

## Bringing it all Back Home: Cannabis and Zoning

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### I. Introduction

New Jersey's recreational cannabis market is finally here and in full swing. As the market continues to grow, cannabis license applicants must consider how zoning will impact their contemplated business operations in any given New Jersey municipality. In short, although a license may permit you to operate a cannabis business, zoning will dictate where, when, and "how" - - that is, what conditions are attached to your operation.

To aid applicants in the real estate and zoning component of their businesses and cannabis license applications, this article broadly details the relevant zoning provisions of the Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA or the Act) and New Jersey's Municipal Land Use Law, the primary zoning legislation in New Jersey, together with issues that both applicant and lawyer alike should consider when applying to a land use board to obtain approval.

### II. CREAMMA, the MLUL, and Municipal Ordinances

Before CREAMMA was enacted, many New Jersey municipalities adopted ordinances that prohibited cannabis-related uses in anticipation of the legalization of recreational marijuana. CREAMMA, however, partially regulates the municipal zoning of cannabis uses as detailed below.

*First*, CREAMMA voids ordinances that prohibited cannabis uses adopted prior to the Act's effective date and required municipalities to act on cannabis uses within 180 days; no later than August 21, 2021. If a town failed to act at all within that timeframe, the consequence was significant: (1) the "growing, cultivating, manufacturing, and selling and reselling of cannabis and cannabis items, and operations to transport in bulk cannabis items by a cannabis cultivator, cannabis manufacturer, cannabis wholesaler, or as a cannabis distributor or cannabis delivery service shall be permitted uses in all industrial zones of the municipality;" and (2) "the selling of cannabis items to consumers from a retail store by a cannabis retailer shall be a conditional use in all commercial zones or retail zones, subject to meeting the conditions set forth in any applicable zoning ordinance or receiving a variance from one or more of those conditions in accordance with the [Municipal Land Use Law (MLUL)]." *NJSA 24:6I-45(b)* (emphasis added).

*Second*, CREAMMA further provides that if a municipality failed to act within that 180 day period, and consequently the foregoing cannabis uses were either permitted or conditionally permitted in industrial or commercial zones, the municipality could not revisit the regulation of

cannabis uses for five years, and that any future prohibition of cannabis uses could be prospective only. Any cannabis business that were either permitted or conditionally permitted because the municipality failed to act will be “grandfathered in.” *Id.*

A cannabis business that becomes an existing non-conforming use should be aware that Section 68 of the MLUL provides an additional layer of protection in that event. Under Section 68 of the MLUL, non-conforming uses existing at the time an ordinance that prohibits that use is enacted may be continued following the effective date of such an ordinance. Section 68 also provides that a prospective purchaser, mortgagee, or other interested person may apply for a certificate stating that the use in question existed prior to the adoption of the prohibiting ordinance either (1) within one year of the enactment of the ordinance to the municipal administrative officer; or (2) at any time to the board of adjustment. *NJSA 40:55D-68*. A business in this situation should also be aware that a future expansion of their then non-conforming business or use will require a (d)(2) variance. *NJSA 40:55D-70(d)(2)*.

*Third*, CREAMMA permits municipalities to prohibit some, but not all, cannabis uses. Namely, a municipality may prohibit all cannabis uses except for the delivery of cannabis and cannabis-related items within town limits. *NJSA 24:6I-45(b)*. Many municipalities chose to prohibit what they could. Some towns that were interested in permitting and regulating cannabis, however, found themselves in a nearly impossible scenario. Although CREAMMA gave municipalities 180 days to decide whether to prohibit or permit and regulate cannabis, the Cannabis Regulatory Commission (CRC) voted to adopt their rules effective August 19, 2021. That gave interested municipalities a mere two days to decide how to proceed after those regulations were adopted. Although not expressly spelled out in the text CREAMMA, the Act may be read to permit a town to first prohibit and then later amend or adopt a superseding ordinance that permits and regulates cannabis uses.

Thus, if an applicant is seeking to establish a cannabis business within a municipality that has prohibited cannabis uses, not all is lost. Corresponding with municipal officials about the feasibility of re-zoning or a (d)(1), use variance would be prudent in that event. Moreover, cannabis license applicants need to provide proof of support from a municipality regarding their proposed business, so, as with many other commercial zoning applications, conferencing with municipal officials should be considered part and parcel of a cannabis zoning application as well.

*Fourth*, for municipalities that do choose to permit cannabis uses, CREAMMA provides that towns may regulate cannabis establishments with ordinances “governing the number of cannabis establishments, distributors, or delivery services, as well as the location, manner, and times of operation of establishments and distributors, but the time of operation of delivery services shall be subject only to regulation by the commission.” *NJSA 24:6I-45(a)*.

These regulations may impact an applicant’s site selection for their cannabis business. Consider the Borough of Raritan, which conditionally permits alternative treatment centers (ATC), for an example of “time, place, and manner” regulations. In Raritan, an ATC may not be located within 1,500 feet another ATC, within 500 feet of a day care, child-care center, nursery school, drug or alcohol rehabilitation center, public park or public pool; nor within 1,000 feet of a public, private or special education elementary or secondary school property. *Raritan Borough Code*, § 207-138.1(C)(3).

*Fifth*, CREAMMA created the concept of “Impact Zones.” In brief, Impact Zones are areas that the Legislature determined were most impacted by prior enforcement of criminal drug laws. A business proposed in an Impact Zone receives priority treatment during the licensing application process. *NJSA 24:6I-36(e)(1)*. The list of Impact Zones is available at the CRC website. Although not all municipalities have “opted in” to permit cannabis businesses, those municipalities that have done so and are located in an Impact Zone are worthy of particular consideration during the site-selection process in light of the priority treatment those license applications will receive.

### III. Cannabis Businesses and Board Hearings

Although CREAMMA adds an additional layer of zoning regulations over the MLUL, a land use application for a cannabis business is, at the end of the day, a land use application for a commercial business. Applicants should be prepared to answer routine land use and planning concerns about parking, traffic, lighting, security, trash removal, signage, etc. The following is a non-exhaustive list of items cannabis applicants should consider when preparing for a zoning or planning board meeting, with an emphasis on a proposed retail operation. Of course, preparation for these answers will depend on an in-depth review of the relevant zoning and site plan design ordinances. Applicants should also be aware that many of the items raised below must be addressed in a cannabis license application as well.

#### *1. Parking, Deliveries, Loading, and Traffic.*

Whether a proposed business has a compliant number of parking spaces is a routine aspect of any land use application. Applicants should also be prepared to testify how deliveries will be handled at the site. Applicants should consider if the site has at least one designated loading zone and whether deliveries will be handled through a door other than the front entrance. Applicants should also know what size vehicles will be providing deliveries, and at what times.

#### *2. Security, Lighting, Site Details, and Hours and Details of Operation.*

Applicants should be prepared to detail how security will be handled at the site. Many towns require that a lighting plan be prepared and submitted in connection with a site plan application. Applicants should also be ready to testify about the basic details of their operations, including, without limitation, the number of employees, business hours, trash removal and dumpster locations at the site, and anticipated customer volume at various times (mornings, afternoons, nights, weekdays, and weekends). Applicants should also be prepared to identify basic site details such as landscaping, lighting, and any buffering.

#### *3. Notice.*

While a full description of what Section 12 of the MLUL requires is beyond the scope of this article, applicants should be aware that legal notice is a jurisdictional requirement for a land use board to consider an application. The notice must be advertised in a newspaper and to all property owners within 200 feet of the site at least ten days in advance of the hearing date. An applicant’s notice should take care to describe the location of the

proposed site, the proposed use and any details that may bear on the intensity of the use, the date, time, and location of the hearing (including video conferencing and telephone dial-in details for a virtual meeting), how and where application materials may be viewed by the public, as well as a description of any variances that are being requested. NJSA 40:55D-12.

#### *4. Signage.*

Finally, applicants should be aware that municipalities (and some landlords) regulate signage and that deviations from a sign ordinance will require a variance. Applicants should work with their sign professional and review the relevant ordinance when preparing a signage plan.

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