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WHERE TO PUT IT? THE CONFUSING QUESTION OF HOW TO DEAL WITH MARIJUANA DISPENSARIES

Ian Morrison

I. Introduction

Around the country, there is a resurgence in the old debate over marijuana. Proponents of marijuana use who are unsatisfied with the federal government's response have shifted the debate to the state level. Their efforts have produced mixed results so far. In allowing for medical marijuana use, California has created a major industry within the state. This industry has drawn the ire of the federal government, creating a constitutional challenge. Not to be outdone, Washington and Colorado made their own national headlines. Both states became the first in the country to legalize marijuana for recreational use. However, Colorado has been unique in its approach. The referendum that residents passed did not have much regulation for dispensaries. Instead, regulation was left up to state agencies to sort out.

Colorado has run into the interesting question of how and where to allow dispensaries for marijuana use. For the answer, the state is not the only participant. Local municipalities have great latitude in regul-

3. See id.
5. See id.
6. See Wilkey, supra note 2.
9. See id.
10. See id.
lating distributors through the use of zoning. Municipalities in other states sought to regulate marijuana distributors through new zoning initiatives limiting the location and operation of dispensarys. Among the proposed zoning rules, Seattle seeks to limit marijuana farms to industrial areas while Franklin County, Massachusetts is zoning its dispensaries in the same areas as its adult stores. Dispensaries have also been restricted based on their proximity to other uses, such as schools or churches. These restrictions apply even if they want to operate in an area normally zoned for commercial use. Some municipalities have effectively banned dispensaries from their towns and cities by not providing for them in their zoning plan.

These municipal zoning restrictions are being met with opposition from a number of groups nationwide. Many in the business community claim that such restrictive zoning, such as Seattle's, will drive up rent prices as marijuana farms compete for such limited space. Dispensary owners argue such tight restriction on where they can operate is bad for their business and forces them into "green zones," where they are in direct competition with one another. Municipalities throughout Colorado will be forced to choose between providing the sale of a product with health benefits and protecting their citizens. This situation creates a novel zoning problem for municipalities as they are forced to balance the opinions of their residents with laws of the state. Ultimately, the restrictive zoning practices of municipalities negatively impacts other properties in restricted zones, since social stigmas and saturated competition drive customers away and fail to promote legitimate marijuana businesses.

13. See infra notes 14-17.
15. See id.
16. Id.
II. Background

All state laws regarding illicit substances are subordinate to federal laws due to the supremacy clause of the Constitution.\(^{22}\) The basis of modern federal marijuana regulation comes from the Controlled Substances Act (CSA).\(^{23}\) Manufacturing and distribution of a substance depends on the schedule of the substance.\(^{24}\) Marijuana is classified as a schedule one drug, which makes it illegal to possess or sell.\(^{25}\) States have emulated the CSA when enacting drug legislation of their own.\(^{26}\)

Modern zoning finds its basis in the power granted by the State Zoning Enabling Act (SZEA).\(^{27}\) The act was first developed by the federal government for the purpose of standardizing zoning among the individual states.\(^{28}\) SZEA requires adopting states to establish zoning or planning commissions and set forth a zoning code and comprehensive plan.\(^{29}\)

Colorado's recently adopted law does not seem to have the legal complexities of the laws of other states.\(^{30}\) Colorado's law allows for private use of marijuana, provided residents possess no more than one ounce.\(^{31}\) Individuals must be twenty-one and older in order to buy, sell, or possess marijuana.\(^{32}\) The law also removes criminal penalties for transfers of one ounce or less where there is no remuneration.\(^{33}\) Additionally, Colorado's law sets forth several factors to be considered by the state when an individual or business is applying for a license to dispense marijuana.\(^{34}\) The law gave the power to regulate dispensaries to the Department of Revenue, which released its regulations handbook on July 1, 2013.\(^{35}\)

The department's regulations do not directly regulate the zoning of a dispensary.\(^{36}\) Rather, the department only regulates the access that owners can give the public, and the signage that must be posted.\(^{37}\)

\(^{22}\) Robert A. Mikos, Preemption Under the Controlled Substances Act, 16 J. Health Care L. & Pol'y 5, 12 (2013).


\(^{24}\) See id.

\(^{25}\) Drug Enforcement Administration, Drug Scheduling, UNITED STATES DEPARTMENT OF JUSTICE (Sept. 6, 2013 9:00PM) http://www.justice.gov/dea/druginfo/ds.shtml. Schedule one drugs are defined as "drugs with no currently accepted medical use and a high potential for abuse."

\(^{26}\) 28 C.J.S. Drugs and Narcotics § 210 (2013).

\(^{27}\) 10-53C Zoning and Land Use Controls § 53C.08 (Lexis).

\(^{28}\) See id.

\(^{29}\) See id.

\(^{30}\) CO. Cons. Art. XVIII, §16.

\(^{31}\) See id.

\(^{32}\) See id.

\(^{33}\) See id.

\(^{34}\) See id.

\(^{35}\) See id.

\(^{36}\) 1 COLO. CODE REGS. § 212-2 (West 2013).

\(^{37}\) See id.
Regulations state a dispensary can have both retail and growing use so long as they are separated. Owners are also forbidden from allowing anyone under the age of twenty-one into the store and signage indicating this must be posted. The only land use and zoning restriction for dispensaries is the requirement that the state and local municipality first approve all material changes to the building. Material changes can include changing the physical size of the building or adding additional sales or display counters within the store. In the end, nearly all zoning decisions are left to the municipality to decide upon.

III. Analysis

A. The Narrowing of Restrictions on Zoning for Dispensaries Will Negatively Affect Property Values

i. Property Values in Neighborhoods Where Dispensaries are Concentrated Will Likely Decrease

Municipalities often regulate the presence of businesses they find objectionable based on their secondary effects. This is often seen with adult businesses. Regulation of dispensaries up until this point generally mirrored the regulation of adult establishments. Such regulations have included tying the use to industrial zones, providing for setback limits from schools and churches, and regulating the number of establishments within a given zone. For many, this was the only way to both allow the businesses to operate and deal with the legal and moral conflicts such an establishment would generate.

Seattle’s zoning regarding adult businesses and dispensaries is a great example of this similarity. Seattle requires strip clubs to be at least eight hundred feet away from schools or anywhere children might congregate and at least six hundred feet away from other adult

38. 1 COLO. CODE REGS. § 212-2.501 (West 2013).
39. 1 COLO. CODE REGS. § 212-2.409 (West 2013).
40. 1 COLO. CODE REGS. § 212-2.303 (West 2013).
41. Id.
42. See id.
44. See id.
46. See id. at 4.
48. See infra notes 51-53.
establishments. Zoning requirements have restricted adult uses to industrial zones and general commercial areas. Zoning requirements have also required that dispensaries, primarily zoned for industrial areas, be located at least one thousand feet away from any school or place where children routinely congregate. Adult bookstores and dispensaries face the same zoning restrictions due to the social stigmas surrounding them. Thus, their existence is likely to have similar effects on property values.

While there is no definitive data on the effect of marijuana dispensaries on property values, one can look to the effects of adult bookstores on property values to provide such insights. Studies show a direct correlation between the presence of adult establishments and the appraised value of a property. In one study, researchers found that real estate appraisers decreased the value of a home within five hundred feet of an adult establishment at least 90% of the time. Likewise, it found property values would decrease for a shopping center a minimum of 64% of the time. These numbers are based only on the presence of one business. The study also measured the impact of the multiple establishments additionally on a property's value. It found that 80% of the time, the presence of multiple establishments additionally decreased a single family home's property value. For shopping centers, property value was likely to decline 61% of the time with additional establishments nearby. The study also analyzed the distances which adult businesses would have to be so properties would be comfortable with their presence. The study found that property appraisers would be comfortable with adult businesses being more than half a mile away from them without there being an impact on property values.

50. Id.
52. See supra notes 47.
53. See id.
55. See id. at iii.
56. Id. at 5.
57. Id. at 8.
58. See id. at 5, 8.
59. See id.
60. See id. at 11.
61. Id.
62. See id. at 7, 10.
63. See id.
The results point to the finding that the presence of such establishments negatively impacts property values. Applying the logic of this study would mean marijuana stores are likely to cause property values to decline in surrounding areas. Municipalities seem to be responding in a proactive manner by restricting the zoning of such stores to areas where property values are unlikely to be affected.

ii. Property Values in Industrial Neighborhoods Are Likely to Increase

To deal with the negative effects on property values, municipalities will often zone adult stores in industrial zones. The same has been done with marijuana dispensaries. As a compromise, many municipalities have zoned marijuana dispensaries in industrial areas. Some municipalities have tried to distinguish between retail shops and growing operations by zoning cultivation of marijuana to industrial areas and retail shops to more local zones, like light industrial zones. Light industrial areas account for uses that are different than heavy industry, which creates a supply and demand issue for both areas. Often, the presence of dispensaries is even further restricted within industrial light zones to certain building types.

One example of the potential supply and demand issue is the city of Seattle. Seattle has zoned one type of use within its light industrial district, which accounts for 46% of the available space. However, each cultivation use could be up to 30,000 square feet, or about three quarters of an acre. Seattle’s industrial sections make up a total of 12% of the land area. Thus, marijuana farms will only have access to approximately 6% of the total land in the city, and even less if retailers are restricted to these zones as well. Given the demand for mari-
juana and the lack of space for dispensaries, prices for land within these areas will be at a premium as cultivators fight for the space to farm.\textsuperscript{78} Additionally, marijuana prices will be at a premium as supplies will be lower than demand.\textsuperscript{79}

With many Colorado municipalities zoning themselves in the same manner as Seattle, they can expect similar problems.\textsuperscript{80} Building space will be at a premium for cultivators as they fight for the few areas in a city where they can legally operate.\textsuperscript{81} The situation is further complicated by the fact that both retailers and farmers are often zoned in the same areas.\textsuperscript{82} While it is possible for a distributor to get both a cultivation and retail license, it is unlikely that every property will be able to do so.\textsuperscript{83} It is also unlikely that every retailer would be able to single-handedly meet their own demand.\textsuperscript{84} This only means one thing: that industrial property prices will go up as entrepreneurs in the marijuana business want a place to set up shop.\textsuperscript{85}

B. Narrowing Regulations Placed On Dispensaries Will Make It Hard For Them to Operate and Will Lead to a Rise in Prices
i. Dispensaries in “Green Zones” Will Have Difficulty Operating and Competing

So far, the trend has been to zone away dispensaries by restricting them to industrial areas.\textsuperscript{86} In effect, this has created “green zones” within municipalities. Such zoning can lead to unhealthy competition amongst businesses, causing them to fail.\textsuperscript{87} In some municipalities, there are so many business locations of a given type that they are directly competing with one another.\textsuperscript{88} Starbucks is a great example of a business competing with itself—the Seattle coffee chain is mocked for being on every corner.\textsuperscript{89} Its business strategy and the problems it has faced are somewhat indicative of what marijuana dispensaries can expect to undergo.\textsuperscript{90} Dispensaries will have a hard time competing
against one another when consumers will have a ready choice among all the establishments in the area.\textsuperscript{91} Unlike Starbucks, dispensaries are not capable of expanding their market presence by adding new products.\textsuperscript{92} They act as a specialty store, offering only one product to their customers.\textsuperscript{93} Forcing dispensaries into direct competition with one another in a restricted zone will only hurt them and cause them to fail.\textsuperscript{94} Dispensaries zoned in green zones will only survive by cannibalizing one another, leaving only a fraction of the market remaining.\textsuperscript{95} That fraction remaining will likely increase prices due to a lack of competition.\textsuperscript{96} An increase in prices may in fact drive away consumers from legitimate retailers in favor of illegal sources.\textsuperscript{97} These sources will be outside both state regulation and taxation and municipal zoning controls.\textsuperscript{98}

ii. Zoning Restrictions Will Make Legal Dispensaries an Easy Target for Federal Law Enforcement

Marijuana dispensaries throughout the country continue to be the target of federal action.\textsuperscript{99} The attorney general's recent decision to restrain federal authorities from prosecuting legally operating dispensaries does not prevent them from prosecuting dispensaries in the future.\textsuperscript{100} It is still the view of the federal government that state-run

\footnotesize{(September 03, 2013 10:00PM) http://www.businessweek.com/the_thread/brandnewday/archives/2008/07/starbucks_to_cl.html.}
\footnotesize{91. William D. McElyea, Playing the Numbers: Local Government Authority to Apply Use Quotas in Neighborhood Commercial Districts, 14 Ecology L.Q. 325, 329 (1987).}
\footnotesize{92. See generally 1 COLO. CODE REGS. § 212.}
\footnotesize{93. See id.}
\footnotesize{94. See Goodman, supra note 91.}
\footnotesize{95. Id.}
\footnotesize{96. See GCSE Bitesize, supra note 80; see also Susan Gardner, Economic impact of marijuana legalization subject of presentation, REDWOOD TIMES, (Sept 10 10:00PM) http://www.redwoodtimes.com/garbervillenews/cl_23852451/economic-impact-marijuana-legalization-subjectpresentation (Noting the drop in prices because of a viable legal market); Mike Koncza, Legalizing marijuana is hard. Regulating a pot industry is even harder, WASHINGTON POST (Sept 10, 2013 10:00PM) www.washingtonpost.com/blogs/wonkblog/wp/2013/06/29/legalizing-marijuana-is-hard-regulating-a-pot-industryiseven-harder/.}
\footnotesize{97. Gardner, Economic impact of marijuana legalization subject of presentation, REDWOOD TIMES, (Sept. 10, 2013 10:00PM).}
\footnotesize{98. Id.}
marijuana dispensaries are illegal and against the CSA. Thus, federal agencies believe it is within their purview to shut down dispensaries.

CSA enforcement actions will increase if federal authorities resume prosecution of dispensaries. Authorities will have unprecedented ease in identifying and acting against dispensaries. Narrow zoning restrictions will but point to the areas of a municipality in which dispensaries are located. From there, it is simply a matter of subpoenaing information related to state registries in order to carry out large enforcement actions. In Seattle, targeted raids in certain sections of the city yielded huge results for the federal government while dealing a crippling blow to dispensaries. California neighborhoods operating dispensaries have been the target of federal raids for years as authorities have sought to disrupt their operations.

In contrast, municipalities where there has been less zoning oversight have proven to be more difficult for federal officials to shut down. In these cities, the industry continues to operate legally under state law without worrying about one well-placed federal raid destroying it all. Los Angeles is a good example of this practice. For years, Los Angeles had no additional zoning requirements for medical marijuana dispensaries. Roughly 750 dispensaries had opened in retail zones all over the city because of the lack of restriction and strength of the market. Federal officials admitted that because of the number and variety of locations, they could not keep up with enforcement. As federal agents targeted one dispensary, another

102. See id.
103. See id.
106. See id.
107. See id.
108. See id.
109. Michael Berkey, Mary Jane's New Dance: The Medical Marijuana Legal Tango, 9 CARDOZO PUB. L. POL'Y &ETHICS J. 417, 441-42 (2011); see also infra notes 118, 120.
110. See Dickinson, supra note 106.
112. See id.
113. See id.
opened to meet the market demand.\(^{114}\) In each instance, local officials continued to control their operations and presence while collecting taxes on their sales.\(^{115}\)

Overall, the narrowing of zoning restrictions will make it more difficult for dispensaries to operate as they will become easy targets.\(^{116}\) Federal authorities will know where to look based on the specific zoning laws of a municipality.\(^{117}\) In turn, municipalities will lose viable businesses as their local industries are dismantled.\(^{118}\)

IV. Conclusion

There will always be businesses that people find objectionable. Ultimately, it is in the best interests of a municipality to have less restrictive zoning.\(^{119}\) Such zoning practices lessen the impact on property values by spreading dispensaries evenly throughout a municipality.\(^{120}\) It will also allow the market to properly thrive and meet customer demand.\(^{121}\) Finally, it will become harder for federal authorities to shut down dispensaries and interfere with the local economy.\(^{122}\) This way, the voter’s wishes can truly be honored.\(^{123}\)

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114. See Linthicum, supra note 113.
115. See id.
116. See Dickinson, supra note 106 (Highlighting examples where federal agents raid known dispensaries districts).
117. Id.
118. See id.
119. See Berkey, supra note 111
120. See discussion supra Part III.A.i.
121. See discussion supra Part III.B.i.
122. See discussion supra Part III.B.ii.
123. See supra note 8.