



Frequently Asked Questions About Local Regulation of Marijuana

March 2021

Oregon's medical and recreational marijuana laws are codified in [ORS chapter 475B](#). Provisions relating to recreational marijuana are found in ORS 475B.005 to 475B.545. Medical marijuana is addressed in ORS 475B.785 to 475B.949. Testing of cannabis and cannabis products are covered in ORS 47B.550 to ORS 475B.590. Packaging, labeling and dosage of cannabis and cannabis products are covered in ORS 475B.600 to 475B.655. Taxation of cannabis and cannabis products is addressed in ORS 475B.700 to 475B.760. Provisions relating to the authority of cities and counties to prohibit the establishment of cannabis-related businesses are found in ORS 475B.968.

Below are answers to some of the most commonly asked questions about Oregon's marijuana laws and their impacts on local governments. For more information on these laws, review the LOC's guidebook, [Local Government Regulation of Marijuana in Oregon](#).

HOME RULE AND FEDERAL LAW

1. I've heard that cities did not need this legislation to regulate marijuana because Oregon is a home rule state. What is home rule?

Home rule is the power of a local government to set up its own system of governance and gives that local government the authority to adopt ordinances without having to obtain permission from the state. City governments in Oregon derive home rule authority through the voters' adoption of a home rule charter as provided for in the Oregon Constitution. All 241 cities in Oregon have adopted a home rule charter. A charter operates like a state constitution in that it vests all government power in the governing body of a municipality, except as expressly stated in that charter or preempted by state or federal law.

2. So how does home rule relate to a city's authority to regulate marijuana?

Home rule authority allows local governments to enact ordinances regulating marijuana unless preempted by state law. The Legislature can limit local government authority if it passes legislation that clearly and unambiguously preempts that authority. Because the Legislature continues to pass bills relating to marijuana, it is important to understand how state and local authority interact because that relationship will impact what cities can and cannot do when it comes to regulating marijuana. Specifically, unless clearly preempted, cities can impose regulations in addition to those authorized under ORS chapter 475B pursuant to their home rule authority.

3. Isn't marijuana illegal under federal law? If so, how can Oregon legalize it?

Marijuana is classified under the federal Controlled Substances Act as a Schedule I drug, which means it is unlawful under federal law to grow, distribute, possess, or use marijuana for any purpose. Individuals who engage in such conduct could be subject to federal prosecution. Thus far, courts have upheld a state's authority to decriminalize marijuana for state law purposes. Oregon did so for medical marijuana in 1998 and for recreational marijuana in 2014. What that means is someone who grows, distributes, possesses, or uses marijuana within the limits of those

state acts is immune from state prosecution, but might still be subject to federal prosecution if federal authorities desired to do so.

The U.S. Drug Enforcement Agency has indicated that it may consider reclassifying marijuana in the future. To date, this has not occurred, and there is no guarantee that any such reconsideration would result in a reclassification.

4. Can we as a city council use our home rule authority and vote to re-criminalize marijuana within our city?

No. A city's home rule authority is subject to the criminal laws of the state of Oregon. As noted above, Oregon's marijuana laws provide immunity from criminal prosecution for individuals who are acting within the parameters of those laws. Consequently, a city council cannot remove the immunity provided by state law.

The immunity provided by state law does not extend to all crimes committed while engaging in marijuana-related activities. For example, the immunity provided by state law does not apply to the crime of driving under the influence. Likewise, a city should be able to impose criminal penalties against a person engaging in a marijuana-related activity that violates another law, such as a business license ordinance, zoning, or anti-smoking regulations. However, before doing so, a city should work with its city attorney to confirm that the state law immunities do not apply.

BANS

5. Can my city ban the growing, processing, and sale or transfer of marijuana?

ORS 475B.968 provides a process, explained below, for cities to prohibit several types of marijuana activities that are registered or licensed by the state. For instance, cities may prohibit:

- Medical marijuana processing sites (preparing edibles, skin and hair products, concentrates and extracts);
- Medical marijuana dispensaries;
- Recreational marijuana producers (growers);
- Recreational marijuana processors (preparing edibles, skin and hair products, concentrates and extracts);
- Recreational marijuana wholesalers; and
- Recreational marijuana retailers.

Another marijuana activity registered by the state is medical marijuana grow sites under ORS 475B.810. State law is silent on whether a city can prohibit these sites, though state law does expressly place limits on the amount of marijuana that can be located at any grow site. Moreover, medical marijuana dispensaries and processing sites may operate regardless of a local ban under ORS 475B.968 if they have registered with the state on or before the date of the ordinance adopting the ban and have successfully completed the local land use application process.

ORS 475B.968 does not state expressly that this process of banning local marijuana activities is the exclusive means of doing so. Cities considering a ban on medical marijuana grow sites, marijuana laboratories, or marijuana researchers — three categories that are not listed above — should consult their city attorney about whether they can do so under either home rule, federal

preemption or both legal theories. Please be advised that this approach may entail significant risk of litigation and potential financial implications.

6. What process does the city need to go through under ORS 475B.968 to impose a ban on the growing, processing, or sale or transfer of marijuana?

If a city adopts an ordinance under ORS 475B.968 that prohibits local marijuana establishments, that ordinance must be referred to the electors of the city at the next statewide general election. If the ordinance is subsequently approved by the voters, then the city must provide the text of the ordinance to the Oregon Health Authority (OHA) if the ban concerns any of its registered dispensaries or processing sites and the Oregon Liquor Control Commission (OLCC) if the ban applies to any establishments that it licenses under ORS 475B.010 to ORS 475B.545.

As soon as the council adopts the ordinance, it must submit it to OHA for medical bans and the OLCC for recreational bans, and those agencies will discontinue licensing those establishments until the date of the next statewide general election. In this way, the council's adoption of an ordinance banning marijuana acts as a moratorium until the election occurs.

7. Can my city ban the personal use and growing of marijuana?

ORS chapter 475B does not provide an avenue for cities to ban the personal use and growing of marijuana. Cities may only ban certain marijuana establishments, and only with voter approval.

That said, cities are not preempted from limiting these activities. For example, cities may require that marijuana grown at home for personal use must be grown, stored, and processed indoors.¹ In *Brown*, the Oregon Court of Appeals found that ORS Chapter 475B did not preempt cities' from placing reasonable restrictions on personal use, as long as these local ordinances do not go so far as to effectively ban personal use.²

8. If the city adopts a ban under ORS 475B.968, are existing marijuana activities allowed to remain open?

The answer depends upon the type of activity. As noted above, medical marijuana dispensaries and medical marijuana processors that have registered with the state by the time their city adopts a prohibition ordinance are not subject to the ban if they have successfully completed a city or county land use application process.

This protection does not extend to any of the other marijuana activities that a city may prohibit under ORS 475B.968. Consequently, recreational marijuana growers, processors, wholesalers, and retailers will be subject to a local ban, even if those businesses were already operating at the time the ban was enacted.

That said, cities that pursue a ban on marijuana will want to work closely with their city attorney when enforcing the ban against existing businesses to identify any due process claims that could be raised by business owners.

¹ See *Brown v. City of Grants Pass*, 291 Or App 8, 15 (2018).

² *Id.*

9. If my city adopts a ban under ORS 475B.968, will it still get a share of state marijuana tax revenues?

No. A city that adopts an ordinance prohibiting the establishment of medical or recreational marijuana businesses is not eligible to receive a distribution of state marijuana tax revenues.

10. If the voters in my city vote to reject the ban, when will the Oregon Liquor Control Commission or Oregon Health Authority begin registering or licensing marijuana businesses?

Licensing or registration begins on the first business day of the January immediately following the date of the statewide general election. This date was chosen to provide an opportunity for cities and counties to adopt local time, place or manner restrictions, business license ordinances and forms and to take other action required to address issues and concerns relating to the addition of marijuana businesses in the city. Cities dealing with this situation will want to consult with their city attorney to discuss action steps and to further determine if there are home rule or business license possibilities to prohibit some or all marijuana business activities.

11. My city requires businesses to obtain a license to operate, and a city ordinance provides that the city will not issue a business license if a business operates in violation of local, state, or federal law, creating an effective ban on marijuana businesses. Should we continue to enforce that ordinance instead of adopting a ban using the procedure described in ORS 475B.968?

Possibly. Under Oregon law, cities are permitted to adopt “reasonable regulations” of commercial marijuana activities.³ Thus, ORS Chapter 475B.486 authorizes cities to regulate marijuana businesses through local business licenses and land use permits.⁴ Arguably, any regulation that goes so far as to effectively ban marijuana businesses is “inconsistent” with this provision and the rights of licensees under ORS Chapter 475B. Any charter amendments or ordinances that are inconsistent with ORS Chapter 475B are preempted under ORS 475B.454.

That said, ORS Chapter 475B is itself inconsistent with federal law. Any city that is seeking an alternative to the ban authorized by the chapter should consult an attorney about the potential for a federal preemption claim.

12. If my city adopts a ban under ORS 475B.968 and the ban is approved by the voters at a statewide general election, will it be possible to repeal the ban later?

Yes. ORS 475B.496 provides the mechanism by which a city that has effectively banned marijuana businesses may repeal that prohibition.

First, the city council must adopt an ordinance repealing its earlier ordinance which prohibited one or more of the activities listed above in question 5. Unlike the ordinance prohibiting marijuana, an ordinance of repeal does not need to be referred to voters at a statewide general election.

As soon as the city council adopts the ordinance, it must submit it to the OHA if it affects any registered dispensaries or processing sites. For recreational marijuana, the council must submit

³ ORS 475B.486.

⁴ See generally *Diesel v. Jackson County*, 284 Or App 301, 302 (2017).

the ordinance to the Oregon Department of Administrative Services, as well as the OLCC if the ordinance concerns an establishment for which a license has been issued.⁵

LOCAL TAX

13. Can my city tax recreational marijuana?

Yes, if the city has not adopted an ordinance under ORS 475B.968 prohibiting marijuana activities in the city.

Under ORS 475B.491, cities may impose up to a 3 percent tax on sales of marijuana items made by those with recreational retail licenses by referring an ordinance to the voters at a statewide general election, meaning an election in November of an even-numbered year.

14. Can my city tax medical marijuana?

No. ORS 475B.491 provides that the authority to “impose a tax or fee on the production, processing, or sale of marijuana items in this state is vested solely in the Legislative Assembly,” and a city may not adopt or enact ordinances imposing a tax or fee on those activities except for a 3 percent tax on retail licensees. While some retail establishments sell medical grade marijuana products, state law also prohibits the taxation of individuals who hold a registry identification card that authorizes them to engage in the medical use of marijuana, or a cardholders designated primary caregiver who is buying marijuana on their behalf. These restrictions — found under ORS 475B.707 — demonstrate that only recreational marijuana purchases may be taxed.

15. My city enacted a tax on marijuana before ORS 475B.491 was enacted. Can we continue to impose that tax now?

The status of taxes enacted prior to ORS 475B.491 is an open question. This law provides that, except as provided by law, the authority to “impose” a tax or fee on the production, processing or sale of marijuana items is vested solely in the Legislative Assembly, and a city may not “adopt or enact” ordinances imposing a tax or a fee on those activities. Arguably, cities that had already adopted or enacted a tax prior to the effective date of ORS 475B.491 are grandfathered in. However, the issue is not free from doubt, and cities that decide to collect on pre-ORS 475B.491 taxes should be prepared to defend their ability to do so against a legal challenge. Consequently, cities that plan to continue to collect taxes imposed prior to the passage of ORS 475B.491 should work closely with their city attorney to discuss the implications and risks of that approach.

16. My city requires all businesses to obtain a license and pay a fee. Does that fee count as part of the 3 percent tax or fee that the city can impose under ORS 475B.491?

ORS 475B.491 limits a local tax on “the sale of marijuana items” to 3 percent and provides that a city may not otherwise adopt or enact an ordinance imposing a tax or fee on “the production, processing or sale of marijuana items.” Although ORS 475B.491 preempts certain local taxes and fees, a city may be able to continue to impose taxes and fees of general applicability, which are not specific and limited to marijuana businesses, without being subject to the 3 percent limit.

⁵ ORS 475B.496(2).

Cities considering imposing such a tax or fee should obtain their city attorney’s advice before doing so.

17. If my city adopts a ban for some—but not all—marijuana activities, can it still impose a local tax on those activities not banned?

No. ORS 475B.968(7) broadly provides that a city that adopts a ban prohibiting one or more marijuana activities within its jurisdiction “may not impose a local tax or fee on the production, processing or sale of marijuana or any product into which marijuana has been incorporated.”

STATE TAX

18. What is the state going to tax and in what amount?

Under ORS 475B.700, the state will impose a 17 percent tax on the retail sale of marijuana items, including marijuana leaves and flowers; immature marijuana plants; marijuana concentrates and extracts; marijuana skin and hair products; and other marijuana products.

19. How much of the state tax revenues will go to cities?

Ten percent of the state marijuana tax revenues will be distributed to cities that do not adopt ordinances prohibiting the establishment of marijuana facilities registered and licensed by the state.⁶

20. How will the state tax revenues be distributed to cities?

Prior to July 1, 2017, tax revenues were distributed proportionately to all Oregon cities based on their population. Today, those revenues are distributed quarterly as follows: 75 percent based on population and 25 percent based on licensure numbers in the city compared to the total licenses in all cities. Only cities that have not banned marijuana premises for the six current license types and have provided a timely OLCC certification may receive these quarterly payments.⁷ Cities without any retailers or medical marijuana shops are still eligible to receive a share of revenues (from the population-based portion) if they have not banned any of the licensed premises.

21. Will the Oregon Department of Revenue be available to help collect local marijuana sales taxes on behalf of cities and counties?

Yes. ORS 305.620 allows cities and counties to enter into intergovernmental agreements with the Oregon Department of Revenue (DOR) for the collection, enforcement, administration, and distribution of local marijuana sales taxes. For such a collection effort to occur, cities need to coordinate with DOR so that local law authorizes DOR collection and accounting practices. A sample IGA for use by a city and the DOR is available on the League’s website under the [Marijuana Resources page](#). For more information, contact the DOR Marijuana Tax Program at (503) 947-2597 or marijuanatax.dor@oregon.gov.

TIME, PLACE AND MANNER RESTRICTIONS

22. Does state law place any restrictions on where marijuana businesses can locate?

⁶ The remaining revenues will be distributed as follows: 40 percent to the Common School Fund; 20 percent to the Mental Health Alcoholism and Drug Services Account; 15 percent to the State Police Account; 10 percent to counties; and 5 percent to the Oregon Health Authority.

⁷ See ORS 475B.759(4)(A).

Yes. Medical marijuana dispensaries, recreational marijuana retail stores and wholesalers, and medical and recreational marijuana processors that process marijuana extracts cannot locate in an area zoned for residential use.

In addition, medical marijuana dispensaries and recreational marijuana retail stores are subject to the following restrictions:

- Neither can locate within 1,000 feet of certain public and private schools, unless the school is established after the marijuana facility.
- Medical marijuana dispensaries cannot locate within 1,000 feet of another dispensary.
- Medical marijuana dispensaries cannot locate at a grow site.

Finally, before issuing any recreational marijuana license, a license applicant must request a statement from the city that the requested license is for a location where the proposed use of the land is a permitted or conditional use. If the proposed use is prohibited in the zone, the OLCC may not issue a license to the applicant. A city has 21 days to act on the applicant's request, but when that 21 days starts to run varies:

- If the use is an outright permitted use, 21 days from receipt of the request; or
- If the use is a conditional use, 21 days from the final local permit approval.

23. What are the limits on the amount of marijuana at a medical marijuana grow site?

Generally, a medical marijuana grow site may have up to 12 mature plants if it is in a residential zone, and up to 48 mature plants if it is located in any other zone. However, there are exceptions for certain existing grow sites. If all growers at a site had registered with the state by January 1, 2015, the grow site is limited to the number of plants that were at the grow site as of December 31, 2015, not to exceed 24 mature plants per grow site in a residential zone and 96 mature plants per grow site in all other zones. A grower loses the right to claim those exceptions, however, if the grower's registration is suspended or revoked.

In addition to possessing mature marijuana plants, a medical marijuana grower may possess the amount of usable marijuana that the person harvests from the mature plants, not to exceed 12 pounds of usable marijuana per mature plant for outdoor grow sites and 6 pounds of usable marijuana per mature plant for indoor grow sites.

24. What are some examples of the "reasonable regulations" that cities can impose on medical and recreational marijuana businesses?

ORS 475B.486 expressly provides that cities may impose reasonable regulations that include, but are not limited to, the following:

- Cities may limit the hours of operation of retail licensees and medical marijuana grow sites, processing sites and dispensaries;
- Cities may limit the location of all four types of recreational licensees, as well as medical marijuana grow sites, processing sites and dispensaries, except that a city may not impose more than a 1,000-foot buffer between retail licensees;
- Cities may impose reasonable conditions on the manner in which marijuana is processed or sold to the public; and

- Cities may limit the public’s access to the premises of all four types of recreational licenses, as well as medical marijuana grow sites, processing sites and dispensaries.

The law also provides that time, place, and manner regulations imposed on recreational licensees must be consistent with city and county comprehensive plans, zoning ordinances, and public health and safety laws. For more information about the permitted time, place, and manner restrictions on marijuana businesses, review the model time, place, and manner ordinance in Appendix D of the LOC’s guidebook, [Local Government Regulation of Marijuana in Oregon](#).