordinances enjoy similar deference. New Jersey law provides that municipalities have wide discretion in determining what uses are suitable for each district, and need not provide for every appropriate use within the borders of the municipality.<sup>24</sup> There are limits, however, as seen in *Lusardi v. Curtis Point Prop. Owners Assoc.*, which involved an ordinance prohibiting recreational use of privately owned unimproved oceanfront property.<sup>25</sup> The Court held that “local planning decisions must be consistent with state policy concerning land use and resource allocation,” including for “recreational” use, and must “consider the welfare of all the State’s citizens, not just the interests of the inhabitants in the particular locality.”<sup>26</sup> Still, the Court heavily weighed the “unique character” of oceanfront property.<sup>27</sup> Perhaps the same may not be said about the targeted sites of marijuana businesses.

### **CUMMA’s Treatment of Local Law**

CUMMA and its regulations do not include an express local option. Yet they do not impose any specific duties on localities to accept ATCs and would not likely meet the difficult standard required to preempt local bans. In fact, it could be argued that the CUMMA scheme is opt-out *permissive*. The statute itself, like Washington’s I-502, is largely silent on locating ATCs, and fails to expressly bar municipalities from hav-

ing a say.<sup>28</sup> Unlike laws in some states, it fails to enumerate use categories by which local governments must treat them (e.g., ‘industrial’ for cultivation facilities, ‘retail’ for dispensaries), or even impose nondiscrimination provisions.<sup>29</sup> Moreover, CUMMA regulations set forth that they “do[] not prohibit a political subdivision from limiting the number of [ATCs] that may operate in the political subdivision or from enacting reasonable local ordinances applicable to [ATCs.]”<sup>30</sup> CUMMA regulations further note that applications will be judged based, in part, on:

- “Written verification of the approval of the community or governing body of the municipality in which the alternative treatment center is or will be located;”
- “Evidence of compliance with local codes and ordinances including, but not limited to, the distance to the closest school, church, temple or other places used exclusively for religious worship or a playground, park or child day care facility from the alternative treatment center;” and
- “Community support and participation.”<sup>31</sup>

By requiring local support and evidence of compliance with local laws, CUMMA and its regulations effectively confer on local governments a ‘veto power’ over the placement of ATCs in their district.<sup>32</sup>

### **Local Rejection of ATCs and the State’s Failure to Respond**

CUMMA’s assertion of state policy helped clear the way for municipalities to rebuff ATCs and have contributed to the extended delay in implementing the program. To address this issue, in Jan. 2012, State Senator Declan O’Scanlon introduced a bill to designate ATCs under the Right to Farm Act, which would have precluded local zoning. Due

to political pressure against the measure, including the threat of a veto from former Governor Christie, the measure never materialized. “I will tell you very clearly that I will not...[force] municipalities to take these facilities,” he stated.<sup>33</sup>

Since then, few proposals along the lines of the O’Scanlon bill have surfaced as part of efforts to boost/reform the state’s struggling program. Governor Murphy’s Executive Order No. 6, signed in January, recognized that CUMMA’s implementation was “marked by significant delays, resulting in far fewer patients being served by the program than anticipated,” and charged the Department of Health with reviewing “all aspects” of the program, “with a focus on ways to expand access to marijuana for medical purposes.”<sup>34</sup> Nevertheless, the otherwise comprehensive report generated by the department sidesteps the thorny issue of local bans entirely.<sup>35</sup>

### **Current Recreational Use Proposals**

Most of the current recreational use proposals, for their part, do not appear to pursue a preemption strategy. In fact, two of the leading bills, S-830 (sponsored by Senator Nicholas Scutari) and A-1348 (sponsored by Assemblymen Reed Gusciora, Tim Eustace and James Kennedy), would *expressly codify* a local option.

Under S-830, local governments would have a year to pass an ordinance to ban marijuana businesses. Those that fail to do so would still retain the right to relegate the businesses to a discrete zoning district and impose time, place and manner restrictions.

A-1348, meanwhile, aims for a dense marijuana market, calling for the establishment of up to 400 dispensaries. The bill would further permit residents to domestically cultivate up to six plants. Nevertheless, A-1348 includes an opt-out scheme for commercial marijuana activity nearly identical to that in S-830. Further, unlike legislation in other opt-out states,<sup>36</sup> the bill would also permit

municipalities to prohibit home growing within their borders. The only aspect of the recreational use these bills seeks to carve out from local regulation is the criminalization of simple possession.

In lieu of preemption, both proposals pursue a Washington-style carrot-and-stick approach; they would reward *only* opt-in municipalities with a share of the tax revenue generated by the program.

### Tradition and Political Realities

Following the local option path on marijuana would be consistent with New Jersey's tradition of forceful local regulation at the intersection of commerce and morality. Paramus, for example, retains the toughest blue laws in the United States, even as it lies in one of the top 10 zip codes for retail sales in the country.<sup>37</sup> One of the Garden State's 32 'dry' towns, Ocean City, has an ordinance forbidding even bring your own bottle (BYOB) consumption of alcohol in restaurants.<sup>38</sup> Both of these ordinances, which are supported by local residents to preserve a certain moral quality of their towns, held firm in response to recent ballot initiatives aimed to repeal them.<sup>39</sup> A 2010 attempt by former-Governor Christie to advance legislation to preempt Paramus's blue laws failed in the face of bipartisan local opposition.<sup>40</sup>

Accordingly, Governor Murphy and other proponents of New Jersey marijuana expansion may have already made the calculation that preemption of local bans is politically untenable and an opt-out system, at least in the short term, inevitable.

The wisdom and effectiveness of such local bans has been called into question.<sup>41</sup> For example, in Ocean City's neighboring towns of Somers Point, Marmora and Strathmere, scores of bars and restaurants draw in the dry town's inhabitants, who must drive off the island for alcohol sales and BYOB dining options. Does this dynamic, even with its increased risk of driving under the

influence, achieve the desired effect of preserving the moral quality?

More pressing for the New Jersey green rush, how will an opt-out system bode for the development of New Jersey's nascent marijuana industry? If New Jersey experiences opting out on a wide scale, as has occurred in other similar states, will patients have sufficient access to medical marijuana? Will other New Jersey municipalities follow the lead of Pleasantville, which recently approved plans for a medical marijuana dispensary, while prohibiting the sale of recreational marijuana?<sup>42</sup> And what of New Jersey's prospects as the East Coast marijuana hub? ☺

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### Endnotes

1. Omar Sacirbey, Marijuana entrepreneurs already lining up for New Jersey's looming recreational market, *Marijuana Business Daily*, Dec. 13, 2017, accessed May 30, 2018.
2. Quinnipiac University Poll, Sept. 2017, accessed July 11, 2018, at [https://poll.qu.edu/images/polling/nj/nj09142017\\_N62bnmk.pdf/](https://poll.qu.edu/images/polling/nj/nj09142017_N62bnmk.pdf/).
3. Michael Catalini, Bill to legalize marijuana in NJ introduced in new session, US News Online, Jan. 11, 2018, accessed May 30, 2018; 2018 Bill Text NJ S.B. 830.
4. John Schroyer, New Jersey Rising? *Marijuana Business Daily*, Jan. 2018, p. 34.
5. Payton Guion, These 26 N.J. towns have taken a stand on legal weed. Are they for or against?, NJ.com, Advance Local Media. LLC, May 8, 2018, updated June 7, 2018, accessed, July 11, 2018; Kristie Cattafi, Lodi joins other New Jersey Towns in ban of legal weed sales, northjersey.com, June 20, 2018, accessed July, 11, 2018.
6. *Id.*
7. *Id.*
8. [- ions/whether-statewide-initiative-establishing-system-licensing-marijuana-producers.
  9. <http://lawfilesex.tleg.wa.gov/biennium/2015-16/Pdf/Bills/House%20Passed%20Legislature/2136-S2.PL.pdf>.
  10. <https://www.oregon.gov/oha/PH/DISEASES/CONDITIONS/CHRONIC/DISEASE/MEDICALMARIJUANAPROGRAM/Documents/ommp-local-option-form.pdf>.
  11. \[https://www.oregon.gov/olcc/marijuana/Documents/Cities\\\_Counties\\\_RMJOptOut.pdf\]\(https://www.oregon.gov/olcc/marijuana/Documents/Cities\_Counties\_RMJOptOut.pdf\).
  12. <https://www.bostonglobe.com/metro/2018/03/16/recreational-marijuana-companies-face-bans-moratoriums-most-mass-cities-and-towns/VZVpZpjpNggWuynQ45gQSJ/story.html>.
  13. \[https://www.michigan.gov/documents/lara/Municipality\\\_Opt-In\\\_Spreadsheet\\\_2-16-18\\\_614253\\\_7.pdf\]\(https://www.michigan.gov/documents/lara/Municipality\_Opt-In\_Spreadsheet\_2-16-18\_614253\_7.pdf\).
  14. \*Id.\*
  15. Steven M. Wise et al., The Power of Municipalities to Enact Legislation Granting Legal Rights to Nonhuman Animals Pursuant to Home Rule, 67 \*Syracuse L. Rev.\* 31 \(2017\).
  16. \*Id.\*
  17. \*Id.\*
  18. N.J. Const. art. IV, § 7, para. 11.
  19. See, e.g., Dan Adams and Margeaux Sippell, Pot shops face bans in most of Mass, BostonGlobe.com, Boston Globe Media Partners LLC, March 17, 2018, accessed June 1, 2018.
  20. It should be noted that these states permit local governments to opt out of commercial marijuana activity only. This activity includes the cultivation, processing, transportation, testing, labeling, and sale and purchase of marijuana subject to state regulation. Residents of opt-out localities remain free to travel intrastate to purchase marijuana. No state has yet countenanced the](http://www.atg.wa.gov/ago-opin-</a></li></ol></div><div data-bbox=)



- “re-criminalization” of simple possession on a local level. Robert A. Mikos, *Marijuana Localism*, 65 *Cas. W. Res. L. Rev.* 719 (2015).
21. *Mack Paramus Co. v. Paramus*, 103 N.J. 564, 578, 511 A.2d 1179, 1187 (1986), applying the five-part pre-emption test formulated in *Overlook Terrace Management Corp. v. West New York Rent Control Bd.*, 366 A.2d 321 (N.J. 1976).
  22. *Mack Paramus*, citing *Summer v. Tean-neck*, *supra*, 53 N.J. at 535.
  23. *Expo, Inc. v. Passaic*, 149 N.J. Super. 416, 421, 373 A.2d 1045, 1048 (Super. Ct. 1977).
  24. *Lusardi v. Curtis Point Prop. Owners Assoc.*, 86 N.J. 217, 226-27, 430 A.2d 881, 886 (1981), citing *Fanale v. Borough of Hasbrouck Heights*, 26 N.J. 320, 325 (1958).
  25. 86 N.J. 217, 226, 430 A.2d 881 (1981).
  26. 430 A.2d at 886; Municipal Land Use Law, N.J.S.A. 40:55D-2(g).
  27. 430 A.2d at 886-887.
  28. In fact, it is arguable that CUMMA fails even to preempt municipalities from passing ordinances banning “CUMMA-lawful” possession of medical marijuana by registered patients. It fails to expressly prohib-
  - it localities from doing so and N.J. Stat. § 24:6I-6 merely exempts from prosecution activity criminalized only by other *state* statutes.
  29. *Compare, e.g.*, Pennsylvania Medical Marijuana Act, 35 P.S. § 10231.2107; 28 Pa. Code § 1141.49.
  30. N.J. Admin. Code §§ 8:64-7.5 and 7.9.
  31. N.J. Admin. Code §§ N.J.A.C. 8:64-6.2 and 7.1.
  32. ATCs are required to provide “written verification of a municipal government body in which the ATC will be located. As with other facilities the Department licenses, it is the responsibility of the ATC to work with the local governing body in the municipality they are seeking to locate. Evidence of compliance with local codes and ordinances is also required prior to issuance of a permit.” New Jersey Department of Health website, ATC FAQs, accessed June 2018, [http://www.nj.gov/health/medical/marijuana/atc\\_faqs.shtml#10](http://www.nj.gov/health/medical/marijuana/atc_faqs.shtml#10).
  33. Lukas K. Murray, *Neighbors blunt about Medicinal marijuana dispensary plan*, *Courier Post Online*, Jan. 16, 2012, accessed June 1, 2018.
  34. New Jersey Executive Order No. 6 (2018).
  35. NJ Health Executive Order 6 Report, March 23, 2018, accessed June 1, 2018, at [http://www.state.nj.us/health/medicalmarijuana/documents/EO6Report\\_Final.pdf](http://www.state.nj.us/health/medicalmarijuana/documents/EO6Report_Final.pdf).
  36. J. B. MacKinnon, *America’s Last Ban on Sunday Shopping*, *The New Yorker*, Conde Nast Digital, Feb. 7, 2015, accessed May 30, 2018.
  37. J.B. MacKinnon, *America’s Last Ban on Sunday Shopping*, *The New Yorker*, Conde Nast Digital, Feb. 7, 2015, accessed May 30, 2018.
  38. Kathleen O’Brien, *What it means to be one of N.J.’s 32 “dry” towns*, *NJ.com*, Advance Local Media LLC, Dec. 21, 2016, accessed May 31, 2018.
  39. MacKinnon, *supra*, note 29; Ted Sherman, *Ocean City voters decide: No shirts, no booze, no problem*, *NJ.com*. Advance Local Media LLC, May 8, 2012, accessed May 30, 2018.
  40. MacKinnon, *supra*, note 29.
  41. *See*, Mikos, *supra*, note 13.
  42. Vincent Jackson, *Pleasantville approves medical marijuana dispensary*, *The Press of Atlantic City*, BH Media Group, Inc., Aug. 8, 2018, accessed Aug. 9, 2018.