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“ZONING” IN ON MARYLAND’S NASCENT MARIJUANA INDUSTRY

Matthew McComas

I. Introduction

Is green the new gold?¹ Last year, the marijuana industry pulled in a whopping \$2.4 billion.² To put it in perspective that’s about 74% more than it did the year before.³ As of today, four states (Alaska, Colorado, Oregon, and Washington) and the District of Columbia have legalized recreational marijuana.⁴ But, more so, 23 states have decriminalized medical marijuana, including the State of Maryland in 2013.⁵

One of the most frequent legal issues in states with medical or recreational marijuana industries concerns where to locate marijuana distribution and production facilities.⁶ In Maryland, new law states that local municipalities shall determine the zoning and planning requirements of marijuana facilities.⁷ However, the generality of the rules leave them open to scrutiny.⁸ For instance, can a local government legally ban marijuana facilities from its municipality? And, if it cannot, what do appropriate zoning regulations look like?

The purpose of this article is to examine the regulations governing the zoning and planning requirements of growers, processors, and dispensaries in Maryland. The following analysis will elucidate some of the benefits medical marijuana can have on property values, while revealing some of its shortcomings. Additionally, it will explain the struggles local municipalities are faced with in drafting zoning regulations and propose a solution for future zoning regulation in this budding industry.

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1. Nanette Porter, *Denver: Indo Expo Trade Show, “Green is the New Gold,”* MEDICAL JANE (Jun. 9, 2015), <http://www.medicaljane.com/2015/06/09/denver-indo-expo-trade-show-green-is-the-new-gold/>.
 2. Chris Weigant, *Marijuana Grows Up*, THE HUFFINGTON POST (Jan. 26, 2015), http://www.huffingtonpost.com/chris-weigant/marijuana-grows-up_b_6551216.html.
 3. *Id.*
 4. *Id.*
 5. Matt Ferner, *Legal Marijuana is the Fastest Growing Industry in the U.S.: Report*, THE HUFFINGTON POST (Jan. 26, 2015), http://www.huffingtonpost.com/2015/01/26/marijuana-industry-fastest-growing_n_6540166.html.
 6. Ian Morrison, *Where to put it? The Confusing Question of How to Deal with Marijuana Dispensaries*, 3 U. BALT. J. LAND & DEV. 79, 80 (2013).
 7. MD. CODE ANN., HEALTH-GEN. § 13-3306 (West 2015).
 8. *Id.*

II. Background

Maryland first passed legislation legalizing the medicinal use of marijuana in 2013, creating the Natalie M. LaPrade Medical Marijuana Commission. However, only medical universities, such as Johns Hopkins, were allowed to distribute it.⁹ After a year, none of the universities had distributed any marijuana to medical patients.¹⁰ So, in April of 2014, Governor Martin O'Malley significantly revamped the medical marijuana program by passing Senate Bill 923 and House Bill 881.¹¹ The bills made medical marijuana more accessible to Marylanders by bringing in private capital to help produce and distribute the drug.¹² Specifically, the law provided that private growers, processors, and dispensaries could legally produce and distribute medical marijuana within the state, subject to certain conditions.¹³

For instance, the bills initially limited the amount of growers to 15 and limited the amount of dispensaries (with the amount of dispensaries to be decided by the Commission at a later date), but did not limit the amount of processors allowed.¹⁴ Further, it required that "an entity seeking licensure as a medical marijuana grower shall meet local zoning and planning requirements."¹⁵ Later amendments to the law reworded the provision to state that marijuana growers "shall conform to local zoning and planning requirements," or in the case of dispensaries and processors, "shall conform to *all* local zoning and planning requirements."¹⁶ Additionally, the Commission agreed on terms that would allow two dispensaries per senatorial district (for a total of 94), plus a dispensary for each grower's location (bringing the grand total to 109).¹⁷

About a year later, Governor Larry Hogan, who became governor of Maryland in 2015, signed House Bill 490 into law.¹⁸ The bill made slight alterations to the program.¹⁹ For instance, it replaced the word "marijuana" with the more scientific term "cannabis," ultimately

9. Feni Nirappil, *After Long Delay, Maryland is about to Launch Medical Marijuana Program*, THE WASHINGTON POST (2015), https://www.washingtonpost.com/local/md-politics/after-long-delay-maryland-is-about-to-launch-medical-marijuana-program/2015/09/22/9b7d0a92-5d65-11e5-8e9e-dce8a2a2a679_story.html.

10. *Id.*

11. Natalie M. LaPrade Medical Marijuana Commission, *Laws and Regulations* (Dec. 9, 2015), <http://mmcc.maryland.gov/pages/law/law.aspx>.

12. *Id.*

13. S. Res. 531, 435th Gen. Assemb., Reg. Sess. (2015).

14. *Id.* (currently there is no limit on the amount of processors allowed within the State).

15. *Id.*

16. MD CODE ANN., HEALTH-GEN. § 13-3306 (West 2015).

17. Natalie M. LaPrade Medical Marijuana Commission *supra* note 11.

18. Natalie M. LaPrade Medical Marijuana Commission, *Home*, Maryland.gov (2015) <http://mmcc.maryland.gov/default.aspx>.

19. *Id.*

renaming the program to the Maryland Medical Cannabis Commission, or “MMCC” for short.²⁰ Additionally, it set the initial license for growers, processors, and dispensaries at “four years with two year renewal terms.”²¹ Finally, it completely eliminated “academic medical centers” from the distribution of medical cannabis.²² After a promulgation period, the complete set of rules became effective in September 2015.²³ Shortly thereafter, the MMCC issued a press release for applications from growers, dispensaries, and processors due no later than November 6, 2015.²⁴ Remarkably, the MMCC received a staggering 882 applications by the deadline.²⁵

III. Analysis

A. *Proponents Embrace Economic Opportunity*

i. Medical Cannabis Raises Property Values And Creates Jobs

Most people credit the high demand of applications to the potential for high profits in Maryland.²⁶ The reason being that Maryland law specifies a broad set of qualifying conditions for patients.²⁷ For instance, some of the medical conditions for which applications are encouraged are “severe or chronic pain,” “severe nausea,” or “severe or persistent muscle spasms.”²⁸ It also includes “any other condition that is severe, and for which other medical treatments have been ineffective if the symptoms reasonably can be expected to be relieved by medical cannabis.”²⁹ Thus, since the conditions are mostly general ailments, it is possible that Maryland will see more patients than other states with relative market sizes.³⁰

Correspondingly, this is great news for Maryland’s real estate market.³¹ Commercial property values are expected to increase because of the high demand for retail locations.³² Additionally, growers usually

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Omar Sacirbey, *Potential for Large Patient Pool, Hefty Profits Offsets Onerous Fees in Maryland*, MARIJUANA BUS. DAILY (November, 2015), <http://mjbizdaily.com/lure-of-large-potential-patient-pool-hefty-profits-offsets-onerous-fees-in-maryland/>.

27. *Id.*

28. MD CODE ANN. HEALTH-GEN. § 13- 3304 (West 2015).

29. *Id.*

30. Sacirbey, *supra* note 26.

31. *Maryland MMJ Industry Fires Up Real Estate Market*, MARIJUANA BUS. DAILY (December 9, 2015), <http://mjbizdaily.com/maryland-mmj-industry-fires-up-local-real-estate-market/>.

32. Harry Campbell, *The Effects of Legalizing Marijuana on the Denver Real Estate Market*, THE AGENT HARVEST BLOG (August 27, 2014), <http://www.agenthar>

look for older industrial areas to set up their grow sites.³³ Thus, older warehouses and buildings will become treasure troves for commercial owners once again, rather than vacant moneyless pits.³⁴

On the other hand, some believe legalization of medical cannabis will negatively affect residential property values because of the social stigma associated with marijuana.³⁵ But studies of the Denver housing market refute this claim.³⁶ They actually show a simultaneous increase in residential property values attributable to marijuana proponents migrating to Denver to work in this bustling new industry.³⁷ In addition, landlords have been able to capitalize by increasing the rents of their residential properties.³⁸ As a result, renting is no longer cost efficient for some migrants.³⁹ They would rather own property and use it as a wealth-building asset.⁴⁰ Where real estate developers have realized economic opportunity in revitalizing older houses, there is also a struggle to keep up with demand.⁴¹

ii. Washington County Is on Board

Washington County is embracing economic development.⁴² In fact, its board “unanimously passed a resolution supporting a 45,000-square-foot indoor growing facility proposed by Green Thumb Industries.”⁴³ More recently, Harvest Inc., an Arizona-based company, offered the town of Hancock a five percent non-voting equity stake in the cultivation facility the company wants to open in the County.⁴⁴ If the company wins a license, then it expects to create up to 125 jobs.⁴⁵ It has already found an old Fleetwood RV factory as a potential grow site.⁴⁶ For a town that lost three factories and over a 1,000 jobs in the last 20 years, the medical cannabis industry could be this town’s redemption.⁴⁷

vest.com/blog/the-effects-of-legalizing-marijuana-on-the-denver-real-estate-market/.

33. MARIJUANA BUS. DAILY, *supra* note 31.

34. *Id.*

35. Morrison, *supra* note 6, at 80.

36. Campbell, *supra* note 32.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. Nirappil, *supra* note 9.

43. *Id.*

44. Sacirbey, *supra* note 26.

45. *Id.*

46. *Id.*

47. *Id.*

B. *Adversaries Fight Back Against Medical Cannabis*

i. Local Officials Concerned About Crime

Opponents of medical cannabis believe an issue could arise if an influx of marijuana use exacerbates the ongoing drug problems of a community.⁴⁸ There is a certain stigma clouding the medicinal benefits of marijuana.⁴⁹ Specifically, society looks down on marijuana for being a “gateway drug.”⁵⁰ For instance, it is regarded as a drug that may not be especially dangerous but may lead to harder drugs like heroin or cocaine.⁵¹ The issue confounding some local governments in Maryland is whether or not state law preempts them from legally banning medical cannabis in their municipality?

Recently, the California Supreme Court upheld a local zoning ban on medical cannabis facilities from operating within its jurisdiction despite state law permitting medicinal cannabis.⁵² In *City of Riverside*, the Court discussed three ways local legislation could be preempted by state law: expressly, by implication, or by conflict.⁵³ First, state law expressly preempts local legislation when it clearly and completely covers the subject matter, as it is exclusively a state matter.⁵⁴ Second, state law impliedly preempts local legislation when it partially covers the subject matter but is of paramount concern to the state.⁵⁵ Third, and lastly, State law preempts local legislation when it partially covers the subject matter, but allowing the local ordinance would be so adverse to the state as to outweigh the benefit to the locality.⁵⁶ On the other hand, the Court made clear that there is “no preemption where state law expressly or implicitly *allows* local regulation.”⁵⁷

In this case, the Court found that California’s state cannabis legislation in no way limited local regulation of medical cannabis facilities or authorized the existence of such facilities.⁵⁸ Further, the Court opined that legislation enacted by the voters of California only meant to create a “narrow exception to the criminal law for medical marijuana possession.”⁵⁹ Finally, the Court offered additional support saying that the local interests of each municipality may vary from jurisdiction to

48. Campbell, *supra* note 32.

49. Morrison, *supra* note 6, at 80.

50. Maia Szalavitz, *Marijuana as a Gateway Drug: The Myth that Will Not Die*, TIME (Oct. 29, 2010), <http://healthland.time.com/2010/10/29/marijuana-as-a-gateway-drug-the-myth-that-will-not-die/>.

51. *Id.*

52. *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 300 P.3d 494 (Cal. 2013).

53. *Id.* at 500.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 510.

58. *Id.*

59. *Id.* at 502.

jurisdiction.⁶⁰ “Thus, facilities that dispense medical marijuana may pose a danger of increased crime, congestion, blight, and drug abuse, and the extent of this danger may vary widely from community to community.”⁶¹

ii. Anne Arundel County’s Proposed Ban

Similar to the government officials in the *City of Riverside*, the Anne Arundel County Executive, Steve Schuh, is concerned with possible crime resulting from the decriminalization of marijuana.⁶² “Schuh said the state regulations on who can grow and obtain medical marijuana are so loose that they amount to legalizing recreational marijuana uses. The potential consequences for Anne Arundel, he said, include medical cannabis being resold on the street and would-be robbers stalking patients who leave dispensaries carrying as much as \$3,000 worth of pot.”⁶³ Schuh initially proposed a ban, but was quelled after not receiving enough support to move forward.⁶⁴

Furthermore, on September 22, 2015, the Attorney General of Maryland, Brian Frosh, issued an advisory opinion on whether state law preempted Schuh’s locally proposed ban.⁶⁵ Frosh wrote, “the laws on medical marijuana. . . specifically authorize entities registered and licensed under its provisions to perform certain acts related to medical marijuana, from use and possession to manufacture and sale.”⁶⁶ He continued, “the law expressly states that persons who act under the authority of the law may not be subject to arrest, prosecution, or any civil or administrative penalty, including a civil penalty or disciplinary action by a professional licensing board, or be denied any right or privilege, for the medical use of cannabis.”⁶⁷ Thus, Frosh believes that state law expressly preempts Schuh’s ban because it clearly and completely covers the subject matter, as it is exclusively a state matter.⁶⁸

As a result, Schuh and the Anne Arundel County Council came together in October and proposed “some of the strictest medical marijuana regulations in Maryland.”⁶⁹ Schuh’s proposal would “prevent businesses from operating within 1,000 feet of schools and homes,

60. *Id.* at 508.

61. *Id.* at 508-9.

62. Nirappil, *supra* note 9.

63. *Id.*

64. Fenit Nirappil, *Maryland County Backs Away from Proposed Medical Marijuana Ban*, THE WASHINGTON POST (Oct. 2015), https://www.washingtonpost.com/local/md-politics/maryland-county-backscal-marijuana-ban/2015/10/19/e31933a4-7673-11e5-bc80-9091021aeb69_story.html.

65. Brian E. Frosh, *Attorney General Letter to Senator Zirkin* (September 22, 2015), <http://mmc.maryland.gov/pages/Attorney%20General%20Letter%209.22.15.pdf>.

66. *Id.*

67. *Id.*

68. *Id.*

69. Nirappil, *supra* note 64.

and prohibit window displays of marijuana.”⁷⁰ Additionally, growers must have armed security, be located on at least 10 acres, and may not emanate light at night.⁷¹

C. *The Problem With Onerous Regulations*

i. Avoiding “Green Zones”

However, draconian zoning regulations could have harsh unintended consequences, such as limiting medical cannabis businesses to only certain areas within a municipality.⁷² Thus, “clustered pockets” of medical cannabis dispensaries may limit the availability of patients to prescribed medical cannabis.⁷³ Additionally, medical cannabis businesses are typically treated like businesses that deal in the “vices” (liquor stores, adult film stores, etc.) due to their secondary effects.⁷⁴ A cluster of medical cannabis businesses with other like-businesses could lead to a poor business climate.⁷⁵ Finally, medical cannabis companies would run each other out of business in areas that are appropriately called “green zones.”⁷⁶ Since they are in such close proximity, they would suffer from unhealthy competition.⁷⁷

ii. Baltimore County's Solution

Initially, the Baltimore County Council proposed strict zoning regulations, similar to those of Anne Arundel County.⁷⁸ For instance, medical marijuana businesses could not be located within 1,000 feet of a house of worship, a public or private school, a public park or public recreation facility, a public library, a child care home, a residential lot, or within 2,500 feet of another medical marijuana dispensary.⁷⁹ However, advocates of medical cannabis argued that the regulations would

70. *Id.*

71. *County Executive Steve Schuh, Bipartisan County Council Majority Propose Medical Marijuana Zoning Framework*, ANNE ARUNDEL COUNTY (Oct. 2015), http://www.aacounty.org/News/AACO_News/county-executive-steve-schuh-bipartisan-county-council-majority-propose-medical-marijuana-zoning-framework.

72. Josh Wolf, *S.F. Board Watch: City to Consider Expanding ‘Green Zone’ for Marijuana Dispensaries*, SAN FRANCISCO PUBLIC PRESS (Nov. 7, 2013 6:54 PM), <http://sfpublicpress.org/news/2013-11/sf-board-watch-city-to-consider-expanding-green-zone-for-marijuana-dispensaries>.

73. *Id.*

74. Morrison, *supra* note 6, at 82.

75. Wolf, *supra* note 72.

76. Morrison, *supra* note 6, at 85.

77. *Id.* at 80.

78. BALT. COUNTY COUNCIL, MD., *Zoning Regulations – Medical Cannabis*, H.B. 61-15 (2015), <http://www.baltimorecountymd.gov/countycouncil/legislation/archived/2015/Bills%202015>.

79. *Id.*

essentially ban marijuana businesses from Baltimore County altogether.⁸⁰

In response, the Baltimore County Council revised their plan, deleting many of the burdensome regulations.⁸¹ For example, the new plan merely states, “[a] medical cannabis dispensary may not be located within 500 ft. of a public or private elementary school, middle school, or high school; or, within 2,500 ft. of another medical cannabis dispensary.”⁸² Additionally, the regulations allow dispensaries within business districts and growing and processing facilities within certain rural zones.⁸³ However, in commercial revitalization districts or resource preservation and environmental enhancement zones a person must obtain a special exception.⁸⁴ A special exception “can be granted by an administrative judge after a public hearing.”⁸⁵

IV. Conclusion

In the end, Baltimore County’s zoning and planning requirements on medical cannabis facilities provide the best roadmap for bipartisan workmanship.⁸⁶ As such, other local municipalities in Maryland need to strike a balance between onerous regulations and the large demand for medical cannabis.⁸⁷ Both arguments for and against medical cannabis are grounded in the public’s well being, so both sides will lose if they do not find a middle ground.⁸⁸

Furthermore, the state should explicitly mandate in the statute that local governments must allow the existence of marijuana growers, dispensaries, and processors within their municipalities.⁸⁹ That would end the debate between the state and local governments over preemption.⁹⁰ Until then, municipalities that want a ban will continue to argue for one.⁹¹ Most recently, the Calvert County Council “ask[ed] state lawmakers to give counties the option of banning marijuana dispensaries and growing facilities within their borders.”⁹² Reportedly,

80. Nirappil, *supra* note 9.

81. *Id.*

82. BALT. COUNTY COUNCIL, *supra* note 78.

83. Pamela Wood, *Balto. Co. Council Approves Zoning Rules for Medical Marijuana*, BALTIMORE SUN (Sept. 8, 2015, 7:04 PM), <http://www.baltimoresun.com/news/maryland/baltimore-county/bs-md-co-marijuana-zoning-20150908-story.html>.

84. *Id.*

85. *Id.*

86. BALT. COUNTY COUNCIL, *supra* note 78.

87. Morrison, *supra* note 6, at 88.

88. See Nirappil, *supra* note 9.

89. See *City of Riverside v. Inland Empire Patients Health and Wellness Ctr., Inc.*, 300 P.3d 494, 511 (Cal. 2013).

90. *Id.*

91. *Maryland County Wants Out of MMJ Program*, MARIJUANA BUS. DAILY (Dec. 16, 2015), <http://mjbizdaily.com/maryland-county-wants-out-of-state-mmj-program/>.

92. *Id.*

they are willing to take the State to court over the matter.⁹³ As such, it is imperative that the General Assembly take up the matter before licenses are issued this fall.⁹⁴

93. *Id.*

94. *Maryland Announces 6-Month MMJ Licensing Delay*, MARIJUANA BUS. DAILY (Dec. 21, 2015), <http://mjbizdaily.com/maryland-announces-updated-licensing-timeline/>.