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WHY LOCALISM IS BAD FOR BUSINESS: LAND USE REGULATION OF THE CANNABIS INDUSTRY

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This Article provides a survey of land use restrictions related to cannabis dispensaries and examines how localities have used such restrictions to control where this new land use can locate. Several of these zoning ordinances have been challenged in court as preempted by state or federal law, and this Article examines a few of these cases. The Article considers both policy and legal arguments against the regulation of cannabis dispensaries by local governments, setting forth the legal argument that zoning ordinances that ban, or substantially restrict, activities or operations related to cannabis may constitute an improper application of a locality's delegated zoning power in certain circumstances.

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INTRODUCTION

Federal restriction of the use and sale of cannabis first occurred in 1937 with the passage of the Marihuana Tax Act.[1] Legal penalties for cannabis possession increased in 1951 and 1956 with the enactment of the Boggs[2] and Narcotic Control Acts,[3] respectively, and prohibition under federal law with the

1. Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (1937) (repealed 1970).

2. *See* Boggs Act of 1951, Pub. L. No. 82-255, 65 Stat. 767 (1951).

3. *See* Narcotic Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 567 (1956); Leigh Ann Anderson, *CSA Schedules*, DRUGS.COM (last updated June 17, 2020), https://www.drugs.com/csa-schedule.html.

Controlled Substances Act of 1970.[4] Over the course of the next thirty years, opposition to the drug started to wane and, in 1996, California became the first state to permit botanical cannabis for medicinal purposes under physician supervision with the enactment of the Compassionate Use Act.[5] In 2012, Washington and Colorado voted to legalize recreational cannabis use in small quantities.[6] As of December 2020, thirty–six states and four territories have adopted statutes—in some cases, constitutional provisions—that legalize cannabis for medical use.[7] Fifteen states and three territories have additionally legalized cannabis for adult nonmedical uses (hereinafter referred to as "recreational use").[8]

The emerging cannabis industry faces several key challenges. One of these challenges is resistance from local government as to where cannabis dispensaries may physically locate. Cannabis dispensaries represent an entirely new land use. Inaccessible dispensaries, or too few dispensaries, may not only adversely impact the industry's financial bottom-line, but may also impermissibly restrict a patient's access to medical care. Part I provides a general survey of different land use restrictions related to cannabis dispensaries and examines how localities have used such restrictions to control or restrict where this new land use can locate. Several of these local zoning ordinances have been challenged in court as preempted by state or federal law, and this part provides a brief survey of a few of these cases.

Part II sets forth both policy and legal arguments against the regulation of cannabis by local governments. Two general policy arguments against cannabis localism are considered.

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4. *See* Controlled Substance Act of 1970, 21 U.S.C. §§ 801–971 (2018); Keith Speights, *Timeline for Marijuana Legalization in the United States: How the Dominoes are Falling*, MOTLEY FOOL (last updated Jan. 2, 2020, 1:06 PM), https://www.fool.com/investing/timeline-for-marijuana-legalization-in-the-united.aspx.

5. *See* CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West 1999).

6. *See* COLO. CONST. art. XVIII, § 16; *see also* WASH. REV. CODE ANN. § 69.50.4013 (2016).

7. *See* NAT'L CONF. OF STATE LEGIS., *State Medical Marijuana Laws*, https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (last updated Mar. 1, 2021). The four territories include the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. *See id.*

8. *See id.* The three territories include the District of Columbia, Guam, and the Northern Mariana Islands. *See id.*

First, to the extent that local government action is motivated by an intention to reduce total cannabis consumption, this intention is undercut by the transportability of cannabis use. *Second*, to the extent that local government action is motivated by an intention to reduce total cannabis consumption only *within* a jurisdiction, local land use regulation is likely to yield an inequitable distribution of social costs and benefits. Cannabis localism allows people who live in jurisdictions that have banned cannabis to receive the public benefits of state tax revenue collected from cannabis operations and activities without incurring any of the corresponding social costs. In addition, this part sets forth the legal argument that zoning ordinances that ban, or substantially restrict, activities or operations related to cannabis may, under certain conditions, constitute an improper application of a locality's delegated zoning power. Specifically, this part considers two government interests that localities can rely upon to justify a zoning ordinance that bans (or effectively bans) cannabis dispensaries as an allowable land use: (1) the protection of community morals, and (2) the regulation of economic competition, and argues that neither may be legitimate under rational basis review.

Part III briefly concludes.

I.
Land Use Restrictions on Cannabis Dispensaries

This part provides a general survey of different land use restrictions related to cannabis dispensaries and examines how localities have used such restrictions to control or restrict where this new land use can physically locate. Several of these zoning ordinances have been challenged in court as preempted under state or federal law, and this part provides a brief survey of a few of these cases.

A. *Zoning Law and Authority*

This section provides a general overview of zoning law and delegated authority.

1. *General Background on Zoning*

"Zoning is the deprivation, for the public good, of certain uses by owners of property to which their property might oth-

erwise be put . . . ."[9] A zoning ordinance is a legislative document drafted and enacted by a city or county government and is enforced by a specialized board or planning commission.[10] Through zoning ordinances, localities set forth classifications of permitted and prohibited land uses, often dividing the locality into separate districts within which certain prescribed uses are allowed.[11] Land use restrictions vary across localities according to the different legislative decisions that each local legislative body makes when drafting or amending its zoning ordinance.[12] Although zoning decisions are made with respect to specific neighborhoods, and the property owners located within, zoning decisions are considered legislative in nature, impacting the community at large, and require a holistic analysis of aesthetic, environmental, and economic considerations.[13]

To justify a zoning ordinance, the government must establish that the zoning decision promotes the public health, safety, morals, or general welfare of the community. At a local level, the authority to promote these specific criteria is referred to as the "police powers."[14] Hence, for a zoning ordinance to be valid, the enactment of the ordinance must represent a legitimate exercise of a locality's police power.[15] In general, local governments are permitted, within constitutional limits, to regulate or restrict uses, population densities, physical characteristics, or locations of land and buildings within their jurisdictions by use of zoning ordinances.[16] Localities, however, do not have an inherent authority to regulate land use; instead, this authority is *delegated* to localities by state

9. Gilgert v. Stockton Port Dist., 60 P.2d 847, 850 (Cal. 1936).

10. *See, e.g.*, CAL. GOV'T CODE § 65850 (West 2000).

11. *See, e.g.*, John R. Nolon, *Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Use Control*, 23 PACE ENVTL. L. REV. 821, 830–33 (2006).

12. *See, e.g.*, W.R. Grace & Co.-Conn. v. Cambridge City Council, 779 N.E.2d 141, 149–50 (Mass. App. Ct. 2002).

13. *See* Metro. Baptist Church v. D.C. Dep't of Consumer & Regulatory Affairs, 718 A.2d 119, 125 (D.C. Cir. 1998).

14. *See* Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). The police power grants municipalities broad authority to craft policies that are designed to address issues of local concern. *See id.*

15. *See id.* at 387.

16. *See, e.g.*, *id.* at 388–89.

zoning enabling statutes[17] or through home-rule provisions contained in the state constitution.[18]

Despite an oftentimes broad grant of power to localities, courts have limited the scope of the police powers based upon common law interpretations of applicable statutory and constitutional provisions. Courts, for example, have held that a zoning ordinance is valid only if the restriction bears "a reasonable relation to the general welfare" of the community.[19] Although courts are strongly deferential to local legislatures when assessing the validity of a zoning ordinance, declining to interfere if reasonable minds could differ as to the propriety of the ordinance at issue,[20] courts have held land use ordinances invalid if the ordinance is arbitrary or unreasonable, possessing no real relationship to the public health, safety, morals, or general welfare of the community.[21] Moreover, a zoning ordinance is only entitled to regulate economic competition if the primary purpose of the local ordinance is to advance a legitimate public interest.[22]

2. *Cannabis State Regulations*

Although local governments are afforded substantial discretion in the regulation of local matters, this regulatory power is limited by the concept of state sovereignty that can restrict the applicability of local ordinances in conflict with state law. With respect to cannabis, some state statutes explicitly provide for broad local authority to regulate cannabis land uses, while others impose significant statutory constraints upon that authority. Other state statutes are silent on the subject.

17. *See, e.g.*, MICH. COMP. LAWS § 125.3201 (2016).

18. *See, e.g.*, G.A. CONST. art. IX, § 2.

19. *See, e.g.*, Wal-Mart Stores Inc. v. City of Turlock, 41 Cal. Rptr. 3d 420, 439 (Cal. Ct. App. 2006) (quoting Associated Home Builders v. City of Livermore, 557 P.2d 473 (Cal. 1976)).

20. *See, e.g.*, *Euclid*, 272 U.S. at 388 (stating that "if the validity . . . be fairly debatable, the legislative judgment must be allowed to control").

21. *See, e.g.*, *Home Builders*, 557 P.2d at 473.

22. *See, e.g.*, Hernandez v. City of Hartford, 159 P.3d 33, 41–42 (Cal. 2007).

a. Express Authority to Ban

Several state statutory schemes expressly delegate to local governments the power to prohibit all activities or operations related to cannabis. Colorado's constitutional provision authorizing the recreational use of cannabis, for example, provides that "[a] locality may prohibit the operation of marijuana cultivation facilities [and other marijuana operations] . . . ."[23] A similar provision is found in Alaska's recreational cannabis statute, which expressly allow local governments to prohibit cannabis activities and operations, including cultivation, within the jurisdiction.[24] As of 2016, Michigan has allowed localities to determine if medical cannabis operations are permitted within a jurisdiction.[25] California also authorizes local governments "to completely prohibit the establishment or operation of one or more types of [cannabis] *businesses* . . . within the local jurisdiction,"[26] but expressly prohibits local governments from banning *personal* cultivation if undertaken inside a residence or accessory structure.[27]

b. Express Limitation to Ban

Some cannabis state statutes expressly limit localities' authority to ban, or restrict, cannabis-related activities or operations. Delaware's Medical Marijuana Act,[28] for instance, while expressly preserving local authority to enact zoning restrictions on medical cannabis operations if not in direct conflict with the state statute, provides that "no local government may prohibit registered compassion center operations altogether,

23. COLO. CONST. art. XVIII, § 16(5).

24. *See* ALASKA STAT. § 17.38.210 (2015).

25. *See* MICH. COMP. LAWS § 333.27205 (2020).

26. CAL. BUS. & PROF. CODE § 26200(a)(1) (West 2020).

27. *See* CAL. HEALTH & SAFETY CODE § 11362.2(b) (West 2020). In Washington, the ability of local entities to regulate recreational cannabis was not explicitly described in the Washington State I-502 and has required clarification; in January 2014, the Washington State Attorney General issued an opinion that the state law passed by voters in 2012 did not preempt Washington's local governments from banning or regulating local cannabis businesses. *See* Letter from Robert W. Ferguson, Att'y Gen. of Washington, to the Hon. Sharon Foster, Chair, Washington State Liquor Control Board (Jan. 16, 2014), https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/FosterAGO2014No02.pdf.

28. Delaware Medical Marijuana Act, DEL. CODE ANN. tit. 16, § 49A (2017).

either expressly or through enactment of ordinances or regulations which make registered compassion center . . . operations unreasonably impracticable in the jurisdiction."[29] Likewise, Texas law prohibits any local "rule, ordinance, order, resolution, or other regulation that prohibits the cultivation . . . of low THC-cannabis."[30] Hawaii's statute provides that "medical cannabis production center(s) shall be permitted in any area in which agricultural production is permitted . . . ."[31] While Illinois' Compassionate Use of Marijuana Pilot Project Act does not completely preempt local authority to ban medical cannabis operations, the statute does provide that local ordinances may not "unreasonably prohibit the cultivation, dispensing or use of medical cannabis . . . ."[32]

Oklahoma's cannabis statute is one of the most restrictive with respect to the exercise of local zoning power, stating that "[n]o city or local municipality may unduly change or restrict zoning laws to prevent the opening of a retail marijuana establishment."[33] Although the state statute allows localities to follow their own planning and zoning procedures to determine if specific zoning districts are suitable for growing, processing, or retail cannabis sales, state law prohibits localities from unduly restricting or preventing the opening of a cannabis dispensary.[34] In part due to this relatively restrictive statutory frame-

29. *Id.* § 4917A.

30. TEX. HEALTH & SAFETY CODE ANN. § 487.201 (West 2017).

31. HAW. REV. STAT. ANN. § 329D-22(a)(1) (West 2017).

32. 410 ILL. COMP. STAT. ANN. 130/140 (LexisNexis 2017).

33. OKLA. STAT. tit. 63, § 425(F) (2018). Florida law is relatively proscriptive as well, at least with respect to medical cannabis cultivation and processing, stating that all matters regarding the "[r]egulation of cultivation, processing, and delivery of marijuana . . . [is] preempted to the state" FLA. STAT. § 381.986(11) (2017). Not only are local governments barred from banning the cultivation of medical cannabis, but local governments may not impose any restrictions beyond those included in the state statute or state agency regulations implementing the statute. *See id.*

34. *See* OKLA. STAT. tit. 63, § 425(F) (2018). Interestingly, the history of Oklahoma's prohibition of 3.2 percent beer, and the corresponding caselaw, highlight the importance of having state statutes that expressly preempt local government action in the context of a potentially locally unwanted land use such as a cannabis dispensary. *See, e.g.*, Sparger v. Harris, 131 P.2d 1011, 1013-14 (Okla. 1942) (considering a municipal ordinance that prohibited the sale of 3.2 percent beer on Sundays, where state law had no such restriction on Sunday sales, and overturning the ordinance because 3.2 percent beer had been expressly defined as "nonintoxicating" by the Oklahoma state

work, Oklahoma has more licensed cannabis dispensaries than any other state in the United States, with 1,742 cannabis dispensaries operating across the state as part of a three-tiered system that regulates growers, processors, and dispensaries.[35] Specifically, Oklahoma has one cannabis dispensary for every 2,356 persons in the state.[36] California, by contrast, has one cannabis dispensary for every 67,972 persons.[37]

B. *Land Use Regulation*

Local land use regulations related to cannabis dispensaries can be divided into three categories: (1) use restrictions, (2) proximity buffers, and (3) density controls.[38] A locality can close a cannabis dispensary as a public nuisance if the dispensary does not conform to local land use regulations.[39]

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legislature); *Ex parte* Gammel, 208 P.2d 961, 967 (Okla. Crim. App. 1949) (considering a local ordinance that prohibited the use of a curtain, screen, or any type of obstruction in excess of three feet from the floor to obstruct the interior view from the street of any premises that served 3.2 percent beer and rejecting this exercise of police power as preempted by state law, emphasizing that the legislature had spoken so that there would be a uniform application of the law in each county and municipality of the state); *Ex parte* Pappe, 201 P. 2d 260, 263 (Okla. Crim. App. 1948) (reviewing the validity of another Sunday sale restriction on 3.2 percent beer and rejecting the ordinance because the ordinance prohibited conduct expressly permitted by state statute, concluding that the state had "invaded this field" and that "a municipality may not pass any ordinance that conflicts with the general statute."); 7-Eleven v. McClain, 422 P. 2d 455, 458–59 (Okla. 1967) (considering whether an ordinance may prohibit the sale of 3.2 percent beer for consumption off premises if such sales are not prohibited by state law and finding that the ordinance occupied a field of legislation reserved to the state and restricted the sale of 3.2 percent beer in a manner, and to an extent, contrary to the express provisions of the state statute and was, therefore, void as an excessive use of police power).

35. *See* Ed Keating, *Which State Has the Most Licensed Cannabis Dispensaries? The Answer May Surprise You*, CANNABIZ MEDIA (Sept. 18, 2019), https://cannabiz.media/which-state-has-the-most-licensed-cannabis-dispensaries-the-answer-may-surprise-you/.

36. *Id.*

37. *Id.*

38. Jeremy Németh & Eric Ross, *Planning for Marijuana: The Cannabis Conundrum*, 80 J. AM. PLAN. ASS'N 6, 8 (2014); Patricia Salkin & Zachary Kansler, *Medical Marijuana Meets Zoning: Can You Grow, Smoke, and Sell That Here?*, 62 PLAN. & ENV'T L. 3, 3–6 (2010).

39. *See, e.g.*, State v. McQueen, 828 N.W.2d 644, 646–47 (Mich. 2013).

1. *Local Land Use Regulations*

Many local ordinances include land use restrictions that limit the type of zoning districts within which cannabis dispensaries may locate. San Francisco, for instance, permits the cultivation and sale of medical cannabis only in Residential Commercial (RC) medium and high-density zones and further requires medical cannabis dispensaries meet a restrictive set of permitting criteria to comply with existing zoning codes.[40] Localities can be more restrictive, however. Monument, Colorado, for example, allows the commercial sale of medical cannabis in commercial zones as a conditional use only.[41] San Mateo County in California allows medical cannabis dispensaries only within the unincorporated areas of the county;[42] while Alameda County, California has adopted a similar approach.[43] Los Angeles County, by contrast, does not permit cannabis-related activities or operations in any of its unincorporated areas.[44]

Some localities have enacted temporary bans, also known as "moratoriums," prohibiting cannabis dispensaries from operating anywhere in the jurisdiction, to allow time to assess the expected impact of this land use and to develop and enact appropriate local regulations in response. In Massachusetts, for example, recreational cannabis was legalized on July 28, 2017.[45] As of March 2018, 130 municipalities in the state had enacted a temporary moratorium on recreational cannabis retail sales, ostensibly to provide municipalities with enough time to implement proper zoning regulations.[46] Courts have generally approved this regulatory practice, holding that state

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40. *See* S.F., CAL., PLANNING CODE art. 2, § 209.3 (2017).

41. *See* MONUMENT, COLO., ZONING CODE §§ 17.36.030(A), (C) (2009). Further, the cultivation of recreational cannabis is restricted to accessory uses of residences. *See* MONUMENT, COLO., ZONING CODE § 17.05.010 (2016).

42. *See* SAN MATEO COUNTY, CAL., CODE §§ 5.148.010–.090 (2018).

43. *See* ALAMEDA COUNTY, CAL., CODE §§ 6.108.010–6.108.230 (2009).

44. *See* LOS ANGELES COUNTY, CAL., CODE §§ 7.55.010–7.55.340, 22.56.196(1)(a) (2010).

45. *See* Kristin LaFratta, *Massachusetts Gov. Charlie Baker Signs Marijuana Rewrite into Law*, MASSLIVE (July 28, 2017), https://www.masslive.com/news/boston/2017/07/governor_baker_signs_massachus.html.

46. *See* Dan Adams & Margeaux Sippell, *Pot Shops Face Bans in Most of Mass.*, BOSTON GLOBE (Mar. 16, 2018), https://www.bostonglobe.com/metro/2018/03/16/recreational-marijuana-companies-face-bans-moratoriums-most-mass-cities-and-towns/VZVpZpjpNggWuynQ45gQSJ/story.html.

law does not supersede a locality's authority to enact moratoriums as a means to promote the general welfare of the community.[47] Indeed, some localities have concluded that cannabis is simply not a land use that fits within their community and have enacted ordinances that *permanently* ban all commercial activities or operations related to cannabis.[48] In February 2020, Santa Clara, California, for example, voted to permanently prohibit all cannabis-related businesses and activities in any zoning classification.[49] Likewise, as of March 2018, fifty-nine municipalities in Massachusetts had enacted some type of permanent ban on recreational retail sales.[50]

Localities that do allow cannabis dispensaries to operate in the jurisdiction have often enacted statutory provisions that seek to distance these dispensaries from residential land use. The purpose of this type of proximity buffer is to "limit geographic availability of marijuana as well as reduce problems typically assumed to co-occur in proximity to dispensary locations, such as crime."[51] Some municipalities, for example, require a one-thousand foot distance between the property line of a cannabis dispensary and a residential-zoned property;[52] other municipalities require a distance of five-hundred feet.[53] Some individual municipalities have set even shorter distances.[54] San Mateo County, for example, has chosen not to impose any distance requirement, requiring instead a subjective assessment to determine if there exists sufficient distance between the cannabis dispensary and residential districts so as

47. *See, e.g.*, City of Claremont v. Kruse, 100 Cal. Rptr. 3d 1, 18 (Cal. Ct. App. 2009) (holding that "the CUA, by its terms, accordingly did not supersede the City's moratorium on medical marijuana dispensaries, enacted as an urgency measure for the immediate preservation of the public health, safety, and welfare") (internal quotations omitted).

48. *See, e.g.*, SIERRA MADRE, CAL., MUNICIPAL CODE § 17.10.010 (2010).

49. *See* SANTA CLARA, CAL., CODE OF ORDINANCES No. 2018 (2020).

50. *See* Adams & Sippell, *supra* note 46.

51. Bridget Freisthler et al., *Evaluating Medical Marijuana Dispensary Policies: Spatial Methods for the Study of Environmentally-Based Interventions*, 51 AM. J. COMMUNITY PSYCHOL. 278, 279 (2013).

52. *See, e.g.*, MONUMENT, COLO., CODE OF ORDINANCES § 17.36.030(C)(1)(a) (2020).

53. *See, e.g.*, TEMPE, ARIZ., ORDINANCE No. O2017.25, §1(B)(4) (2017).

54. *See, e.g.*, SANTA CRUZ, CAL., MUN. CODE §§ 24-12-1340(11), -1350(2) (2020) (allowing cannabis dispensary within fifty feet of a residential unit if proven that the dispensary will not have an adverse impact upon the residential property).

not to adversely impact residential land use.[55] In addition to residential zones, local governments have also required cannabis cultivation facilities be some prescribed distance from locations that tend to be visited by children, including schools, parks, playgrounds, day-care centers, and youth facilities.[56]

Finally, some localities have employed density controls to either cap the total number of cannabis dispensaries in the jurisdiction or base the total number of dispensaries upon the population of the jurisdiction. The number of cannabis dispensaries allowed to operate varies greatly across jurisdictions. Los Angeles, for example, had permitted a maximum of seventy dispensaries, though this ordinance has since been repealed.[57] Los Angeles had allowed these dispensaries to be distributed proportionally throughout the city based upon the population of individualized areas in relation to the total population of the entire city.[58] Other localities in California allow far fewer than seventy. Oakland, California, for example, a city roughly 10% the size of Los Angeles, allows only eight annually;[59] Berkeley, California, a city roughly 3% the size of Los Angeles allows just six.[60] Alameda County, which includes both Oakland and Berkeley, and has a population of approximately

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55. *See, e.g.*, SAN MATEO COUNTY, CAL., CODE OF ORDINANCES § 5.148.040 (2020).

56. *See* MENDOCINO COUNTY, CAL., CODE § 9.31.070(A)(1) (2020); *see also* Patricia E. Salkin & Zachary Kansler, *Medical Marijuana Meets Zoning: Can You Grow, Sell, and Smoke That Here?*, 62 PLANNING & ENV'T. L. 3, 5 (2010) ("Local governments have also sought to distance dispensing facilities from other types of locations and uses, such as churches, drug and alcohol rehabilitation facilities, group homes, halfway houses, recreational property, and in some instances, any publicly owned or maintained property.").

57. L.A., CAL., MUNICIPAL CODE § 45.19.6.2(B)(1) (2010).

58. *See id.*

59. *See* OAKLAND, CAL., CODE OF ORDINANCES § 5.80.020 (2009); *Quick Facts: Los Angeles city, California*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/losangelescitycalifornia (last visited Dec. 7, 2020); *Quick Facts: Oakland city, California*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/oaklandcitycalifornia (last visited Dec. 7, 2020).

60. *See* BERKELEY, CAL., MUN. CODE § 12.26.130(A) (2010); *Quick Facts: Los Angeles city, California*, *supra* note 59; *Quick Facts: Berkeley city, California*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/berkeleycitycalifornia (last visited Dec. 7, 2020).

one-and-a-half million, recently increased the permitted number of cannabis dispensaries from three to five.[61]

2. *Enforcement as a Public Nuisance Per Se*

In terms of enforcement, a locality can enjoin a cannabis dispensary as a public nuisance if the dispensary does not conform to local land use regulations. A nuisance can be defined as "[a]nything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoying of life or property".[62] A nuisance per se occurs if a "legislative body with appropriate jurisdiction, in the exercise of the police power, expressly declares a particular object or substance, activity, or circumstance to be a nuisance."[63] Many local codes provide that a land use in violation of existing zoning ordinances may be abated as a public nuisance.[64] Hence, opening a cannabis dispensary in a locality in which this land use is not an allowable use may be enjoined by the locality as a public nuisance per se. In *City of Claremont v. Kruse*, for example, the California Court of Appeals concluded that the defendant's operation of a medical cannabis dispensary without obtaining a tax certificate and business license in violation of the city's municipal code constituted a nuisance per se.[65] The court con-

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61. *See* ALAMEDA COUNTY, CAL., CODE OF ORDINANCES § 6.108.030(D) (2020); *Quick Facts: Alameda County, California*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/alamedacountycalifornia (last visited Dec. 7, 2020).

62. CAL. CIV. CODE § 3479 (2011).

63. Beck Dev. Co. v. S. Pac. Transp. Co., 52 Cal. Rptr. 2d 518, 549 (Cal. Ct. App. 1996).

64. Operating under the assumption that land use that is illegal under state or federal law constitutes a nuisance, Richard Doyle, a prior City Attorney in San Diego, argued that because the cultivation, sale, or use of cannabis is illegal under federal law, medical cannabis dispensaries can be legally abated as a nuisance. *See* Patricia E. Salkin, *Regulating Controversial Land Uses*, 39 REAL ESTATE L.J. 526, 537 (2011).

65. City of Claremont v. Kruse, 100 Cal. Rptr. 3d 1, 12 (Cal. Ct. App. 2009); *see also* Urgent Care Med. Servs. v. City of Pasadena, 230 Cal. Rptr. 3d 892, 894 (Cal. Ct. App. 2018) (alleging that a cannabis dispensary is a per se public nuisance); Kirby v. City. of Fresno, 195 Cal. Rptr. 3d. 815, 819 (Cal. Ct. App. 2015) (classifying a violation of ban on cannabis cultivation as both a public nuisance and misdemeanor); City of Corona v. Naulls, 83 Cal. Rptr 3d 1, 14 (Cal. Ct. App. 2008) (finding that a failure to comply with city's procedural requirements related to medical cannabis dispensaries created a

cluded that no showing of harm was required to establish a public nuisance per se, and the operation of the medical cannabis dispensary could, therefore, be enjoined without further proof of injury.[66]

C. *Preemption*

Local land use regulations related to cannabis dispensaries have been challenged in court as preempted by state law or federal law. This section examines a few of these cases.

1. *Preemption by State Law*

In the absence of a clear indication of preemptive intent, local land use authority is typically not preempted by state law, unless the zoning ordinance is in direct conflict with state law.[67] This conflict occurs if local law permits an activity that is forbidden by state law or prohibits activity that state law requires.[68] Further, if the state law on a subject is so comprehensive as to "fully occupy" the field, then there exists no regulatory authority left to be exercised by local governments.[69] State cannabis statutes are unclear in certain respects regarding the extent to which state law preempts local government action, and this statutory uncertainty has resulted in litigation in several states.

a. Upholding Local Authority

Courts are generally reluctant to find the traditional local authority to regulate land use preempted by state cannabis statutes. In *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.*, for example, the California Supreme Court considered whether a local ban on medical cannabis fa-

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nuisance per se and the imposition of a preliminary injunction was within the court's discretion).

66. *See id.*

67. *See* City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc., 300 P.3d 494, 499–500 (Cal. 2013).

68. *See id.*

69. *See* Cannabis Action Coalition v. City of Kent, 351 P.3d 151, 154 (Wash. 2015) (holding that preemption occurs "if the statute occupies the field, leaving no room for concurrent jurisdiction"); Ter Beek v. City of Wyoming, 823 N.W.2d 864, 868 (Mich. Ct. App. 2012) (holding that pre-emption occurs "when the statute completely occupies the regulator").

cilities was invalid given state medical cannabis statutes.[70] One of these state statutes, the Medical Marijuana Program ("MMP"), stated that patients and caregivers who cultivated, processed, transported, or sold cannabis for medical purposes would not be subject to state criminal sanctions.[71] Riverside had adopted an ordinance banning medical cannabis facilities in all zoning districts, declaring this land use a public nuisance.[72] The court held that the MMP was limited in scope, providing immunity only from certain enumerated state criminal and nuisance statutes.[73] Because nothing in the MMP "explicitly guarantees the availability of locations where such activities may occur, restricts the broad authority traditionally possessed by local jurisdictions to regulate zoning and land use planning within their borders, or requires local zoning and licensing laws to accommodate the cooperative or collective cultivation and distribution of medical marijuana," the court concluded that the ordinance was not expressly preempted by the MMP.[74] The court also found no implied preemptive intent, because it was possible to comply with both state and local laws by not engaging in medical cannabis operations altogether: the challenged ordinance did not require conduct otherwise banned by the MMP.[75] Finally, the court construed the MMP as constituting only a limited foray into the regulation of cannabis operations, rather than a statutory scheme that either "fully occup[ied] the field of medical marijuana regulation" or regulated the field to such an extent "that further local regulation would not be tolerated."[76]

In *People v. Onesra Enterprises, Inc*,[77] the California courts reaffirmed that the local authority to regulate land use is not preempted by state cannabis statutes.[78] Onesra Enterprises, a cannabis business, brought suit challenging Los Angeles' Pro-

70. *See Inland Empire*, 300 P.3d at 496.
71. *See id.* at 497 (construing CAL. HEALTH & SAFETY CODE § 11362.775 (West 2003)).
72. *See id.*
73. *See id.* at 506.
74. *Id.* at 506–07.
75. *See id.* at 507.
76. *Id.*
77. People v. Onesra Enters, Inc., 212 Cal. Rptr. 3d 860 (Cal. App. Dep't Super. Ct. 2016).
78. *See id.* at 868

position D, a provision approved by city voters in 2013 prohibiting all medical cannabis businesses in the jurisdiction and allowing only those medical cannabis collectives that satisfied certain restrictive conditions.[79] Although the court recognized that precedent provided immunity from prosecution for *personal* use or cultivation of medical cannabis, the court held that the more general provisions discussed in *Inland Empire* left local governments with clear authority to ban *businesses* that engaged in medical cannabis operations, even those businesses that have chosen to operate as a collective for the benefit of qualified patients.[80]

b. Local Authority Preempted

Some state courts, however, have found local authority over land use matters preempted by state cannabis statutes.[81] In *White Mountain Health Center, Inc. v. Maricopa County*,[82] for instance, the Arizona Appellate Court concluded that the state's medical cannabis statute preempted local jurisdictions from enacting an ordinance that effectively bans medical cannabis operations in the jurisdiction.[83] The Arizona Medical Marijuana Act ("AMMA")[84] expressly authorized local governments to adopt "reasonable" zoning ordinances that limited medical cannabis businesses to certain areas.[85] The Maricopa County ordinance at issue purported to allow medical cannabis cultivation and other medical cannabis operations in a single industrial zone but further imposed an additional restriction—a "poison pill provision"—that no use within that zone can be in conflict with federal, state, or local law.[86] Because cannabis cultivation and possession is a violation of federal law, the zoning ordinance, in effect, banned all cannabis-re-

79. *See* Safe Life Caregivers v. City of Los Angeles, 197 Cal. Rptr. 3d 524, 527–29 (Cal. Ct. App. 2016) (describing series of city enactments that culminated in approval of Prop D).

80. *See Onesra*, 212 Cal. Rptr. 3d at 868.

81. *See, e.g.*, Ter Beek v. City of Wyoming, 823 N.W.2d 864 (Mich. Ct. App. 2012).

82. White Mountain Health Ctr., Inc. v. Maricopa Cty., 386 P.3d 416, 419 (Ariz. Ct. App. 2016).

83. *See Ter Beek*, 846 N.W.2d at 535–36.

84. Arizona Medical Marijuana Act, ARIZ. REV. STAT. ANN. §§ 36-2802–36-2819 (2017).

85. *Id.* at § 36-2804(B)(1)(d).

86. *White Mountain*, 386 P.3d at 420.

lated operations in the county.[87] The Arizona Appellate Court characterized the issue as "whether a local jurisdiction can ban [medical cannabis operations] under the guise of 'reasonable zoning.'"[88] Although the AMMA expressly permitted local regulation of medical cannabis operations through zoning ordinances, the effective ban imposed by the county was found to "nullify the basis for the AMMA, [which was] to permit use of marijuana for medical purposes consistent with the AMMA's terms."[89] Notably, the *White Mountain* court expressly declined to rely upon the California Supreme Court's decision in *Inland Empire*, citing the *Inland Empire* court's emphasis on the limited scope of the California MMP, as compared to the more "complex regulatory scheme" in Arizona.[90] The Arizona court concluded that the poison pill provision in the county's ordinance violated state law and was, therefore, invalid.[91]

2. *Preemption by Federal Law*

Cannabis continues to be listed on Schedule I of the United States Controlled Substances Act (CSA) and is, therefore, still illegal under federal law.[92] The Supreme Court established in *Gonzales v. Raich* that the federal government has the right to enforce a federal prohibition on medical cannabis, even if a state has legalized medical cannabis.[93] The *Raich* decision, however, did not void medical cannabis laws at the state level.[94] Although federal courts have established that the fed-

87. *See id.* at 435.
88. *Id.*
89. *Id.*
90. *Id.* at 436–37.
91. *See id.* at 437.
92. *See, e.g.*, Diane E. Hoffmann & Ellen Weber, *Medical Marijuana and the Law*, 362 NEW ENG. J. MED. 1453 (2010).
93. *See* Gonzales v. Raich, 545 U.S. 1, 9 (2005) (concluding that "[t]he CSA is a valid exercise of federal power"); *see also* United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483 (2001) (holding that the common law defense of medical necessity was not a defense to federal prosecution under the CSA).
94. *See* Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1419, 1423-24 (2009) ("States may continue to legalize marijuana because Congress has not preempted—and more importantly, *may not* preempt—state laws that merely permit (i.e., refuse to punish) private conduct the federal government deems objectionable.").

eral government can enforce federal cannabis laws, the federal government has not explicitly addressed the question of whether federal law preempts state law in this area.[95] Opponents of cannabis legalization contend that a locality must act in compliance with federal law, because federal law preempts state law under the Supremacy Clause of the U.S. Constitution.[96] Specifically, localities have argued that because the federal CSA criminalizes cannabis as a Schedule I drug, a locality acts in violation of federal law when the locality authorizes the operation of cannabis dispensaries. Courts have consistently rejected this argument, however. In *Qualified Patients Ass'n v. City of Anaheim*,[97] for instance, a California appellate court found that federal law did not preempt California's cannabis statutes, holding that "no conflict arises based on the fact that Congress has chosen to prohibit the possession of medical marijuana while California has chosen not to."[98] California's cannabis laws do not require anything that the CSA forbids.[99] The appellate court further stated that that the CSA does not direct the zoning power of local governments in any manner, and thus, a locality's compliance with state law does not violate or otherwise conflict with federal law.[100] Accordingly, if an individual, or group of individuals, chooses to act in a way that violates federal law, but not state law, this fact alone does not

95. *See* Jonathan P. Caulkins et al., *Marijuana Legalization: Lessons from the 2012 State Proposals*, 4 WORLD MED. & HEALTH POL'Y 4, 16 (2012). In 2013, the United States Department of Justice advised federal prosecutors to refrain from devoting scarce federal drug enforcement resources towards the prosecution of individuals who are otherwise compliant with state law. *See* Memorandum for All U.S. Attorneys from James M. Cole, Dep. Att'y Gen., Guidance Regarding Marijuana Enforcement (Aug. 29, 2013) http://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf.

96. *See* TODD GARVEY, MEDICAL MARIJUANA: THE SUPREMACY CLAUSE, FEDERALISM, AND THE INTERPLAY BETWEEN STATE AND FEDERAL LAWS (2012), https://fas.org/sgp/crs/misc/R42398.pdf; *see also* Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5, 16 (2013) (arguing that all state laws regarding illicit substances are subordinate to federal law under the Supremacy Clause).

97. Qualified Patients Ass'n v. City of Anaheim, 115 Cal. Rptr. 3d 89, 105 (Ct. App. 2010).

98. *Id.* at 107 (quoting Garden Grove v. Superior Court, 68 Cal. Rptr. 3d 656, 677 (Ct. App. 2007)); *see also* Daley, *infra* note 132, at 234.

99. *See* Daley, *infra* note 132, at 234; *see generally* Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74 (2015).

100. *See Qualified Patients*, 115 Cal. Rptr. 3d at 107.

impose liability upon the locality in which this individual, or collection of individuals, reside.[101]

In the alternative, proponents of cannabis legalization contend that even if the federal CSA is found to have preemptive effect, cannabis itself does not meet the CSA's strict criteria for placement in Schedule I and that the federal government is required, by law, to permit medical use or to remove the drug from federal control altogether.[102] From the point of view of the cannabis industry, this suggests the following question: what are the land use implications if cannabis is eventually rescheduled? The federal government could reschedule cannabis such that efforts by state or local governments to restrict cannabis dispensaries as an allowable land use are expressly preempted by federal law. Just like state cannabis statutes that expressly preempt local government action, federal law could be written to expressly preempt state or local restrictions on access to cannabis.[103] Because local and state governments must adhere to policies mandated at higher levels of government and are precluded from deviating from such policies, state and local governments would, again, be relatively limited in the restrictions that can be applied to cannabis as an allowable land use. Any land use restriction would be evaluated to determine if the regulation is in direct conflict with federal law.[104] Neither state nor local government would be allowed, for example, to permanently ban cannabis dispensaries if the federal law had been expressly written to preempt this type of government action. This outcome appears unlikely.

Most likely, the federal government will remove cannabis from Schedule I of the CSA without express preemption of state and local land use law: the federal government is likely to grant state and local governments broad authority to regulate a wide range of cannabis-related operations and activities.[105]

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101. *See id.*

102. *See, e.g.*, Jonathan Martin, *Gregoire to DEA: Make Marijuana a Legal Drug*, SEATTLE TIMES (Dec. 1, 2011), https://www.seattletimes.com/seattle-news/gregoire-to-dea-make-marijuana-a-legal-drug/.

103. *See supra* Section I.C.1.

104. *See supra* Section I.C.2.

105. *See generally* Mark A.R. Kleiman, *Cooperative Enforcement Agreements and Policy Waivers: New Options for Federal Accommodation to State-Level Cannabis Legalization*, 6 J. DRUG POL'Y ANALYSIS 1, 4 (2013); *see also* Patrick Radden Keefe,

States and local governments, for example, are likely to retain the authority to either permit or prohibit the importation or sale of cannabis within their borders, to determine the specific structure of cannabis distribution within their borders, or to regulate various aspects of cannabis sales and possession. Under this scenario, other than rendering moot certain narrow legal arguments that attempt to characterize violations of federal law as a public nuisance,[106] the impact of rescheduling cannabis on land use regulation of the cannabis industry is likely to be insignificant given how state and federal courts have thus far viewed federal preemption of local government action under the CSA.[107]

Thus, although removing cannabis from Schedule I of the CSA will have positive implications for the cannabis industry in other respects, including opening access to banking, insurance, and capital markets, rescheduling cannabis will not have a significant impact upon land use restrictions, provided the location of cannabis dispensaries continues to be determined at the state and local level, and not by federal drug policy. Because the spatial distribution of dispensaries is not a function of the status of cannabis as a Schedule I drug under the CSA,[108] even if cannabis is rescheduled at the federal level, the cannabis industry must, in order to promote the long-run growth of the industry, continue to focus on constraining localism in states that have legalized cannabis.[109] Rescheduling cannabis will not alter the fact that state and local law, and not federal law, largely influences the location of cannabis dispensaries. The primary concern of the industry will be to continue to having state cannabis laws that are expressly clear that cannabis operations or activities permitted under state law cannot be restricted or prohibited under local law. If the location of cannabis dispensaries continues to be governed at a local level, then the growth of the cannabis industry will continue to be impeded by local governments that oppose this type of pro-

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Buzzkill, NEW YORKER (Nov. 18, 2013), http://www.newyorker.com/magazine/2013/11/18/buzzkill (reporting on Kleiman's work in advising Washington regarding implementation of its cannabis legalization laws).

106. *See* Salkin, *supra* note 64.

107. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1 (2005).

108. *See* Chemerinsky et al., *supra* note 99.

109. Or, alternatively, upon expanding localism in states that have chosen to make cannabis illegal.

posed development under the guise of urban or regional planning.[110]

II.
Against Localism

This part considers both policy and legal arguments against the regulation of cannabis by local governments.

A. *Policy Arguments*

This section considers two policy arguments against cannabis localism. *First*, to the extent that cannabis localism is motivated by an intention to reduce total cannabis consumption, this intention is undercut by the transportability of cannabis use. *Second*, to the extent that cannabis localism is motivated by an intention to reduce total cannabis consumption only *within* a specific jurisdiction, local land use regulation yields an inequitable distribution of social costs and benefits. People who live in jurisdictions that have banned, or substantially restricted, cannabis receive the public benefits of state tax revenue collected from cannabis without incurring any of the corresponding social costs.

1. *Consumption Effects*

Some have argued that the psychoactive chemical found in cannabis (THC) can slow cognitive functioning for hours, or even weeks, impairing learning and productivity, and can lead to short-run social costs such as traffic accidents.[111] In addition, some object to the consumption of cannabis on moral

110. *See generally* William A. Fischel, *Why Are There NIMBYs?*, 77 Land Econ. 144 (2001).

111. *See* Bengt Halvorson, *Pot Smoking Could Affect Driving for Weeks, Researchers Suggest*, Car Connection (Mar. 4, 2013), https://www.thecarconnection.com/news/1082690_pot-smoking-could-affect-driving-for-weeks-researchers-suggest (reporting on a study that indicates that "cannabis can be detected in the blood, at a level that might affect driving, for weeks after the last 'intake'"). In the long-run, users may experience latent harms caused by long-term chronic use of the drug, and as a result, may require extensive medical care, special tutoring, or other public services. *See, e.g.*, Rebecca D. Crean et al., *An Evidence-Based Review of Acute and Long-Term Effects of Cannabis Use on Executive Cognitive Functions*, 5 J. Addiction Med. 1 (2011) (describing studies that have found long-term impairment of decision-making and greater risk-taking among cannabis users).

grounds, viewing this drug use as a sinful indulgence, a debasement of the soul that is morally objectionable notwithstanding whether cannabis use, in fact, causes physical harm to the user.[112] Under this view, the prohibition of cannabis consumption is motivated by strictly moral judgments, and not by an intention to minimize physical harm to users—or others.

If the principal objective of localism is to reduce overall cannabis consumption either because cannabis consumption is perceived as causing physical harm to the user (or others) or because of moral objections, this intention is undercut by the transportable nature of cannabis. Local regulations—including a permanent ban at the extreme—impose costs on cannabis use that increase the price of cannabis locally.[113] Higher local prices create an incentive to acquire cannabis in neighboring jurisdictions without such limitations. Because a locality cannot prevent its residents from acquiring cannabis in other jurisdictions that have chosen not to similarly restrict or control cannabis within their borders, residents of high-cost cannabis jurisdictions can freely travel to neighboring lower-cost jurisdictions to purchase cannabis (provided the travel costs do not exceed the corresponding price differential in cannabis).[114] Having legally acquired cannabis, a resident may either consume it in the foreign jurisdiction or smuggle it into the home jurisdiction for later consumption.[115] In either case, out-of-jurisdiction purchases undercut, or negate entirely, the impact of local restrictions on overall cannabis consumption.[116]

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112. *See, e.g.*, James Q. Wilson, *Against the Legalization of Drugs*, COMMENTARY, Feb. 1990, at 21, 26 ("Tobacco shortens one's life, cocaine debases it. Nicotine alters one's habits, cocaine alters one's soul.").

113. *See* Robert A. Mikos, *Marijuana Localism*, 65 CASE W. RES. L. REV. 719, 737 (2015).

114. *See id.* at 738; *see also* I. Glenn Cohen, *Circumvention Tourism*, 97 CORNELL L. REV. 1309 (2012) (examining the right to travel to circumvent domestic prohibitions on certain medical services).

115. *See* Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 462 (1992); *see also* Aaron Smith, *Tourists Flock to Colorado to Smoke Legal Weed*, CNN MONEY (Aug. 22, 2014), https://money.cnn.com/2014/08/22/smallbusiness/marijuana-tourism-colorado/ (reporting that a Colorado cannabis shop owner attributed seventy percent of business to out-of-state customers, with another shop owner attributing at least one-third).

116. The transportable nature of cannabis use also weakens efforts by local government to collect taxes on cannabis. Political enthusiasm for cannabis legalization on the part of local government has, in large part, been fu-

2. *Inequitable Cost-Sharing*

The local regulation of cannabis, however, may be motived not by an intention to reduce *overall* cannabis consumption, but, instead, by a desire to reduce cannabis consumption only *within* the jurisdiction. A locality may wish only to deflect the perceived negative impacts of cannabis dispensaries, such as crime, congestion, blight, or drug abuse, from its jurisdiction and may not be particularly concerned with cannabis consumption more generally in other jurisdictions. That is, a locality may seek to prevent cannabis dispensaries within its jurisdiction but may be otherwise willing to allow cannabis dispensaries to operate in other jurisdictions within the state. According to a recent study from Pew Research, three out of four Americans support legalizing cannabis—but almost half of all Americans do not want cannabis dispensaries in their neighborhood.[117] This section considers policy arguments against cannabis localism based upon equity considerations.[118]

Cannabis sales are legal and taxed in nine states.[119] Most of these states tax the consumer purchase of cannabis (e.g.,

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eled by the promise of new tax revenues from the sale of legal cannabis—for example, twenty-seven of the fifty-three municipalities that have legalized retail cannabis sales in Colorado have levied local add-on taxes on such sales. *See* John Aguilar & Jon Murray, *Colorado Cities and Towns Take Diverging Paths on Recreational Marijuana*, DENVER POST (Dec. 27, 2014) https://www.denverpost.com/2014/12/19/colorado-cities-and-towns-take-diverging-paths-on-recreational-pot-2/. Experience with local tobacco cigarette taxes, however, strongly suggests that localities will struggle to collect cannabis taxes that have been set high compared to surrounding jurisdictions; for example, approximately seventy-five percent of all tobacco cigarettes consumed by New York City residents are purchased outside city limits in lower-tax jurisdictions. *See* Editorial, *Cigarette Tax Burnout*, WALL ST. J. (Aug. 11, 2008), https://www.wsj.com/articles/SB121841215866128319.

117. *See* Cassie Slane, *We'd Rather Not: Americans Like Marijuana But Don't Want a Dispensary in Their Town*, NBC NEWS (Apr. 19, 2019), https://www.nbcnews.com/business/business-news/we-d-rather-not-americans-marijuana-don-t-want-dispensary-n996306.

118. The authors recognize that localism is not always undesirable. In 2016, for example, the Pennsylvania Supreme Court held that state statutes that preempted the power of municipalities to ban fracking activities violated the state constitution. *See* Robinson Twp. v. Commonwealth., 147 A.3d 536, 544 (Pa. 2016).

119. *See* Tax Policy Center, *How Do Marijuana Taxes Work*, BRIEFING BOOK, https://www.taxpolicycenter.org/briefing-book/how-do-marijuana-taxes-work (last visited Mar. 5, 2021). The nine states are Alaska, California, Colo-

sales tax on retail transactions), with rates ranging from ten percent in Nevada to thirty-seven percent in Washington.[120] States have spent this new tax revenue on a number of public objectives, including education, mental health, and law enforcement.[121] Alaska, for example, devotes approximately half of the tax revenue collected from cannabis to its general fund and half to initiatives designed to reduce recidivism rates.[122] In Colorado, cannabis sales tax revenue contribute to the state's general reserve fund, as well as to mental health services, youth literacy initiatives, and anti-bullying programs.[123] During the first year of legal adult-use sales, Nevada collected approximately seventy million dollars in cannabis tax revenue and devoted these funds primarily to education and the state's so-called Rainy Day Fund.[124]

To the extent that this tax revenue directly benefits all residents of a state, cannabis localism implies that those who reside in jurisdictions that have banned, or substantially restricted, cannabis receive the public benefits of legalization without incurring any of the corresponding social costs (to the extent that such costs exist). Even if these jurisdictions do not directly benefit from this tax revenue, these jurisdictions may still *indirectly* benefit insofar as tax revenue from cannabis frees up other state funds to the benefit of jurisdictions that have banned cannabis.[125] In fairness, a locality that benefits from state tax revenue, either directly or indirectly, generated by a specific activity should be correspondingly obliged to incur the social costs of that activity as well: a local government, in fairness, ought not receive a social benefit without also having to

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rado, Illinois, Massachusetts, Michigan, Nevada, Oregon, and Washington. *Id.*

120. *Id.* Some states additionally tax the transaction between cultivators and distributors or retailers (akin to taxes on alcohol), with the expectation that some, or all, of these wholesale taxes will be passed through to the end consumer in the form of higher retail prices. *See id.*

121. *See id.*

122. *See id.*

123. *See id.*

124. *See id.*

125. *See generally* Timothy J. Bartik, *The Effects of State and Local Taxes on Economic Development: A Review of Recent Research*, 6 ECON. DEV. Q. 102 (1992).

bear, at least in part, the corresponding social costs.[126] Further, a potential free-rider problem exists that jeopardizes the long-run sustainability of the activity itself, as more and more jurisdictions ban, or substantially restrict, the activity, pushing the unwanted costs onto an increasingly smaller number of jurisdictions. At the limit, the end-result of this cost-shifting is, in effect, statewide abolition of the activity. One solution to this cost-shifting problem is to limit the benefits of state tax revenue collected from cannabis to only those jurisdictions that generate such revenue. In practice, however, a clean partitioning of public benefits is likely to be difficult, especially if the public benefits received by localities are principally indirect in nature.

The effects of such inequitable cost-shifting are evident locally. One of the common critiques of land use regulation is the spatial concentration of unwanted facilities in historically marginalized neighborhoods, with relatively high percentages of low-income residents or people of color. This spatial clustering occurs either, directly, by zoning suitable land use only in such areas or, indirectly, because affluent neighborhoods have greater political power to exclude undesirable land uses.[127] Because local opposition has tended to be concentrated in relatively wealthier communities that benefit less from the opening of a cannabis dispensary (e.g., due to lower unemployment or retail vacancy rates), a disproportionate number of cannabis dispensaries have opened in lower-income communities. A study in 2017, for example, revealed that forty percent of adult-use cannabis store locations in Seattle, and nearly forty-five percent in Denver, were in zip codes in which the median household income was in the bottom twenty-fifth percentile.[128]

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126. A distinction is drawn between recipients of public benefits who are disadvantaged in some way, such as welfare recipients, and recipients of public benefits who are not disadvantaged.

127. *See, e.g.*, Christopher G. Boone et al., *Parks and People: An Environmental Justice Inquiry in Baltimore, Maryland*, 99 ANNALS ASS'N AM. GEOGRAPHERS 767 (2009); Carissa Schively, *Understanding the NIMBY and LULU Phenomena: Reassessing Our Knowledge Base and Informing Future Research*, 21 J PLAN. LIT. 255 (2007); JULIE SZE, NOXIOUS NEW YORK: THE RACIAL POLITICS OF URBAN HEALTH AND ENVIRONMENTAL JUSTICE (2006).

128. *See* Eli McVey, *Chart: Recreational Marijuana Stores Are Clustered in Low-Income Areas of Denver, Seattle*, MARIJUANA BUS. DAILY (July 21, 2017), https://mjbizdaily.com/chart-recreational-marijuana-stores-clustered-low-income-ar-

Cannabis localism allows for this same type of inequitable cost-shifting to play out more broadly at the state level. The concern is that, as is often the case locally, cannabis dispensaries will be primarily clustered in those regions of the state that are socioeconomically disadvantaged (or have a relatively large population of people of color) and likely disproportionately benefit from increased local demand for retail space or lack the political resources necessary to mobilize effectively against locally unwanted land uses. Over time, potential spatial clustering at the state level may only worsen as the concentration of cannabis dispensaries in areas commonly perceived as undesirable reinforces a general stigma around cannabis dispensaries, leading to a positive feedback loop effect in which the increased stigma around dispensaries increases spatial clustering, which, in turn, increases the stigma.[129]

B. *Improper Application of Zoning Power*

This section contends that a colorable argument can be made that zoning ordinances that ban, or substantially restrict, cannabis dispensaries may, under certain conditions, constitute an improper application of a locality's delegated zoning power.

1. *Legitimate Public Purpose*

The general rule is "that zoning ordinances, when reasonable in object and not arbitrary in operation, constitute a justifiable exercise of police power."[130] Local government action must bear "a rational relationship to a legitimate governmen-

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eas-denver-seattle/. The percentage of Denver and Seattle residents in geographic areas where income is in the bottom twentieth percentile is twenty-six percent and twenty-seven percent, respectively, which suggests that retailers are not simply choosing to locate in population-dense areas in the city. *See id.*

129. The opposite might occur, with spatial clustering dissipating over time as the initial uncertainty surrounding the industry resolves itself and perceptions become generally more positive. In fact, Denver and Seattle have both recently experienced a reduction in the clustering of cannabis dispensaries in low-income neighborhoods, as commercial landlords in higher rent districts have become more willing to rent to businesses in the cannabis industry. *Id.*

130. Hernandez v. City of Hanford, 159 P.3d 33, 44 (Cal. 2007) (quoting Lockard v. City of L.A., 202 P.2d 38, 42 (Cal 1949) (en banc)).

tal purpose and is neither arbitrary nor discriminatory."[131] This statement of what is commonly referred to as "rational basis review" suggests a two-step test. The first step is to identify the legitimate government interest that justifies the local ordinance—not all government interests are legitimate. Having successfully identified a legitimate government interest, the second step is to consider if the zoning ordinance is rationally related to the stated government interest and does not constitute arbitrary or capricious action by local government. This section considers each of these steps in turn.

a. Protection of Community Morals

This section examines two government interests that a locality can rely upon to justify local restrictions on cannabis dispensaries: (1) the protection of community morals, and (2) the regulation of economic competition, and argues that neither may be legitimate under rational basis review. Specifically, local governments cannot, through zoning, ban an industry from a jurisdiction either because local officials find the industry personally offensive or because such officials (or existing businesses in the community) have a financial self-interest in disallowing the industry to operate within the jurisdiction.

This section considers the protection of community morals as a basis for land use restrictions and argues that this objective may not constitute a legitimate government interest under rational basis review if the state has the legislative authority to regulate the locally restricted land use. A California case about horseracing illustrates the gist of the legal argument.[132] In *Desert Turf Club v. Board of Supervisors*, the board of supervisors in Riverside County passed an ordinance banning all horseracing tracks in the county, even though the people of California had, through referendum, expressly bestowed to the state legislature the power to regulate all horseracing activ-

131. *See, e.g.*, People v. Jaudon, 718 N.E.2d 647, 655 (App. Ct. Ill. 1999) (citing Town of Normal v. Seven Kegs, 599 N.E.2d 1384, 1387 (App. Ct. Ill. 1992)).

132. *See* Skye L. Daley, *The Gray Zone in the Power of Local Municipalities: Where Zoning Authority Clashes with State Law*, 5 J. BUS. ENTREPRENEURSHIP & L. 215, 232–33 (2012).

ities.[133] As the court stated, the issue in the case was whether a board of supervisors can "overrule the act of the people of the state in adopting a constitutional amendment and the Legislature of the state in passing a full and comprehensive plan for the licensing and control of horse racing by forbidding on moral grounds what the state expressly permits?"[134] Emphasizing that it need only resolve a question of power, and not pass judgment on the morality of horseracing, the court held that the board did not have the power to ban horseracing on strictly moral (or personal) grounds: the board must operate within the confines of the authority granted to it and cannot enact a restrictive zoning ordinance based solely upon moral opposition.[135] The court was careful to emphasize that its holding did not bear upon a locality's general power to zone: "[t]he right to zone is by express provision of law a local matter."[136] A board of supervisors, if acting in good faith, can certainly exclude on "soundly-based grounds" the operation of a horseracing track from its jurisdiction no differently than the board may exclude commercial activity from residential districts.[137] A board of supervisors, however, cannot "under guise of doing one thing, accomplish a wholly disparate end."[138] Here, the board had excluded on purely moral grounds *all* horseracing from the jurisdiction contrary to the legislative fiat of the people of California.[139] The court viewed state law as having taken over, in its entirety, the question of the morality of horseracing, with the state having decided that horseracing cannot be barred on strictly moral grounds.[140]

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133. *See* Desert Turf Club v. Bd. of Supervisors, 296 P.2d 882, 884 (Cal. Ct. App. 1956); *cf.* Wal-Mart Stores, Inc. v. City of Turlock, 41 Cal. Rptr. 3d 420, 421–22 (Cal. Ct. App. 2006) (holding that a zoning ordinance banning all "big box" retailer from the jurisdiction fell within the police powers of the locality).

134. *See Desert Turf Club*, 296 P.2d at 885.

135. *See id.*

136. *Id.* at 886.

137. *See id.* (referring the condition of "soundly-based grounds" to the requirement that a ban (or effective ban) must be based upon a "reasonable" zoning concern); *Wal-Mart Stores*, 41 Cal. Rptr. 3d at 440–41.

138. *Desert Turf Club*, 296 P.2d at 886.

139. *See id.*

140. *See id.* at 887 ("The onus of the people's authorization of race tracks and pari-mutuel machines must be borne by the grouped voters of the whole state; they have, for the time being at least, decided the question [of moral-

In states that regulate cannabis-related activities or operations in some form, state law has arguably, by analogy, taken over in its entirety the question of the morality of cannabis. And, therefore, any justification for a local restriction on cannabis dispensaries grounded solely in moral objection would be preempted by state law under *Desert Turf Club* (or a similar case depending upon the jurisdiction), with the people of the state having already decided the question of its morality.[141] Of course, a locality can "manufacture" an alternate government interest to justify the local restriction. Courts tend to be extremely deferential to local government action, especially with respect to the regulation of local land use, bestowing upon zoning ordinances a presumption of validity.[142] A challenging party must make out a prima facie case that the action is arbitrary or capricious.[143] If successful, the burden then shifts to the government to establish that the challenged action is "fairly debated."[144] As many have observed, it is extremely difficult for a plaintiff to prevail under this standard of review.[145]

Nonetheless, there is still value in forcing a locality to explain why a permanent ban on cannabis dispensaries is not principally motivated by moral opposition. A locality should be required to support local restrictions on an entire industry that is otherwise legal under state law with an appeal to observable effects: it ought not be enough for a locality to state, in a perfunctory manner, that the ordinance aims to prohibit an

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ity], and whatever advantages or disadvantages go with the decision cannot be barred by local legislative action from the entire territory of any county, as has been done in this case."); *Id.* at 888 (instructing the board to reconsider the proposed land use "wholly excluding any consideration as to the alleged immorality of horseracing and betting as authorized by state law.").

141. *See Desert Turf Club*, 296 P.2d at 886.

142. *See* Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

143. *See id.* at 395.

144. *Id.* at 388.

145. *See, e.g.*, Francis S. Chilapowski, *The Constitutional Protection of Informational Privacy*, 71 B.U. L. REV. 133, 145 (1991) ("[W]hen the question of whether a right is fundamental is raised, the preliminary finding of a 'fundamental' interest is usually outcome-determinative."); Russell W. Galloway Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 645 (1992) (stating that rational basis "is so minimal" that "[t]he outcome is a foregone conclusion . . . . The test involves 'minimal scrutiny in theory and virtually none in fact'") (internal citations omitted); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 343 (2d ed. 1988) (referring to rational basis as imposing "relatively toothless limits" upon the state).

activity considered immoral in the eyes of the local community. The valid application of delegated zoning power must require more than mere statement of moral preference. Local restrictions, especially zoning ordinances that permanently ban an entire industry as an allowable land use, must pass some type of results-oriented test under which the court substantively considers and analyzes the real-world effects of the conduct subject to regulation.[146] Otherwise, the extent to which rational basis review can be rightly characterized as restrictive of local governments is highly dubious, as moral objection can be relied upon to justify an extremely wide-ranging spectrum of local government action.[147]

Compared to zoning ordinances enacted by local governments, courts are generally more willing to scrutinize the underlying motivations of individual assessments by zoning boards (or planning commissions), treating such rezonings as more quasi-judicial in nature than legislative.[148] In reviewing rezoning decisions, courts have emphasized that such decisions must be made "for the public good," and not "in deference to the wishes of certain individuals," stating that there must exist a reasonable connection between the individual assessment and the public health, safety, or general welfare of the community.[149] Private property interests must not outweigh the public welfare.[150] Even though the judiciary has been more willing to question stated justifications for individual zoning changes, courts in a number of states, however, are

146. *See, e.g.*, Wal-Mart Stores, Inc. v. City of Turlock, 41 Cal. Rptr. 3d 420, 439 (Cal. Ct. App. 2006) (determining that the increase in pollution, coupled with a fear of "urban decay" was sufficient to uphold as a valid use of police power ordinance banning "big-box" retailers).

147. *See* Daniel F. Piar, *Morality as a Legitimate Government Interest*, 117 PENN ST. L. REV. 139 (2012).

148. *See, e.g.*, Fasano v. Bd. of Cty. Comm'rs, 507 P.2d 23, 29–30 (Or. 1973) (finding that a rezoning was the exercise of judicial authority and placing the burden of proof on the party seeking the change: the county). *See generally* Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1 (1992).

149. Trust Co. of Chi. v. City of Chicago, 96 N.E.2d 499, 502–03 (Ill. 1951) (stating that the police powers of the municipality authorize burdens placed on private property rights only "when public welfare demands").

150. *See, e.g.*, Bd. of Zoning Appeals v. Schulte, 172 N.E.2d 39, 43 (Ind. 1961) ("It was never intended that zoning laws should be used for the purpose of creating special privileges or private rights in property.").

not permitted to consider evidence of improper motives in reviewing challenged legislative actions by local governments, including judicial review of rezonings.[151] In many states, courts are precluded from considering proof, established by judicial admissions of supervisors or otherwise, that a zoning change was corrupted by improper motives.[152]

This general rule of judicial review is mistaken.[153] In determining the validity of a rezoning, a court must be permitted to inquire into the underlying motivations for the land use decision at issue.[154] Whether or not a zoning change by a local body is properly classified as a legislative or quasi-judicial act, a court need not defer to judgments by local authorities that are primarily motivated by spite, self-interest, malice, or moral objection. As discussed, local governments have limited delegated discretion in making land use decisions.[155] This limited discretion fails to justify the broad judicial deference given to local governments in rezoning decisions.[156] The public is entitled to know what motivates local land use decisions and to understand the process by which those decisions were made. Moral objection, standing alone, should not constitute a legitimate government interest under rational basis review, and courts ought to be allowed to consider evidence that such underlying motive induced a locality to restrict or control cannabis dispensaries as an allowable land use.

b. Regulation of Economic Competition

This section considers the regulation of economic competition as a basis for land use restrictions. As a general matter, zoning law should not be primarily used to regulate or restrict economic competition among private businesses; the case of

151. *See* Michael Allen Dymersky & Jesse J. Richardson, Jr., *Use of Motive Evidence in Judicial Review of Rezonings*, 37 ENV'T. L. REP. NEWS & ANALYSIS 10472, 10473 (2007) (compiling cases).

152. *See id.* at 10482; *see also* Carter v. Stanly Cty., 482 S.E.2d 9, 13 (N.C. Ct. App. 1997) ("We are not empowered to look behind the motives of the duly elected members of the County Commission, so long as they act in compliance with the [zoning] law.").

153. *See, e.g.*, Dymersky & Richardson, *supra* note 151 at 10473, 10482.

154. *See id.*

155. *See supra* Section I.A.1.

156. Dymersky & Richardson, *supra* note 151 at 10477–78.

Hernandez v. City of Hanford[157] provides a helpful illustration of this general rule.[158] Hanford, California enacted a zoning ordinance that allowed department stores with fifty thousand or more square feet of floor space to sell furniture in certain commercial districts while denying that right to smaller furniture retailers.[159] The court concluded that because all zoning invariably has some impact upon economic competition,[160] anticompetitive impact, standing alone, cannot invalidate a zoning ordinance: "A zoning ordinance which serves some established purpose of zoning is not necessarily invalid simply because it has the additional effect of limiting competition."[161] In the court's view, a zoning action should be upheld even if the regulation of economic competition reasonably could be viewed as a direct and intended effect of a challenged zoning action, so long as the "primary purpose" of the zoning is to achieve a valid public purpose, and not to advance an impermissible anticompetitive purpose.[162] The California Supreme Court provided as examples of impermissible anticompetitive purposes: "securing a financial advantage or monopoly position for the benefit of a favored business or individual, or imposing a disadvantage on an unpopular business or individual."[163]

The court cited to several appellate cases as examples of its stated approach, including *Ensign Bickford Realty Corp. v. Livermore*[164] in which a city council denied plaintiff's request for permission to build a neighborhood shopping center on its property on the grounds that the city had recently zoned prop-

157. 159 P.3d 33 (Cal. 2007).

158. *See* Daley, *supra* note 132, at 220 & n.30 (noting that *Hernandez v. City of Hanford* delineates the rule that "a zoning ordinance is only entitled to regulate economic competition when its aim is to advance a legitimate public purpose").

159. *See Hernandez*, 159 P.3d at 35.

160. *See id.* at 41 (quoting 1 KENNETH H. YOUNG & ROBERT MILFORD ANDERSON, Anderson's American Law of Zoning § 7.28, at 807 (Kenneth H. Young ed., 4th ed. 1996)) ("The simple division of the community into districts has an inherent and profound effect on the real estate market, because some land is withdrawn from the commercial market and placed in the residential market.").

161. *Id.*

162. *Id.* at 42.

163. *Id.* at 42.

164. 68 Cal. App. 3d 467 (Cal. Ct. App. 1977).

erty in a nearby area to permit construction of a neighborhood shopping center and that the city, in its view, did not believe that the surrounding residential population could financially support two shopping centers.[165] Although the city's denial of the plaintiff's rezoning request had the direct and intended effect of regulating competition among private businesses, a California appellate court, nevertheless, upheld the validity of the city's action on appeal, concluding that the "primary purpose" of the city's regulation of competition was not to further or disadvantage a private business, but, rather, to serve the city's legitimate public interest in carefully planning or controlling the pace and location of economic growth within the city.[166]

In *Hernandez* itself, the court, as a matter of first impression, addressed the question of whether a municipality may enact a zoning ordinance that regulates economic competition by placing limits on potentially competing commercial activities or developments in other parts of the municipality.[167] The court generally held that even if the regulation of economic competition can reasonably be viewed as a direct and intended effect of a zoning ordinance, so long as the *primary purpose* of the ordinance is not the impermissible anticompetitive goal of protecting or disadvantaging a favored or disfavored business or individual, but rather the advancement of a legitimate government interest, such as the preservation of a downtown business district for the benefit of the local community, the ordinance reasonably relates to the general welfare of the municipality and therefore constitutes a legitimate exercise of the municipality's police power.[168] In assessing the validity of a zoning ordinance intended at least in part to regulate economic competition—as is true of a zoning ordinance that bans (or effectively bans) cannabis dispensaries as an allowable land use—a court must determine if the primary purpose of the enacted ordinance, meaning its principal and ultimate objective, is to promote a legitimate public purpose and not to advance an impermissible anticompetitive purpose,

165. *See Ensign Bickford*, 68 Cal. App. 3d at 471–72.
166. *See id.* at 477–78.
167. *See Hernandez*, 159 P.3d at 44.
168. *See id.* at 44–45.

such as excluding an unpopular company from the community.[169]

Assessing this proposed approach, it is unclear, as an initial matter, why anticompetitive effect is a concern *only if* the principal and ultimate objective of the enacted ordinance is to promote an impermissible private anticompetitive purpose. Under this approach, a zoning ordinance passes judicial scrutiny no matter the anticompetitive impact so long as the primary purpose of the legislation is to achieve a valid non-anticompetitive purpose. So long as the locality can establish that the primary purpose of the zoning ordinance is to advance some other legitimate government interest, such as preserving the economic viability of a downtown business district, the locality now has unfettered authority to use zoning to regulate economic competition among private businesses. In theory, the judicial inquiry would be better focused upon the magnitude of the anticompetitive effect, and not upon the extent to which this effect is the "principal and ultimate objective" for the government action.[170] Where an ordinance promotes more than one purpose, for example, how a court identifies which of several competing purposes is primary. While any anticompetitive effect standing alone is surely too broad given that, as the *Hernandez* court rightly noted, almost all zoning has some impact upon economic competition.[171] Primary purpose, on the other hand, is surely too narrow given the relative ease with which a locality can manufacture an alternate primary purpose for a zoning ordinance whose true primary purpose is, in fact, anticompetitive. Indeed, a more sensible test might balance the private anticompetitive effect of the zoning ordinance against other socially beneficial non-anticompetitive objectives served by the ordinance.

The anticompetitive effect of a permanent ban on cannabis dispensaries is likely to be significant. First, local bans on cannabis dispensaries impede the growth of the industry itself: consumer access to cannabis is likely to be significantly restricted if there exist only a handful of retail locations in the

169. *See id.*
170. *Id.*
171. *See id.* at 41.

state.[172] Moreover, the lack of competition between cannabis dispensaries created by local land use restrictions is likely to result in higher prices and lower demand for cannabis, with less overall product differentiation in the market.[173] Second, a ban on cannabis dispensaries restricts economic competition between private businesses to the extent that cannabis is a substitute for other non-cannabis products.[174] There is a growing empirical literature, for example, that suggests that cannabis and alcohol are substitutes.[175] The propensity to substitute intoxicants depends upon the similarity of the anticipated effects.[176] Neuroscience research indicates that cannabis and alcohol share similar neuro-pharmacologic effects of reward and sedation,[177] suggesting that cannabis and alcohol may be substitutes, particularly for occasional, low-consumption users.[178] If this substitution effect holds true, then a ban on cannabis

172. *See, e.g.*, Ian Morrison, *Where to Put It? The Confusing Question of How to Deal with Marijuana Dispensaries*, 3 U. BALT. J. LAND & DEV. 79, 86 (2013).

173. *See generally* G. K. Yarrow, *Welfare Losses in Oligopoly and Monopolistic Competition*, 33 J. INDUS. ECON. 515 (1985) (demonstrating the impact of differentiated goods in an economic framework on the competitiveness within a given market).

174. *See, e.g.*, LMP Services, Inc. v. City of Chicago, 160 N.E.3d 822, 825, 829 (Ill. 2019) (upholding a local ordinance prohibiting food trucks from doing business within 200 feet of a brick–and–mortar food establishment—a restriction that had been described as "pure protectionism" and not constituting a legitimate government interest).

175. *See, e.g.*, John DiNardo & Thomas Lemieux, *Alcohol, Marijuana, and American Youth: The Unintended Consequences of Government Regulation*, 20 J. HEALTH ECON. 991, 1008 (2001); Frank J. Chaloupka & Adit Laixuthai, *Do Youths Substitute Alcohol and Marijuana? Some Econometric Evidence*, 23 E. ECON. J. 253, 273 (1997); D. Mark Anderson et al., *Medical Marijuana Laws, Traffic Fatalities, and Alcohol Consumption*, 56 J.L. & ECON. 333, 333 (2013); Benjamin Crost & Santiago Guerrero, *The Effect of Alcohol Availability on Marijuana Use: Evidence from The Minimum Legal Drinking Age*, 31 J. HEALTH ECON. 112, 112 (2012); Elaine Kelly & Imran Rasul, *Policing Cannabis and Drug Related Hospital Admissions: Evidence from Administrative Records*, 112 J. PUB. ECON. 89, 104 (2014); Randi J. Alter et al., *Substitution of Marijuana for Alcohol: The Role of Perceived Access and Harm*, 36 J. DRUG EDUC. 335, 337 (2006).

176. *See* Simon C. Moore, *Substitution and Complementarity in the Face of Alcohol-Specific Policy Interventions*, 45 ALCOHOL & ALCOHOLISM 403, 404 (2010).

177. *See, e.g.*, Stephen J. Heishman et al., *Comparative Effects of Alcohol and Marijuana on Mood, Memory, and Performance*, 58 PHARMACOLOGY BIOCHEMISTRY & BEHAV. 93 (1997).

178. *See* Hefei Wen et al., *The Effect of Medical Marijuana Laws on Adolescent and Adult Use of Marijuana, Alcohol, and Other Substances*, 42 J. HEALTH ECON. 64, 66 (2015).

dispensaries is anticompetitive insofar as it limits the economic competition faced by private businesses that benefit financially from the consumption of alcohol, such as bars, restaurants, or liquor stores. In similar fashion, medical cannabis may, at least for some patients, be a substitute for opioid-based pain relief medications that have been prescribed to treat chronic pain.[179] In enacting a permanent ban on medical cannabis dispensaries, a locality restricts economic competition among private businesses, protecting incumbent businesses that sell non-cannabis pain relief medications to the disadvantage of new businesses seeking to enter the local market to sell medical cannabis as a viable substitute for the treatment of chronic pain.

A permanent ban on cannabis dispensaries shields incumbent businesses from market competition. This regulation of competitive market forces suggests an invalid exercise of police power if the decision to prohibit the commercial sale of cannabis as an allowable land use was primarily made to protect the private economic interests of local businesses, rather than to protect the community's interests as a whole, which might benefit from increased economic competition in the long-run. That is, if the impact of a permanent ban on cannabis is anticompetitive in that it protects incumbent local businesses from competition from a new entrant, then a permanent ban ought not be viewed as promoting a legitimate government interest, even under rational basis review, unless other positive social impacts of the ban are sufficiently large to offset the expected negative anticompetitive effects.

2. *Rationally Related*

In addition to a legitimate government interest, there must also exist a "rational relationship" between the challenged zoning action and the government interest.[180] To determine if "a rational relationship exists, a court may assume the existence of any necessary state of facts which [the court] can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate

179. *See, e.g.*, Philippe Lucas, *Rationale for Cannabis-Based Interventions in the Opioid Overdose Crisis*, 14 HARM REDUCTION J. 58 (2017).

180. Romer v. Evans, 517 U.S. 620, 635 (1996).

state interest."[181] The U.S. Supreme Court has defined this type of judicial review broadly, stating that an ordinance must be upheld so long as "there is any reasonably conceivable state of facts that could provide a rational basis for the classification,"[182] and that "those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'"[183] Although this sets a high bar for a challenger to meet, a court must still be assured that the zoning decision was arrived at in a fair manner.[184]

To assess if a zoning restriction on cannabis dispensaries is rationally related to a legitimate government interest, a locality must clearly state on the record the government interest promoted by the local restriction. Localities tend to set forth the same basic set of objectives advanced by zoning restrictions on cannabis use. These objectives generally include an intention on the part of the locality to prevent some type of social disorder that detrimentally impacts the quality of life in the community, such as increased criminal activity around dispensaries,[185] loitering, vagrancy, increased traffic, noise, odor, litter, environmental pollution, or a loss of trade for other businesses near dispensaries.[186] It is not clear, however, that a cannabis dispensary will necessarily have any of these expected negative social impacts. With respect to crime, for instance, statistics show that cannabis dispensaries are no more dangerous than bars or convenience stores.[187] Many cannabis dispen-

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181. Amunrud v. Bd. of Appeals, 143 P.3d 571, 578 (Wash. 2006).

182. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993).

183. *See id.* at 315 (citing Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973)).

184. *See* United States v. Salerno, 481 U.S. 739, 746 (1987).

185. Cty. of Los Angeles v. Hill, 121 Cal. Rptr. 3d 722, 731 (Cal. Ct. App. 2011) ("The County submitted expert testimony that most MMD's [sic] are 'cash only' businesses and that the presence of large amounts of cash and cannabis make MMD's [sic], their employees, and qualified patients 'the target of a disproportionate amount of violent crime' including robberies and burglaries. According to the County's expert, MMD's [sic] also attract loitering and cannabis smoking on or near, the premises, which negatively affect the 'quality of life' in the neighborhood. Further, the county's concern with dispensaries attracting an illegal resale market for marijuana would be justified in light of the use of marijuana for nonmedical purposes.").

186. *See, e.g.*, KERN CITY, CAL., CANNABIS LAND USE ORDINANCE 2017-320 (Oct. 24, 2017).

187. *See, e.g.*, Andrew M. Subica et al., *The Geography of Crime and Violence Surrounding Tobacco Shops, Medical Marijuana Dispensaries, and Off-Sale Alcohol*

saries have over $100,000 worth of security installed and will not allow a customer to enter the store without first passing through a series of security checkpoints.[188] Others have bullet-proof glass and security cameras throughout the premises.[189]

In *Gamut Group, LLC v. City of Lansing*, the Michigan Court of Appeals concluded that the city's denial of a rezoning application submitted by a medical cannabis dispensary violated the dispensary's right to substantive due process precisely because there lacked an observable link between the zoning restriction and perceived negative social impacts.[190] Gamut Group owned a building that had housed a medical cannabis dispensary since 2011,[191] and was zoned to permit "local convenience-type shopping" and parking.[192] In 2017, Lansing passed a revised zoning ordinance limiting medical cannabis dispensaries to zoning districts outside of Gamut Group's present location.[193] In response, Gamut Group attempted to rezone its property to fit within the new zoning ordinance.[194] Despite the zoning administrator and the planning board both recommending approval of the rezoning request, despite any public objection, and despite the other three corner lots at Gamut Group's intersection having all been rezoned to Gamut Group's desired district, the city council denied Gamut Group's request.[195] Gamut Group filed suit against the city, contending that the denial of its rezoning request violated its right to substantive due process.[196] The trial court agreed that Gamut Group had been treated differently than others similarly situated and found no legitimate government interest was

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Outlets in a Large, Urban Low-Income Community of Color, 108 PREVENTIVE MED. 8, 14–15 (2018).

188. *See* Slane, *supra* note 117. *See generally* LAWRENCE J. FENNELLY & MARIANNA A. PERRY, PHYSICAL SECURITY: 150 THINGS YOU SHOULD KNOW 167–69 (2d ed. 2016).

189. *See, e.g.*, SKAIDRA SMITH-HEISTERS, SENSIBLE POLICIES FOR MEDICAL MARIJUANA DISPENSARIES IN LOS ANGELES 14 (2007).

190. *See* Gamut Grp., LLC v. City of Lansing, No. 341754, 2019 WL 1265161 (Mich. Ct. App. Mar. 19, 2019).

191. *See id.* at *1.

192. *Id.*

193. *See id.*

194. *See id.*

195. *See id.*

196. *See id.*

advanced by the denial of the rezoning application.[197] On appeal, the appellate court upheld the trial court's ruling, agreeing with the determination of the zoning administrator that rezoning the subject property would have no negative impact on vehicular or pedestrian traffic, the environment, or future patterns of development in the area, and would be consistent with existing commercial zoning.[198] The appellate court found the rezoning denial to be "arbitrary and capricious," because the burdened property was treated differently than the properties on the other three corners of the intersection and no legitimate governmental interests were advanced by the rezoning denial.[199] In the view of the appellate court, "the denial of the rezoning request seemed to be political."[200]

An important issue related to rational basis review of a zoning ordinance is the extent to which a locality must provide evidentiary support for its proffered explanation as to why a zoning that restricts cannabis dispensaries is necessary to promote or preserve the public health, safety, or general welfare of the community.[201] At a minimum, the rationale for a zoning change must be clearly stated in the record and made available for review by a court in the event of an appeal.[202] The harder question, however, is the extent to which this rationale must be supported by some type of factual findings or concrete empirical evidence, put forth by the legislature itself, or more likely by a planning commission (or zoning board) staffed with

197. *See id.*

198. *See id.* at *3. Interestingly, the only issue the city of Lansing had with approving Gamut Group's rezoning application was that the new zoning regulations were intended to take dispensaries out of residential neighborhoods and contain them in business corridors. The appellate court noted that the subject property was already in a business corridor. *See id.*

199. *See id.*

200. *Id.*

201. *Id.* ("For a zoning ordinance to be valid, [it] must bear a direct and substantial relation to the objectives of police power, the preservation of the public health, safety, morals, and general welfare, of the community as a whole.") (citing Albertson v. City of Saginaw, 116 N.W.2d 53 (Mich. 1962)).

202. NEIL ERWIN ET AL., WHO ARE YOU CALLING ARBITRARY? A GUIDE TO HELP PROTECT YOUR LAND USE DECISIONS WITHOUT INVITING LAWSUITS 18 (2016) ("As one state court appellate judge put it during oral argument, '[i]f the City Council refuses to give its reasons for deciding this kind of case, there is not much the court can do to assist it.'"), https://neilerwinlaw.com/assets/uploads/2020/05/Who-Are-You-Calling-Arbitrary-APA-2016-00012729xD3B6F.pdf.

professional land use experts, showing a significant causal connection between the zoning and its stated purpose. This question is especially relevant where the challenger has produced its own impact statement. If a challenger has, for example, examined the traffic impact of medical cannabis dispensaries in other locations and has provided a rigorous, well-reasoned empirical report demonstrating that the opening of a dispensary is unlikely to have a significant impact on traffic, then the locality should not, in response, be able to simply ignore this impact statement or blithely state, without additional evidentiary support, that the impact statement is inapplicable under the present circumstances. Instead, the locality should be obligated to provide some type of concrete evidence in support of its position that the zoning restriction is intended to reduce traffic congestion for the issue to remain "fairly debatable."[203]

While a full-blown impact statement may not be required under rational basis review in light of compelling evidence to the contrary put forth in good faith by a challenger, some type of substantive response to the impact statement should be expected for a locality to reasonably assert that there exists a direct and substantial relation to its stated objective of police power. Simply ignoring the report, or flatly dismissing the report out of hand, is unlikely to yield a decision arrived at in a fair manner.[204] Procedurally, a locality should be compelled, at the very least, to explain the perceived shortcomings of the challenger's analysis or to illuminate the reasons why this analysis did not impact its final zoning decision. For the rationally-related requirement of the rational basis test to have substantive meaning, a locality cannot be allowed to simply identify an obviously legitimate government interest, such as the reduction of local crime rates or traffic congestion, and then state, in a conclusory manner, that the zoning decision is likely to promote this public objective, especially in light of credible empirical evidence to the contrary.[205]

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203. *See Euclid*, 272 U.S. at 388; Bd. of Supervisors of Fairfax Cty. v. Southland Corp., 297 S.E.2d 718 (Va. 1982).

204. *See Salerno*, 481 U.S. at 746.

205. *See* Sedona Grand, L.L.C. v. City of Sedona, 270 P.3d 864, 870 (Ariz. Ct. App. 2012) (stating that City must provide evidence beyond mere "legislative assertion" to carry its burden of demonstrating that the land use law is exempt pursuant to the public health and safety exception).

This is one of the advantages of giving a planning commission a voice in the zoning amendment process. The participation of this type of "administrative agency" allows for the introduction of concrete, empirical-based evidence that elevates the stated impact of the zoning from mere suspicion to something more closely resembling a factual finding. In a number of jurisdictions, local governments are required under the enabling legislation to submit proposed amendments to the planning commission for recommendation before the amendments can become effective.[206] The Elkhart, Indiana zoning ordinance, for example, provides that amendments to the text of the zoning ordinance "may be initiated by the Plan Commission or by a request by the City Council to the Plan Commission," and, following a public hearing, "the Plan Commission shall determine its recommendation on the proposed text amendment," certifying the proposal as favorable, unfavorable, or no recommendation.[207] This statutory framework provides a formal mechanism for rationally relating a proposed zoning ordinance to a stated government interest. If a planning commission concludes after careful analysis that the proposed ordinance will not advance the stated government interest and the local legislative body, nonetheless, approves the ordinance without addressing the findings of the planning commission (or zoning board), a court can rightly question whether the zoning action is rationally related to the stated government interest (or, perhaps, even whether the stated interest is the true motivation for the local action), even under rational basis review. The absence of clear findings of fact or other empirical evidence to support a proposed zoning ordinance ought to at least call into question whether the local land use decision is, in fact, rationally related to a specific gov-

206. *See, e.g.*, AMERICAN SOCIETY OF PLANNING OFFICIALS, AMENDING THE ZONING ORDINANCE 3 (1958), https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/pas/at60/pdf/report115.pdf; James E. Bertram & Bruce Kramer, *Role of Planning Commissioners and Elected Officials*, *in* A GUIDE TO URBAN PLANNING IN TEXAS COMMUNITIES (2008) (discussing relevant Texas law).

207. ELKHART, IND., ZONING ORDINANCE No. 4370 (1998). Likewise, in Gratiot County, the County Board of Commissioners cannot change or depart from the existing zoning ordinance unless the proposed change or departure is first submitted to the Planning Commission for its advice or suggestions. *See* GRATIOT CTY., MICH., ZONING ORDINANCE (1999).

ernment interest.[208] Even if the local legislative body need not rely upon the fact findings of a planning commission, or cite to these findings in a meaningful way, to support a change to the zoning ordinance, the legislative body should, at a minimum, be required to explain, with specificity, why contrary empirical evidence presented to the government as part of the zoning amendment process did not impact or influence its final zoning decision.

Although the extent to which a legislative body must rely upon actual evidence of a causal impact to establish a direct and substantial relationship to a government interest is debatable, especially in light of evidence suggesting a contrary causal impact, a locality should not be allowed to simply state that a zoning ordinance represents a valid exercise of police power: a proper justification of a zoning ordinance cannot simply be that the regulation is reasonable and necessary to promote the public health, safety, morals, or general welfare of the community and is consistent with the General Plan.[209] To allow this as a justification is to allow a locality to engage in an exercise of circular logic in which the locality effectively justifies an ordinance as rationally related to the objectives of police power by stating, tautologically, that the ordinance is rationally related to the objectives of police power.[210] What objectives of police power is it related to, more specifically? And how is the ordinance likely to have an observable causal impact upon these objectives?

Given the potential for improper motives highlighted above, judicial review of a zoning decision should, if possible, be a results-oriented inquiry supported, to the fullest extent feasible, by some form of fact finding or forward-looking empirical analysis. This need for a results-oriented analysis is greatest where a locality can be viewed as treating cannabis dispensaries differently than similarly situated businesses. If a locality, for example, cites an increase in traffic congestion as the reason for its decision not to allow a cannabis dispensary to

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208. *See, e.g.*, MODEL STATUTE ON LOCAL LAND USE PROCESS § 614 (AM. BAR ASS'N 2008).

209. *See, e.g.*, SAN DIEGO CTY., CAL., ORDINANCE No. 10461 (2017).

210. *See Sedona*, 270 P.3d at 870 ("[T]he nexus between prohibition of short-term occupancy and public health is not self-evident, and the governing body must do more than incant the language of a statutory exception to demonstrate that it is grounded in actual fact.").

open in a specific location, then the locality, even if a plausible causal link has been established between cannabis dispensaries and traffic congestion, must still further explain why a cannabis dispensary's negative impact on traffic congestion is expected to be worse than other similarly situated commercial establishments permitted to operate in that same location. A locality, for example, ought not to be allowed to prevent the opening of a cannabis dispensary at a specific location because of publicly expressed concerns about increased traffic congestion only to subsequently allow a twenty-four-hour gas station to open in that same location. Under these facts, the original decision to disallow the operation of a cannabis dispensary appears arbitrary and capricious and strongly suggests that the zoning action was not rationally related to traffic congestion.[211] If a locality is truly concerned with increased traffic congestion, then this concern must apply equally to all commercial establishments, and the locality should be required to explain why a cannabis dispensary is different than other businesses with respect to traffic congestion—or any other perceived negative social impact for that matter—so as to provide assurance that the dispensary was not, in fact, tacitly singled out on the basis of otherwise irrelevant characteristics, such as the product sold.

In reviewing a zoning decision, the presence of similarly situated businesses allows a court to put a locality's stated government interest to the test and has been termed "rational basis with bite."[212] Under this heightened standard of review, a locality must show not only how a zoning restriction that applies only to cannabis dispensaries has a fair and rational relationship to a legitimate government interest, but also how this expected negative impact is likely to be worse than other busi-

211. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937); *see also* Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 561 (1997) (stating that judicial review of property interests under substantive due process is deferential to legislative decision-making). *See generally* James W. Ely, Jr., *The Enigmatic Place of Property Rights in Modern Constitutional Theory*, *in* THE BILL OF RIGHTS IN MODERN AMERICA 108, 110 (David J. Bodenhamer & James W. Ely eds., 2008).

212. *See* Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 780 (1987).

nesses that have been allowed to operate in the same area.[213] The impact of other businesses provides an observable baseline from which the expected impact of a cannabis dispensary can be judged or compared. Again, a locality should not be allowed to simply state, in a conclusory manner, that cannabis dispensaries are somehow innately different than other businesses: a locality must make clear exactly how these perceived differences have a fair and rational relationship to a legitimate government objective, and do not simply reflect a general unease with cannabis as a commercially available consumer good.

Arguably, courts have been too willing to conclude that cannabis dispensaries are not similarly situated with other commercial establishments. In *City of Monterey v. Carrnshimba*, for example, the California Appellate Court held that "in light of the unusual, if not unique, characteristics of a Dispensary, such a use of property does not fall within any of the specific [fifty possible] commercial use classifications identified in the City Code for C–2 District property."[214] In a display of perhaps unwarranted formalism, the court argued that a cannabis dispensary did not fall within the commercial use classification of either retail sales or of a pharmacy or medical supply house.[215] The purpose of this judicial inquiry, however, should not be to creatively identify dimensions along which cannabis dispensaries are not similarly situated with other commercial establishments. Rather, the purpose must be to identify only those differences that have a fair and rational relationship to the government interest which the locality has cited as justifying the differential legislative classification in the first instance. For example, in *County of Los Angeles v. Hill*, the court, while acknowledging that cannabis may, as a legal drug, be dispensed for medical purposes under state law, concluded that "medical marijuana dispensaries and pharmacies are not 'similarly situated' for public health and safety purposes and therefore need

213. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (stating that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike").

214. City of Monterey v. Carrnshimba, 156 Cal. Rptr. 3d 1, 26 (Cal. Ct. App. 2013).

215. *Id.* at 20–21.

not be treated equally."[216] The court listed a number of public health and safety risks not associated with the location of pharmacies and concluded that these differences provided a rational basis for the county to zone medical cannabis dispensaries differently than pharmacies.[217] This represents only one side of the equation, however. Absent from the court's analysis was any discussion of the public health and safety risks posed by pharmacies that are not associated with cannabis dispensaries, such as the fact that pharmacies also dispense addictive drugs, such as Schedule II drugs prescribed for medical conditions like chronic pain.[218] These risks must be compared to those of cannabis dispensaries to properly assess whether the impact of cannabis dispensaries upon public health and safety is greater than the corresponding impact of pharmacies upon public health and safety.

The need for substantive rational basis review is most pressing with respect to an ordinance that permanently bans (or effectively bans) cannabis dispensaries in a jurisdiction. Compared to use restrictions, geographic buffers, or density controls, a zoning ordinance that permanently bans an industry from a jurisdiction warrants a heightened and more probing inquiry into the government interests that the ban is purported to advance, and the extent to which a permanent ban is necessary to promote such interests. Support for heightened scrutiny can be found in the legislative history of state cannabis statutes, including the Oregon state statute where, during deliberations of the house bill, Representative Ken Helm stated, in relevant part:

> I want to say a brief thing about what it means to be reasonable because it is a subjective term. The legislative history that is important to discuss is for those jurisdictions which allow medical and adult-use recreational marijuana and do not opt out in some prescribed fashion, they may not use their local zoning code to effectively eliminate marijuana businesses or growth sites in their communities by, for example, finding zones in which it is very difficult to site these

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216. Cty. of Los Angeles v. Hill, 121 Cal. Rptr. 3d 722, 731 (Cal. Ct. App. 2011).

217. *Id.* at 730–31.

218. *See, e.g.*, Lucas, *supra* note 179.

> businesses, or putting them on the edge of town where nobody wants to go, or in some other way making it so difficult for these businesses to be sited that the businesses won't site in their communities. That's not reasonable.[219]

CONCLUSION

This Article provided a general survey of land use restrictions related to cannabis dispensaries and examined how localities have used such restrictions to control or restrict where this new land use can locate. Several of these local zoning ordinances have been successfully challenged in court as preempted by state law. In addition, this Article considered several arguments against the regulation of cannabis use by local governments, including the claim that zoning ordinances that ban, or substantially restrict, cannabis dispensaries may constitute an improper application of a locality's delegated zoning power under certain conditions. As part of a larger business strategy to promote market growth, the cannabis industry must invest substantial resources not only in lobbying efforts to enact state cannabis laws that make clear that cannabis-related activities or operations permitted under state law are also permitted under local law, but also in litigation (or other) efforts designed to challenge whether certain zoning restrictions on cannabis dispensaries, especially permanent bans, truly bear a rational relationship to a legitimate governmental interest. Indeed, if cannabis is recognized as having medicinal value in the same manner as FDA-approved drugs, then there is no rea-

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219. Or. State Legislature, *House Chamber Convenes*, (June 24, 2015, 1:44:57 PM), https://olis.oregonlegislature.gov/liz/mediaplayer?clientID=4879615486&eventID=2015061018 (statement of Rep. Ken Helm on the third reading of House Bill 3400). Existing caselaw also suggests the need for heightened scrutiny. In *Hernandez*, for example, the court was careful to note that the challenged zoning ordinance restricted only "*where*, within the city', a specific type of business generally may be located, a very traditional zoning objective." Hernandez v. City of Hanford, 159 P.3d 33, 45 (Cal. 2007) (emphasis in original) (quoting Ensign Bickford Realty Corp. v. City Council of Livermore, 68 Cal. App. 3d 467, 477 (1977)). Had the municipality not permitted the business to develop on any parcel of land, rather than just permit the business to develop on one parcel and not another, the court may well have concluded that the zoning restriction unreasonably regulated commercial development in the city or otherwise improperly placed limits on local economic growth.

son that a heightened standard of review should not be employed when zoning restrictions on the location of cannabis dispensaries are challenged.