

Cannabis in New York: Legal Update and Local Planning Issues

presented by

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Cannabis: Local Zoning & Planning

A quick movie break:



<https://www.nytimes.com/2019/02/14/magazine/how-to-grow-hemp.html>
(image by Radlo)

Cannabis: Local Zoning & Planning

Federal - Marijuana vs. Hemp:

- ▶ “Marihuana” means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. (21 U.S.C.A. § 802)
- ▶ Does not include:
 - ▶ The mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination
 - ▶ Hemp

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Federal - Marijuana vs. Hemp:

- ▶ “Hemp” means the plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol [THC] concentration of not more than 0.3 percent on a dry weight basis (7 U.S.C.A. § 1639o)

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{sidebar}

- ▶ Cannabis Sativa vs. Cannabis Indica

- ▶ Sativa

- ▶ “Patients report that sativa varieties offer an uplifting effect, improve focus, and boost mental acuity while providing symptom relief.”

- ▶ Indica

- ▶ “Patients report that indica varieties work best for rest and relaxation. For those needing to unwind while managing symptoms, consider using indica products.”



Sativa Cannabis Leaf



Indica Cannabis Leaf

<https://anb.today/cannabis-sativa-vs-cannabis-indica-science-or-folklore/>

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New York: Marijuana vs. *Industrial* Hemp

- ▶ “Marihuana” means all parts of the plant of the genus Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin.
- ▶ Does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination.
(N.Y. Pub. Health Law § 3302)

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New York: Marijuana vs. *Industrial* Hemp

- ▶ “Industrial hemp” means the plant *Cannabis sativa* L. and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol [THC] concentration of not more than 0.3 percent on a dry weight basis.” (N.Y. Agric. & Mkts. Law § 505)

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TRIVIA QUESTION #1

- Which of these photos depicts hemp?



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History of Hemp Legislation

- ▶ **2014 Farm Bill**
 - ▶ Opened the door for States to authorize hemp cultivation
 - ▶ **Agricultural Pilot Programs**
 - ▶ Institutions of higher education or State Dep't of Agriculture
 - ▶ States must legalize hemp cultivation
 - ▶ For research purposes
 - ▶ **Required real property (hemp growing sites) registration with State**

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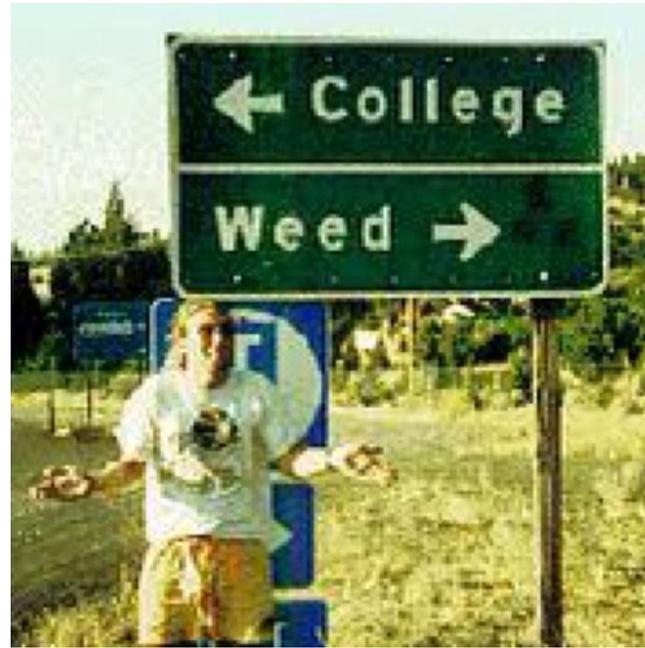
History of Hemp Legislation

- ▶ **New York - Industrial Hemp Pilot Program**
 - ▶ **Agriculture and Markets Law, Article 29**
 - ▶ Law signed in Dec. 2014 (effective June 15, 2015)
 - ▶ **Final regulations released in January 2016**
 - ▶ **Initially limited**
 - ▶ Up to 10 permits issued to universities to grow and research
 - ▶ Limited number of permits and sites authorized to grow

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TRIVIA QUESTION #2

- Which 2 universities were the first to obtain NYS approval to grow hemp under the NY pilot program?



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TRIVIA QUESTION #2

- Which 2 universities were the first to obtain NYS approval to grow hemp under the NY pilot program?

SUNY Morrisville and Cornell University

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History of Hemp Legislation

▶ 2018 Farm Bill

▶ Removed hemp as a Schedule 1 Controlled Substance

- ▶ “Substances in this schedule have no currently accepted medical use in the United States, a lack of accepted safety for use under medical supervision, and a high potential for abuse.” (<https://www.deadiversion.usdoj.gov/schedules/>)
- ▶ heroin, lysergic acid diethylamide (LSD), marijuana (cannabis), peyote, methaqualone, and 3,4-methylenedioxymethamphetamine (“Ecstasy”)

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History of Hemp Legislation

▶ 2018 Farm Bill

- ▶ States and Native American tribes may not prohibit interstate transportation/shipment of lawfully-produced hemp
 - ▶ Lawful:
 - ▶ Produced pursuant to the 2014 Farm Bill (i.e. - via the NY pilot program)
 - ▶ Produced under a State or Tribal plan (law forthcoming)
 - ▶ Produced under U.S. Dep't of Agriculture license

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History of Hemp Legislation

▶ 2018 Farm Bill

- ▶ Person with State or Federal felony conviction re: controlled substances ineligible for 10 years
 - ▶ Exception - growing pursuant to the 2014 Farm Bill before Dec. 20, 2018, and conviction occurred before that date

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History of Hemp Legislation

▶ 2018 Farm Bill

- ▶ USDA to establish regulations and plan requiring States to submit plans to authorize hemp cultivation
 - ▶ Allows States and Tribes to have primary regulatory authority over hemp production
- ▶ Phase out of State pilot programs and 2014 Farm Bill
 - ▶ “States, Tribes and institutions of higher education may continue operating under authorities of the 2014 Farm Bill until 12 months after USDA establishes the plan and regulations required under the 2018 Farm Bill” (<https://www.ams.usda.gov/rules-regulations/farbill-hemp>)

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History of Hemp Legislation

▶ 2018 Farm Bill

▶ USDA Memorandum (May 28, 2019)

- ▶ “[T]he 2018 Farm Bill preserves the authority of States and Indian tribes to enact and enforce laws regulating the production of hemp that are more stringent than Federal law.”
- ▶ “Thus, while a State or an Indian tribe cannot block the shipment of hemp through that State or Tribal territory, it may continue to enforce State or Tribal laws prohibiting the growing of hemp in that State or Tribal territory.”

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TRIVIA QUESTION #3

- According to the ACLU, how many marijuana arrests occurred in the U.S. from 2001 - 2010?

- a) 12.5 million
- b) 6.7 million
- c) 8.2 million

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TRIVIA QUESTION #3

- According to the ACLU, how many marijuana arrests occurred in the U.S. from 2001 - 2010?

c) 8.2 million

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De-criminalization of marijuana in NYS



“Senator Jamaal T. Bailey, a Democrat from the Bronx, left, fist bumps Senator Timothy M. Kennedy, a Democrat from Buffalo, after the legislation expanding decriminalization for marijuana was passed in the State Senate.” *Credit Hans Pennink/Associated Press*

<https://www.nytimes.com/2019/06/20/nyregion/marijuana-laws-ny.html>

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De-criminalization of marijuana in NYS

- ▶ Senate Bill S6579A
- ▶ Removes criminal penalties for possessing less than 2 ounces of marijuana
 - ▶ No longer a misdemeanor - only a violation and fine
 - ▶ Reduced fines
 - ▶ Removes increased punishment for prior offenses
- ▶ Low level marijuana records can be expunged

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NY Industrial Hemp Pilot Program

- ▶ NY Agriculture and Markets Law, Article 29 (statute)
- ▶ NY Codes Rules and Regulations (NYCRR), Title 1, Ch. III, Sub Ch. F (regulations)
- ▶ <https://www.agriculture.ny.gov/pi/pihome.html>
- ▶ **Must obtain license from NY Dep't of Agriculture and Markets**
 - ▶ 4 types of research:
 - ▶ 1) grain
 - ▶ 2) fiber
 - ▶ 3) cannabidiol (CBD)
 - ▶ 4) CBD processing/extraction

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NY Industrial Hemp Pilot Program

- ▶ Individual or business issued license is an “Authorized Research Partner”
 - ▶ List: <https://www.agriculture.ny.gov/pi/list-of-authorized-research-partners.pdf>
(July 22, 2019)

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NY Industrial Hemp Pilot Program

▶ Regulations:

- ▶ Reporting requirements
- ▶ Register growing premises
 - ▶ May only be grown there
 - ▶ Must continually monitor premises
- ▶ Harvested hemp to be stored in secure facility
- ▶ Transported in closed, locked truck/van
- ▶ Must test samples for <0.3% THC
- ▶ Inform local law enforcement
 - ▶ Give copy of security plan

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NY Industrial Hemp Pilot Program

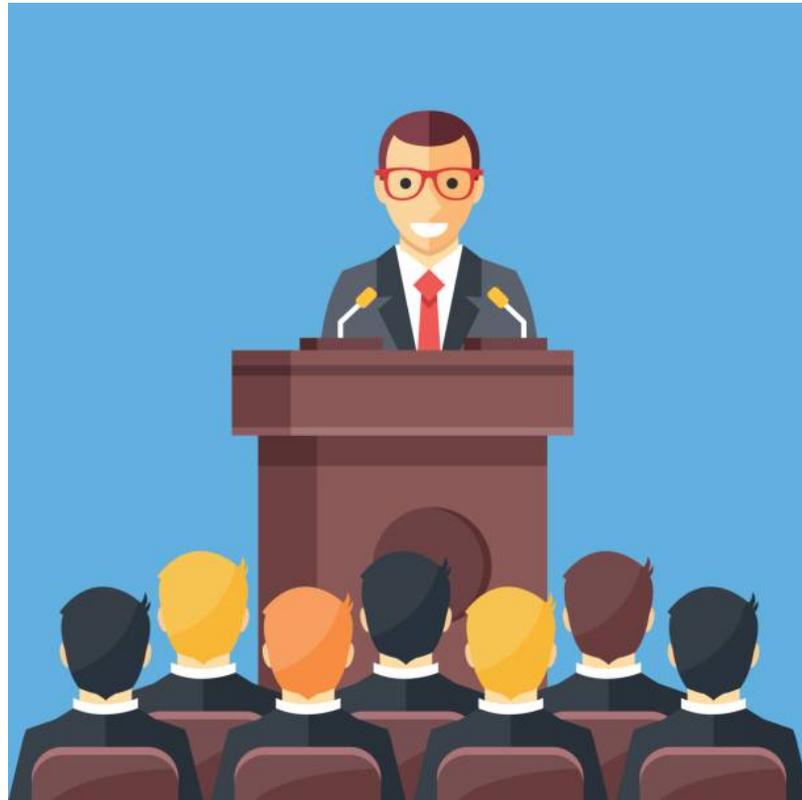
▶ Regulations:

▶ Security

- ▶ Restrict access to premises where hemp is grown
- ▶ Post signs reading “NO TRESPASSING. FACILITY CONTAINS INDUSTRIAL HEMP. UNAUTHORIZED POSSESSION OF INDUSTRIAL HEMP IS SUBJECT TO PROSECUTION PURSUANT TO ARTICLE 220 OF THE PENAL LAW”
 - ▶ Visible from distance of 100 feet from any location around perimeter of premises
- ▶ Equipment or fences to restrict access and detect unwanted presence

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Learning from Experience



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(please listen to the boring speaker recount his stories)

...

(we appreciate your patience)

...

(this will be over soon)

...

(isn't he done yet??)

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Possible types of cannabis-related land uses:

- ▶ Agricultural (growing, harvesting)
- ▶ Industrial (hemp processing, oil extraction, product manufacturing)
- ▶ Commercial (retail - CBD stores, hemp product stores)
- ▶ Entertainment/Food (restaurants/bars with cannabis infused food and drinks - *not currently permitted*)

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Can you regulate legalized industrial hemp or CBD uses in your municipality?

- ▶ Probably yes - provided the regulations are reasonable and have a rational basis.
- ▶ So far, no clear state pre-emption of industrial hemp or CBD (yet). No applicable cases.
- ▶ Regulations must not be inconsistent with state law.
- ▶ Like other uses, you may be able to limit them to certain areas of the municipality.

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- ▶ **Safe:** regulate entire category of use, generally
- ▶ **Danger:** treating cannabis uses differently than other similar uses.
 - ▶ Be prepared to articulate a rational basis why doing so addresses a legitimate public health, safety and welfare concern. This may be difficult.
 - ▶ Ex: What would be the basis for banning a CBD retail store from a certain area, but allowing a liquor store in that area?
- ▶ All regulations must be consistent with comprehensive plan. Updated recently?

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Probably cannot ban legalized industrial hemp or CBD uses completely.

- ▶ Industrial hemp growing is a lawful agricultural use
- ▶ Product manufacturing using legalized industrial hemp is a lawful industrial use
- ▶ Retail store selling legalized hemp and CBD products is a lawful use
- ▶ Food and drinks infused with legalized hemp and CBD oil is currently UNLAWFUL
- ▶ But...but...what about FRACKING!?
 - ▶ Court of Appeals found that State law did not pre-empt WHERE oil/gas extraction could occur, so local municipalities are free to do so.
 - ▶ Towns were able to show fracking “would permanently alter and adversely affect the deliberately-cultivated, small-town character of their communities.”
 - ▶ Probably not able to extend the same justifications to legalized hemp or CBD in NY.

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Are there any special protections for industrial hemp growers?

- ▶ Yes - cannot apply unreasonable local regulations.
- ▶ Section 305-a of Ag. & Markets Law: “Local governments, when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules or regulations, . . . shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of this article unless it can be shown that the public health or safety is threatened.”
 - ▶ “farm operations” means the land and on-farm buildings, equipment . . . and practices which contribute to the production, preparation and marketing of crops . . . as a commercial enterprise... Such farm operation may consist of one or more parcels of owned or rented land, which parcels may be contiguous or noncontiguous to each other.”
 - ▶ Industrial hemp is specifically listed as meeting the definition of “crop” under A&M Law.

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Can you regulate illegal marijuana use in your municipality?

- ▶ Probably not (for now), according to Informal Opinion of NY Attorney General from 1990.
- ▶ AG addressed the authority of a town to enact a local law or ordinance prohibiting the possession of controlled substances, the sale and possession of marijuana and the possession of hypodermic needles, all of which were criminal activities under the NY Penal Law, classified as at least a misdemeanor.
- ▶ AG said that Towns have broad power to adopt local laws regulating the health, safety and welfare of the community using its local police powers. However, there are two exceptions: (1) the local enactment may not be inconsistent with the Constitution or general State law, and (2) the town may not exercise its police power in areas which have been preempted by the State Legislature.
- ▶ AG found that regulation of marijuana and other controlled substances has been preempted by State legislation. “Local regulation in this area, although well intended, is not permitted under State law.”

Probably still good guidance - NY still has a comprehensive scheme of criminal laws regulating this area.

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Town of Hempstead (March 11, 2019)

“It shall be a violation of this Chapter for any person to smoke, consume, show, display, or carry in plain sight marijuana or marijuana products in any Town of Hempstead park or park district park, marina or beach, including indoor and outdoor locations.”

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Town of New Castle (June 14, 2019)

§ 60-410 District regulations.

M. Vape shops and marijuana retail stores. Vape shops and marijuana retail stores shall be subject to the following special provisions in regard to their location:

(1) Vape shops and marijuana retail stores shall not be located within 500 feet of the lot line of any park, playground, library, or religious institution.

(2) Vape shops and marijuana retail stores shall not be located within 2,000 feet of the lot line of any school.

(3) Vape shops and marijuana retail stores shall be prohibited in all residence districts as identified in Town Code § 60-300A.

(4) No more than one vape shop and/or marijuana retail store shall be located on any lot or within 1,000 feet of any other vape shop and/or marijuana retail store.

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Town of Mount Pleasant (April 3, 2019)

No person or persons shall:

(I) Knowingly and unlawfully possess marijuana within the corporate limits of the Town of Mount Pleasant; or

(II) Knowingly and unlawfully possess marijuana in a public place and such marijuana is burning or open to public view within the corporate limits of the Town of Mount Pleasant.

"Marijuana" means all parts of the plant of the genus Cannabis, whether grown or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant, fiber, produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative mixture or preparation of the mature stalks (excepts the resin extracted therefrom), fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination.

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Town of Huntington (August 19, 2019)

§ 198-10 General restrictions (all zoning districts). Except as hereinafter provided;

(K) No building, structure or premises, nor part thereof, shall be used to sell, offer to sell, distribute, or consume recreational marijuana, nor may any land be used for the cultivation of recreational marijuana, nor may marijuana be distributed or consumed in any public park, beach or space.

MARIJUANA - All parts of the plant of the genus cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination. It does not include all parts of the plant cannabis sativa L., whether growing or not, having no more than three-tenths of one percent tetrahydrocannabinol (THC).

MARIJUANA, RECREATIONAL - The consumption of marijuana for personal use and without medical justification.

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Town of Amityville (April 1, 2019)

A. The recreational sale or use of marijuana, cannabis substitutes and related products shall be permitted only in the Industrial District as hereinafter provided.

B. Any business whose primary or ancillary purpose is to facilitate the smoking of tobacco, vapors, e-liquids or other substances through a hookah or waterpipe, or an electronic cigarette, commonly referred to as hookah bars or vape shops, shall be permitted only in the Industrial District as hereinafter provided.

C. No premises shall be used for the recreational sale or use of marijuana and related products, nor as a hookah bar or vape shop, without all applicable licenses, and in strict compliance with any applicable governmental regulations.

D. The location of uses permitted in this section within the Industrial District shall be further restricted as follows:

(1) None of such uses shall be permitted within a three hundred (300) foot radius of any property used for residential purposes.

(2) None of such uses shall be permitted within a one-half mile radius of another such use.

(3) None of such uses shall be permitted within a five-hundred (500) foot radius of any school, church or other place of religious worship, park, playground or playing field.

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What if you get a site plan application for a cannabis-related use?

- ▶ Process it like any other site plan application! Ask the same questions:
 - ▶ Is the application complete? Does it meet the requirements of your local zoning?
 - ▶ IS IT A PERMITTED USE? Look at the zoning district. If “No”, use variance is required.
 - ▶ Hemp or CBD manufacturing = industrial
 - ▶ Hemp growing = agricultural
 - ▶ CBD store = commercial/retail
 - ▶ Is it an *agricultural use* in a *state agricultural district*? If yes, then tread carefully.
 - ▶ Proof of ownership or tenancy. Applicant should explain contractual relationships.

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Require applicants to show proof of compliance with all applicable state and federal laws and regulations.

- ▶ Obtain copy of the applicable state license, permit or research partner agreement.
- ▶ 3 types of licenses under current industrial hemp pilot program:
 - ▶ A license for growing industrial hemp;
 - ▶ a non-CBD processing license (food, fiber, industrial material and/or other non-cannabinoid uses);
 - ▶ a CBD processing license.
- ▶ 3 types of hemp extractor licenses under new hemp bill (not law yet):
 - ▶ 1. Cannabinoid Grower License
 - ▶ 2. Cannabinoid Manufacturer License
 - ▶ 3. Cannabinoid Extractor License
 - ▶ Cannabinoid permit required for retailers, wholesalers, and manufacturers selling “cannabis products derived from hemp extracts”.

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Request a copy of the application submitted to the state which lead to the license, permit or authorization. It may show:

- ▶ A description and map of each location where industrial hemp will be cultivated or possessed, visually depicting the improvements on the premises and identifying their use, and describing the relevant activities conducted at the location.
- ▶ A detailed research plan and summary of the issues and matters that the applicant intends to study in conjunction with growing, cultivating, or processing industrial hemp.
- ▶ A marketing plan.
- ▶ A seed acquisition plan.
- ▶ Statement of relevant experience of the individual responsible for the research project

TRIVIA!

Bill's Groovy House. What would be the best course of action for the planning board to take?

- a. Deny Bill's site plan.
- b. Approve Bill's site plan, with the condition he sell no CBD infused food or drink until doing so becomes legal.
- c. Refer the site plan to the zoning board of appeals to consider a variance.
- d. Ask Bill to provide samples of his products to the planning board so they can make a more "informed" decision.

Trivia!

Answer: b. Approve Bill's site plan, with the condition he sell no CBD infused food or drink until doing so becomes legal.

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Final Steps of Site Plan Review:

- ▶ Complete GML § 239 referral to county planning agency
- ▶ SEQRA determination
 - ▶ Lead agency determination
 - ▶ Classification of action
 - ▶ Environmental Assessment Form completion
 - ▶ Determination of Significance
- ▶ Consider adding conditions to site plan approval (ex: hours of operation, truck trips, on site housing for workers, lighting, fencing/security)
- ▶ Post-Approval
 - ▶ Regular inspections
 - ▶ Ongoing compliance with state, federal and local law

Trivia!

TRUE or FALSE. A public hearing on a site plan application is required by NYS law.

Trivia!

Answer: False. A public hearing is not required by law for site plan review.

- ▶ Section 274-a of the Town law and 7-725-a of the Village Law states that towns *MAY* adopt a local law or ordinance requiring a public hearing for every site plan review application.
- ▶ The planning board may still voluntarily call for a PH if they feel that it would be necessary.

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New York Amendments to Industrial Hemp Law

- ▶ Senate Bill 6184-A
- ▶ Modifies the current Pilot program
- ▶ Allows for more regulation by NYS
- ▶ Still in the context of “research”

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New York Amendments to Industrial Hemp Law

▶ Major provisions:

- ▶ Industrial hemp used (seeds and plant starts) must be sourced from an authorized NYS hemp producer
- ▶ Applicants for hemp licenses must pay a per-acre fee, and a \$500 non-refundable application fee
- ▶ Applicant must show evidence of his/her good character, experience and competency, and that they have sufficient equipment, testing, and security measures
- ▶ “Action Plan” to correct any non-compliance with the new law
- ▶ Licenses can be revoked or suspended for a wide range of reasons (for example, “the applicant does not have good character”)
- ▶ NYS to develop regulations regarding testing procedures, maintenance of records, procedures for random sampling, security measures

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New York Amendments to Industrial Hemp Law

▶ Major provisions:

- ▶ State authorized to access criminal history records of applicants and obtain national criminal history reports from the FBI (at the applicant's cost)
- ▶ Applicants can be required to give their fingerprints
- ▶ State has full access to all lands, buildings, cars, boats, factories, containers, etc. “for the purposes of enforcing the provisions of this article”
 - ▶ Can open and inspect any container reasonably believed to contain industrial hemp
 - ▶ Can obtain a search warrant if the grower does not allow access
- ▶ State can seize hemp when it has substantial evidence indicating the hemp has > .3% THC

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New York Amendments to Industrial Hemp Law

- ▶ **New Article 29-A - “Regulation of Hemp Extract”**
 - ▶ Pertains to production of CBD oil
 - ▶ Outlines a licensing procedure for extraction licenses
 - ▶ Allows for inspections to ensure ongoing compliance
 - ▶ State can create standards for extracted products

QUESTIONS?

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