

## Episode 18: “Effects of the MRTA on Municipalities and Operators, Featuring Corey Auerbach”

Speakers: Aleece Burgio, host, Barclay Damon, and Corey Auerbach, partner, Barclay Damon

**[Aleece Burgio]** Hey, everyone, this is a Barclay Damon Live broadcast. You’re listening to The Cannabis Counselor, and I’m your host, Aleece Burgio. Let’s get into it.

**[AB]** What’s up, everybody? This is Episode 18 of The Cannabis Counselor. I’m your host, Aleece Burgio, and today we’re going to be talking with Corey Auerbach. He is a partner here at Barclay Damon. He’s the co-chair of the Land Use And Zoning Practice Area. And he’s also a member of the Cannabis Service Team. So Corey is going to kind of take us through the effects of the legislation of the Marijuana Regulation Taxation Act on both municipalities and on operators. So stay tuned.

**[AB]** ] Corey, thank you so much for joining in with The Cannabis Counselor, Episode 18. How are you doing today?

**[Corey Auerbach]** Doing great. Thanks so much for having me. A longtime listener, first time caller, so great to be here.

**[AB]** ] And we’re absolutely stoked to have you here. Corey, we introduced you off-camera. Would you mind telling just the listeners what type of clients you’re representing here at Barclay Damon.

**[CA]** Sure, so I think you can classify them in two groups. So most of the time, we’re representing the industry, representing developers that have land use and zoning issues, siting issues, development approvals, permitting, things like that. And then we also represent some municipalities as special counsel, assisting them with land use and zoning and other related issues.

**[AB]** So that’s interesting. You want to break up industry applications, operators, versus what towns and municipalities need to know on the MRTA. Why don’t we transition first for the towns: What are some of the things as we’re waiting right now, right ... it’s the rules and regulations aren’t coming out for another couple of months. I think everyone’s kind of in this hype period where they’re excited about getting going, but there isn’t much to go off of yet. And everyone’s kind of being directed to local zoning regulations, talking with your legislators, your town planners, things like that. What should the towns and municipalities be doing to prep themselves at this date right now?



**[CA]** Yeah. So that's a great question. I think you hit the nail on the head. So the big issue that's being talked about in the municipal circles is whether a jurisdiction wants to opt out of the program for locating dispensaries and on-site consumption establishments within their jurisdiction. So I think municipalities need to take stock. They need to decide, are we a jurisdiction that wants to allow these, particularly the dispensaries and the on-site consumption establishments in our jurisdiction? (Which also means do they want to enjoy a share of the tax revenue) or do they not want to? And for those that do not want to participate, they can adopt a law by the end of the year, opting out, such that industry—if they want to come in on the retail side, and this is exclusive to dispensaries and on-site consumption—that they would not be eligible to receive licenses in that jurisdiction. On the other hand ...

**[AB]** ... Well, I was just going to say, you know, we've seen it already with Long Island. And this has been a big, contentious issue for the past three or four years. Long Island has kind of come out—as both a county and some of the local towns and villages, and things of that nature—saying, “We don't want it, not in our house.” But that doesn't necessarily mean that they won't be having other types of licenses, right, in their localities? So sorry, keep going, what were you going to say?

**[CA]** That's a great point. So, again, there will be licenses that allow people to engage in cultivation and processing, distributing or operating cooperatives, or micro businesses. This opt-out law does not relate to them. This is exclusive to the dispensaries and on-site consumption establishments. So on the other hand, if a jurisdiction is ready to welcome a dispensary or on-site consumption establishment in their jurisdiction, now would be a good time to be taking stock of their local zoning laws and make sure that if one of these opportunities arises, they are well-positioned to receive them rather than first starting to think about it when the application is made. So that's what I mean about taking stock. They really need to do some soul-searching. And when I say they I'm talking about villages, cities and towns, I'm distinguishing the counties here. They need to determine whether this is something they want or something they don't want. Now, what happens if they change their mind. So I mentioned that the opt-out law has to be adopted no later than December 31, 2021.

**[AB]** Mmhm.

**[CA]** You can always opt back in, but what you risk there is if you've opted out, you may miss an opportunity where someone wanted to locate within the boundaries of your jurisdiction, but because you opted out, even though you could opt back in, there's going to be a lot of choices. So if you're on the list of jurisdictions that opt out, dispensaries and on-site consumption establishments are just going to go to your neighbor, or to another town or city. So that's something that you want to be mindful of.

**[AB]** Yeah. Let's break that down a little bit. So these municipalities have until the end of the year, and I think it's a ... battle to determine whether or not they want to opt or opt out, obviously, two episodes ago, we listened to Eddie Sundquist, the mayor of Jamestown. He was one of those town officials who took a step forward, says we are opting in, we are cannabis friendly. They're prepping themselves. They're getting together with utility companies, with town planners, with their council, trying to make



sure that they're cannabis friendly. Now, for the ones that aren't, right, the ones that are seriously considering and maybe doing this kind of like, I want to call it, dipping their toes in. They're not totally ready for it right now, but by the end of the year, they're not totally sure they want to be in it. I think they're going to miss it, right? They're going to be able to opt back in, but most likely they might miss the first round because, as we know from previous episodes, the applications are anticipated for May, June of 2022. And so what that means is, yes, they can opt out by the end of the year, but there's processes that need to go into place for them to opt back in. And if they missed that first round, we don't know when the next round is going to be. It could be in a year. It could be in two years, three years. And so we're not just talking about this first 2022 year of revenue. We could be talking about missed revenue up until 2025, 2026.

**[CA]** Yeah. That's what it comes down to is the lost revenue. There's a really big fiscal implication associated with this. I think that the local government that hosts one of these facilities gets up to 3% of the tax revenue from the sales tax associated with the sales within their jurisdiction. So that could be a pretty significant number. And you don't want to miss out on that opportunity. Now, you noted that there's already been some jurisdictions, particularly in Long Island, where they've adopted laws prohibiting either dispensaries or paraphernalia or other things. It's important to note that, to the extent those laws were adopted before the MRTA, they will be ineffective to serve as an opt-out. So any of those jurisdictions would need to adopt a new law before the end of the year in order to formally opt out. So that's something that municipalities should be mindful of when considering where they fall on this issue.

**[AB]** Now, what do they have to do if they want to opt back in? Is there some sort of requirement that these municipalities will have to do as their voter participation?

**[CA]** Great question. So, procedurally to opt out of this requires the adoption of a local law. And whether you're in a city, town or village, the local law is subject to a permissive referendum. And we could probably do a whole podcast on permissive referendum, but what that means essentially is once the law is adopted, it doesn't go into effect for a certain period of time. And if a certain number of electors in that jurisdiction file a petition, a proposition will actually be placed on the ballot for the voters to determine whether or not they are for or against opting out. And if they vote against opting out, that law would not go into effect. If they vote for opting out, then the law would go into effect at that time. Similarly, you would have to adopt a local law to adopt back into the program with similar procedural requirements and would just make a note to the municipalities out there that you do have to comply with the state Environmental Quality Review Act and other procedural requirements that would be associated with any other municipal action.

**[AB]** I know, when you think about that, we're talking about so many different municipalities having to do this process. None of them are going to be in the same timeline. You know, they're all going to take their own time and doing propositions, doing these permissive referendums, and that's hoping that, that all gets done in a timely fashion before applications open. If that proposition is voted on, and the new law is shot down, hopefully that's happening before all the new applications and operators are ready to submit. And you and I kind of know this; we've worked on multi-state applications, and you're usually the one that's analyzing our real estate for those operators. But when we're doing that research, we're always looking at every single zoning code, every type of regulation that we can get our hands on because we stay very, very far away from anyone that has anything that's anti-marijuana ... because it's just going to be a pain. Why go there when you can go somewhere else? Right?

**[CA]** Exactly. Exactly, and my approach to this is the same as it is for all development, which is a municipality should really be taking stock of how they want to see the future of their jurisdiction



developed. Because you don't want to miss an opportunity when one comes knocking because you weren't prepared to receive it. If somebody's ready to strike, they want to be able to put a shovel in the ground, they don't want to have to wait and see whether or not they're going to be able to bring forward their permitted use. So it's definitely an issue. And you and I have done tons of due diligence together when we come up against something on behalf of the industry that may not be favorable because there are so many opportunities, they will just pass you by and go somewhere else.

**[AB]** Exactly. If there is any hint or whiff of negative connotation to marijuana and your locality, there's a zillion other ones to go to, especially now that it's not county-based. I mean, we're talking about going exactly right to the town over, and doing the exact same thing. So that's going to be a very interesting topic for the municipality, the towns, villages, cities that are going to have this opportunity before the end of the year. Transitioning out to your other point about the other kind of category people here represent, which is like the operators—as an operator, for example, say, I'm a potential retail store, and right now I'm getting my ducks aligned. I'm ready to start talking to an attorney. What are things that I need to be mindful of in this whole process while I look for real estate, while I analyze where I want to be for ... up to three retail stores, right? Part of the legislation is that any retail operator has an opportunity of three locations. So what are some things, for somebody who might not be in the city that they want to have one of the other stores in, what should I be looking for?

**[CA]** Yeah. So on the front end, as you're doing your land use due diligence or your zoning or real estate due diligence, there are definitely some things that you want to be mindful of. The first ones that come to mind is there are going to be siting requirements that are, they're really not dissimilar from what you might see from the State Liquor Authority, for a bar or for a liquor store, where you can't locate within 500 feet of a school or 200 feet from a place of worship. So those are things that would eliminate, right off the bat, certain pieces of real property that we always look at when we're making siting choices. And, of course, local zoning is still going to apply. So there is somewhat of a preemption as it relates to operation and licensing, but local governments have been expressly reserved, their zoning authority as it relates to siting dispensaries and on-site operations. So you'll want to take a look at the zoning law. There might be special use permit requirements, or site plan approvals—so long as those laws don't unreasonably or ... make it unreasonably impracticable. That's actually the term of art that's using the MRTA.

**[AB]** That's a tongue twister!

**[CA]** Yeah. Those zoning laws and other regulations that relate to time, place, and manner restrictions are expressly reserved to the jurisdiction. Now, what makes operation unreasonably impracticable? We don't really know at this point. I mean, that's sort of a "wait and see." But you definitely want to be checking on the zoning regulations and see if there are other special use permits, site plan approvals, the same sort of considerations that you would have for any sort of retail establishment.

**[AB]** Yeah. That's interesting. Now these footage requirements, the 500 feet from school, playground, daycare, and then 200 feet from house of worship, is that also for other license holders, or is that more so just in the retail on-site consumption space?

**[CA]** Yeah. That's just for the retail for on-site consumption, for dispensaries, those are specifically



items where the jurisdictions can opt out of. Those are the things that we want to be mindful of for those restrictions.

**[AB]** You know, you and I have dealt with this more in the hemp space so far, because that's really where we've been. We've got a majority of these operators have been hemp operators before it's turned to adult use. And there's things that you come into issue with that when you're a production or processor that you probably won't have as big of an issue with, with retail or on-site consumption, because when you're a grower and you're a processor, the odor becomes a really, really big issue. And I'm not to say that, you know, a retail store might not have some odor emitting from it, but when you're growing in large scales, we could be talking about 100,000 square foot facilities ... Have you seen previously with other states kind of adopt odor regulations or light or sound or things like that, that is going to be part of the local approval process?

**[CA]** Yeah. We've definitely even seen that here in New York popping up as it relates to hemp producers. And what we're finding is that often people will resort to sort of common law nuisance theories, when there are issues of odor or light, that the issues really arise when incompatible uses are near each other. And what we see is people attempting to use sort of a nuisance theory to try to abate those issues. I haven't seen it really on a statutory level yet, but definitely from a common law perspective that these are going to be issues that we're going to be addressing. I think time will tell whether any of the regulations that we're expecting are going to touch on those sort of health and safety issues.

**[AB]** Yeah. And it becomes just a nuisance for operators, too, right? I mean, when you don't have a legislative ... in a written form, it's just this in length process that continues to not be rectified because it's a "wait and see" approach of well... is it a little bit better with this mitigation? Can we meet somewhere in the middle? As opposed to having concrete, written out, "You can only have this sound bite. You can only have this amount of odor," or a residency can't be this close to a facility, and things of that nature. What else should operators be thinking about as they kind of sit tight and wait for rules and regs, anything else?

**[CA]** You know, there's a lot of uncertainty right now, and I think that what's going to happen is a lot of that will be clarified with chapter amendments and regulations. So it's really a big "to be determined." And I think that there's going to be some time—you'd know better than me, Aleece. And I know we've talked about this before, but we're probably looking 2022, 2023 until we start seeing some of these, some of these operators come online and that'll give time in the interim for regulations in chapter amendments to clarify some of these issues.

**[AB]** Absolutely. And I think for those who are in the queue right now waiting patiently at their seats for these rules and regs to drop, and you're waiting for something to do, if you have a locality in mind, feel free to reach out to those councilmen, those town planners, and get a feel of where they're landing on this issue because they should be talking about it by now. The MRTA passed at the end of March. They have until the end of the year. This is a conversation that should be happening in every locality and municipality because people are prepping. And if you need help with any of those things, feel free to come to Barclay Damon, because we do do a lot of that work. And we're very excited to kind of see where adult use kicks off, and having those relationships with the municipalities to help them also figure out what they want to do. It's not just again what we said, it's not just operators. We are hyper-focused as well, on making sure that these towns, villages, and cities have the right plans in place to accept these operators. So it's kind of a joint deal. Thank you so much, Corey, for joining us. And is 18 a lucky number that you said, I can't remember?



**[CA]** 18! And I'm thrilled to be here for your 18th episode. That is "chai"—that means life. [Editor's note: The Hebrew word carries several meanings in the Jewish culture and religion.] So I'm pleased to be here for your 18th show.

**[AB]** Well, you and I are the light of everyone's lives. So, it's very good.

**[AB]** The Cannabis Counselor Podcast is available on YouTube, LinkedIn, Apple Podcast, Spotify, and Google Play. Like, follow, share, and continue to listen. Thanks.

*Disclaimer:*

*[AB] Just so everyone knows, this material is for informational purposes only and does not constitute legal advice or a legal opinion, and no attorney-client relationship has been established or is implied. Thanks for listening.*

