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COMMENTARY

Navigating Local Hurdles: Challenges Facing Cannabis Applicants in New Jersey

"Navigating New Jersey's evolving cannabis regulations poses substantial challenges for businesses, primarily due to municipalities' broad authority under CREAMMA," write Mandelbaum Barrett's Joshua S. Bauchner and Natalie C. Diaz.

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Marijuana

By Joshua S. Bauchner and Natalie C. Diaz | July 16, 2024 at 11:30 AM



New Jersey's Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA) allows for the sale, consumption, and possession of cannabis and cannabis products for individuals aged 21 and older. CREAMMA authorized municipalities to prohibit various cannabis uses by enacting ordinances within 180 days of the act's effective date of Feb. 20, 2021. Municipalities also can regulate the location, manner, and operational hours of cannabis establishments. This wide-ranging authority grants municipalities the power to set location and density requirements for cannabis businesses and reject applicants who do not meet their criteria. N.J. Stat. Ann. Section 24:6I-45. Despite state-level legalization, cannabis remains a Schedule I narcotic under the federal Controlled Substances Act (CSA). Existing alongside Article VI of the U.S. Constitution's Supremacy Clause, which establishes federal law as the supreme "Law of the Land," CREAMMA exemplifies a state regulatory framework where municipalities have greater control over cannabis regulation than the federal government.

Municipalities demonstrate local support for a proposed cannabis business by showing that the location is suitable for operations, as required for annual license applicants. This involves providing a resolution of local support (ROS) and a zoning determination letter confirming compliance with municipal zoning requirements and any granted variances. N.J. Admin. Code Section 17:30-7.10(b)(8)-(9). Thus, CREAMMA delegates significant regulatory authority to municipalities over cannabis establishments, as site suitability is a crucial factor considered by the New Jersey Cannabis Regulatory Commission (CRC) during license review.

Municipal Regulations and Challenges for Cannabis Businesses

According to the CRC, 208 out of New Jersey's 564 municipalities opted into the recreational cannabis market, each enforcing individual local ordinances regulating cannabis operations. These ordinances cover operational aspects such as time, place, and manner, and many municipalities impose further restrictions on the permitted classes of cannabis establishments and set limits on available licenses. Zoning regulations also dictate specific locations for cannabis businesses in relation to schools, day cares, houses of worship, and similar facilities.

Each municipality has the authority to establish its own licensing procedures. For example, the city of Paterson requires a non-refundable application fee of \$60,000 for non-residents. Paterson, N.J., Code Section 172-6(B)(6) (2022). Along with stringent zoning requirements, these fees pose significant challenges for cannabis applicants, particularly "social equity" businesses which must be majority-owned by either economically disadvantaged individuals or those with eligible

marijuana-related convictions. With many municipalities capping the number of ROS they will issue, and only a limited number opting to permit cannabis establishments, competition is fierce. “Social equity” applicants often face even greater difficulties due to financial constraints and are more likely to struggle with operational start-up costs and finding compliant properties. These obstacles further hinder their ability to enter and sustain themselves in the cannabis market.

Challenging Municipal Authority

Challenging municipal actions can be daunting due to the presumption of validity they carry. Appellate courts can overturn such decisions only if they are deemed “arbitrary, capricious, or unreasonable.” *Bryant v. City of Atlantic City*, 707 A.2d 1072, 1079 (N.J. Super. Ct. App. Div. 1998). This presumption is especially pertinent in cases involving cannabis establishments, given municipalities’ authority to enact ordinances under their police power, aimed at protecting public health, safety, and welfare. N.J. Stat. Ann. Section 40:48-2. Typically, challenges are pursued through actions in lieu of prerogative writs, arguing that an ordinance represents an arbitrary and unreasonable exercise of municipal authority. Ordinances enacted within this scope are presumed valid unless proven otherwise. This presumption can be rebutted by demonstrating that the ordinance lacks a substantial relation to the public welfare and should not be unduly discriminatory or exceed the public need. See, e.g., *Schmidt v. Board of Adjustment of Newark*, 88 A.2d 607, 612 (N.J. 1952); *Reingold v. Harper*, 78 A.2d 54, 58 (N.J. 1951). Municipal measures must avoid unnecessarily restricting personal or property rights beyond what is essential to achieve their intended public purpose. See, e.g., *Reingold*, 78 A.2d at 58; *N.J. Good Humor v. Bd. of Comm’rs of Bradley Beach*, 11 A.2d 113, 117 (N.J. 1940). Therefore, if a plaintiff fails to satisfy its heavy burden of showing that no set of facts could rationally support a finding that the ordinance served the public interest, then it likely will not succeed in challenging the ordinance in court.

In the context of cannabis regulation, the Appellate Division noted the absence of established legal precedent regarding municipal discretion in granting or withholding “local support” for cannabis license applicants under CREAMMA’s licensing framework in *Big Smoke v. Twp. Of West Milford*, 313 A.3d 77, 87 (N.J. Super. Ct. App. Div. 2024). In this case, the plaintiff sought approval for a Class 5 Cannabis Retailer License from the CRC. Initially, the Township of West Milford issued a zoning permit with conditions. Subsequently, Ordinance No. 2022-015 (the “Buffer Ordinance”) mandated a 2,500-foot separation requirement between cannabis retailers, impacting the plaintiff’s proposed location near another cannabis retailer, SoulFlora, which was less than 500 feet away. The township denied the plaintiff’s request for a ROS and, soon after, SoulFlora received CRC approval and a zoning permit.

Big Smoke sought injunctive relief arguing that the Township’s refusal to issue the ROS was unlawful. The trial court ruled against it, citing the potential for Big Smoke to apply for a ROS at a compliant location under the Buffer Ordinance without showing immediate, irreparable harm. On appeal, the court considered the township’s discretion under CREAMMA and related statutes, recognizing the broad regulatory powers afforded to municipalities. The court upheld the trial court’s decision, concluding that the township’s denial of the ROS based on the Buffer Ordinance was neither arbitrary nor unreasonable. Emphasizing municipalities’ authority under CREAMMA to establish location and density requirements for cannabis businesses, the Appellate Division affirmed the legality of the township’s actions.

In contrast, in *In re. Application for Med. Marijuana Alt. Treatment Ctr. for Pangaea Health & Wellness*, 243 A.3d 688 (N.J. Super. Ct. App. Div. 2020), the Appellate Division addressed issues surrounding the scoring methods used by the Department of Health for selecting alternative treatment centers (ATCs) for medicinal marijuana. The court determined that the scoring system allowed for too much variability and lacked transparency and integrity making it arbitrary and unreasonable. The decision provides municipalities with critical guidance to ensure their review processes withstand judicial and public scrutiny, forming the foundation upon which reviewing bodies should base their decisions.

Regarding the involvement of municipalities, applicants were required to demonstrate local community support as part of their applications to operate an ATC (ATCs gave way to adult-use operations). This included providing evidence such as approval from local governing bodies, descriptions of community ties, and plans for local engagement. Some applicants, including the successful one in question, submitted documents like letters of support from local officials and memoranda

of understanding with the municipality. The court noted comparisons to Massachusetts where Host Community Agreements (HCAs) between license applicants and local municipalities were required and considered valuable for expanding the medicinal cannabis program. It found no inherent ethical issue with New Jersey applicants having similar agreements, suggesting that such agreements could support program expansion rather than being viewed as unfair tactics.

Navigating New Jersey's evolving cannabis regulations poses substantial challenges for businesses, primarily due to municipalities' broad authority under CREAMMA to regulate locational and operational aspects aimed at protecting public health and welfare. This authority imposes significant hurdles for cannabis applicants, including stringent zoning requirements and limited license availability. While many applicants encounter hardship at the local level, litigation of these issues is daunting due to the high burden of proving arbitrariness and unreasonableness, alongside financial constraints associated with litigating these matters—especially on behalf of an entity which is not operational and has no cash flow. As the industry progresses, achieving a balance between local regulatory control and equitable market access, especially for “social equity” applicants, remains pivotal. The evolving cannabis framework in New Jersey underscores the intricate interplay between state mandates and local discretion, shaping the regulatory landscape the industry must navigate.

Joshua S. Bauchner *is a partner with the law firm of Mandelbaum Barrett and serves as the chair of the cannabis, hemp, and psychedelics practice group. His decades-long practice is heavily focused on litigation with a concentration in enforcement of commercial contracts, partnership disputes, and employment law. Contact him at jbauchner@mblawfirm.com.*

Natalie C. Diaz *is an associate at Mandelbaum Barrett where she represents cannabis business owners, with a concentration in regulatory compliance, commercial real estate, and corporate transactions. Contact her at ndiaz@mblawfirm.com.*

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