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SPACING REQUIREMENTS AS A LAND USE STRATEGY: THE MARIJUANA PUZZLE

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I. Introduction

Spacing requirements that require a minimum distance between commercial businesses are an impromptu zoning strategy. They are not usually included in comprehensive plans and are an afterthought in zoning codes. They are standalone requirements that require spacing so that targeted businesses do not create harmful secondary effects. Marijuana dispensaries are the latest target.

This article considers spacing requirements from schools for marijuana dispensaries, a requirement that has an unsettled legal basis and a doubtful legitimacy. Comprehensive planning and zoning policies are required that can provide a fair and balanced approach to the spacing problem.

II. Spacing for Marijuana Dispensaries

As states began authorizing retail zoning for marijuana dispensaries through ballot initiatives[1] and legislation,[2] they had to consider what kind of regulations they should authorize. A number of states did not leave spacing decisions at the local government level but adopted statutes with spacing requirements that local governments must follow.

Excluding marijuana dispensaries is one alternative, and exclusion requirements vary.[3] Some states

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set a deadline that allows municipalities to opt-out of permitting marijuana dispensaries,[4] some states allow municipalities to prohibit marijuana dispensaries,[5] and some states exclude marijuana dispensaries from residential zones.[6] A state may also delegate unrestricted local authority[7] or may prohibit exclusion.[8]

This article considers an alternative: school spacing requirements from schools for marijuana dispensaries.[9] In an unusual intervention, states adopted regulations[10] or statutes[11] with spacing requirements that local governments must follow.[12] Spacing requirements vary. They may be a requirement for local zoning, or a state may expressly condition the licensing of a marijuana dispensary on compliance with a local school spacing requirement[13] to show that the proposed dispensary is located far enough away from nearby schools.[14] There is no agreement on how much spacing from schools is necessary. Colorado, Maine, Michigan, Nevada, Oregon, Virginia, and Washington each have a 1,000-foot school spacing requirement.[15] Alaska's school spacing requirement is 500 feet,[16] which it shares with Massachusetts, Montana, and New York.[17] California has a 600-foot requirement.[18] Statutes may restrict or allow a local option.

Here are some examples of different statutory spacing requirements. There is no consensus about the level of government that should decide whether spacing requirement should be adopted, and no consensus on the spacing distance that should be required:

1. *No prescribed school spacing requirement*.[19] Virginia municipalities determine school spacing requirements individually, but the state provides limitations. The Virginia state agency responsible for dispensary licenses may deny a license if the dispensary will be located so close to "any . . . public private or parochial school or institution of higher education . . . that the operation of such place under such license will adversely affect or interfere with the normal, orderly conduct of the affairs of such facilities or institutions."[20]

2. *A school spacing requirement that municipalities cannot change.* New York provides what appears to be an unalterable 500 foot spacing requirement.[21]

3. *Municipalities may make a spacing requirement more restrictive, subject to limitations.* Arizona municipalities may set their own school spacing requirements provided that dispensaries are at least 500 feet away from schools,[22] but "may not enact any ordinance . . . [that] is more restrictive than a comparable ordinance, regulation, or rule that applies to nonprofit medical marijuana dispensaries."[23] Under Maine law municipalities may make the school spacing requirement more restrictive, but cannot make it "less than 500 feet from the property line of a preexisting public or private school."[24]

4. *Municipalities may relax statutory spacing requirements*. The Massachusetts spacing requirement is 500 feet "from the nearest School Entrance, unless a [municipality] adopts an ordinance or bylaw that reduces the spacing requirement."[25] Oregon has a

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spacing requirement and requires a physical barrier to the dispensary.[26]

5. *The school spacing requirement is changeable, to some extent, in either direction.* Colorado municipalities may "vary the distance restrictions" for schools "or may eliminate one or more types of schools" from the requirement.[27] California provides a 600-foot "buffer" between dispensaries and schools, but under Proposition 64, as codified, "the department or local jurisdiction [may] specif[y] a different radius."[28]

III. Spacing Requirements for Land Uses Protected by the Free Speech Clause

Spacing requirements have faced hostility. The spacing of group homes for the disabled is a prominent example, as it has been held invalid under the Federal Fair Housing Act.[29] This section considers spacing requirements that have been held to be a violation of the free speech clause in the federal constitution. Although spacing for marijuana dispensaries is social and economic legislation that receives rational basis judicial review,[30] not the more demanding judicial review that courts apply in free speech cases, the free speech cases provide insight on how courts may treat spacing from schools when it is required for marijuana dispensaries.

A. OUTDOOR ADVERTISING

Outdoor advertising, usually through billboards or on-premises signs, is a land use protected by the free speech clause as a form of commercial speech.[31] The Supreme Court adopted four factors for the review of regulations that affect commercial speech in *Central Hudson Gas & Electric Corporation v. Public Serv. Commission*.[32] They require an intermediate standard of judicial review that is more demanding than rational basis judicial review.

The third and fourth *Central Hudson* factors are similar to the means/ends test required by substantive due process. They require that the regulation of commercial speech must directly advance a substantial governmental interest, and must not be more extensive than necessary to serve that interest. In *Lorillard Tobacco Company v. Reilly*,[33] the U.S. Supreme Court held that a state regulation that controlled outdoor advertising violated the third and fourth *Central Hudson* factors. It prohibited on-site and off-site advertising for smokeless tobacco and cigars at any location within a 1,000 foot radius of any public playground area in a public park, an elementary school or a secondary school. Its purpose was to address the incidence of cigarette smoking and smokeless tobacco use by children under legal age in order to prevent access to such products by underage consumers.[34]

The regulation satisfied the third *Central Hudson* factor as the state extensively reviewed studies of the advertising problem and had "ample documentation" of the problem with underage use of smokeless tobacco and cigars. The regulation of advertising of smokeless tobacco and cigars in order to combat tobacco product use by minors was not based on mere speculation and conjecture.[35]

The Court held, however, that the regulation did not satisfy the "critical" fourth *Central Hudson* factor, which requires a reasonable fit between the means and ends of a regulatory scheme.[36] The regulation's broad sweep showed that the state had not carefully calculated the costs and benefits associated with the burden on speech that it created. The state relied on studies by federal agencies that supported the regulation, but the Court held that the free speech clause required a case specific analysis.[37] In connection with zoning restrictions, the advertising prohibition would "prevent advertising in 87% to 91% of Boston, Worcester, and Springfield"[38] and other areas, and would "constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers."[39]

The Court's decision in *Lorillard* was based on factual analysis and did not provide guidance on when an outdoor advertising regulation would be a complete ban. A court could nevertheless reach the same conclusion for marijuana dispensaries

and hold that excessive spacing requirements had enacted a complete ban.[40]

B. ADULT-ORIENTED USES

Spacing is a common strategy for adult-oriented uses. It typically separates adult uses from each other and prohibits location near susceptible uses like schools.[41] *City of Renton v. Playtime Theatres, Inc.*[42] upheld the constitutionality of a zoning ordinance that prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. It largely relied on an earlier Supreme Court case, where a plurality upheld a city ordinance prohibiting an adult theater within 1,000 feet of any two other "regulated uses" or within 500 feet of any residential zone.[43]

The spacing limitation in *City of Renton* could possibly have been content-based because it regulated the content of adult movies, and a content-based regulation is presumptively unconstitutional. The Court avoided this problem by holding that the Renton ordinance did not fit neatly into either the "content-based" or "content-neutral" category. It treated theaters that specialize in adult films differently from other kinds of theaters, and the Court held that the ordinance was aimed not at the content of the films shown at "adult motion picture theatres," but at the undesirable "secondary effects that such theaters had on the surrounding community."[44] It was "designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views."[45]

Preserving the quality of urban life must be accorded high respect, the Court concluded, and the ordinance was designed to serve a substantial governmental interest and allowed for reasonable alternate avenues of communication.[46] Renton relied on studies done by Seattle as the basis for its ordinance, and the city did not have to conduct new studies or produce independent evidence if it relied on evidence "reasonably believed to be relevant."[47]

The Court then held that the ordinance complied with the free speech requirement that it had to leave reasonable alternative avenues of communication open. More than 5% of Renton's land area was available for adult theater sites, but the Court did not indicate what percentage of a city's land area was required to avoid a violation of the free speech clause. It did hold that sites did not have to be commercially available.[48] Courts have generally followed *City of Renton* and have upheld similar requirements,[49] even when they were a "direct response" to or were timed immediately after the arrival of an adult use, as this would not necessarily indicate a desire to "eradicate[e] [ ] any erotic message."[50]

The secondary effects doctrine adopted in *City of Renton* provides a legitimate governmental interest that could uphold spacing requirements for marijuana dispensaries. The difficulty is that reviews of studies about secondary effects found that they were based on scant and flawed bodies of evidence.[51] They make the *City of Renton* decision doubtful, though one court that upheld the spacing of adult-oriented uses rejected a critical review of the secondary effects problem.[52] Secondary effects can play an important role in the validity of spacing requirements for marijuana dispensaries.

IV. Land Use Regulation as Control of Competition

A. THE CONTROL OF COMPETITION DOCTRINE

Courts are unanimous in holding that the prevention of competition is not a proper purpose in zoning,[53] although the legal basis for the rule is not clear. Court decisions holding that a zoning regulation is invalid as a control of competition also are usually fact-based with little substantive discussion. The rule seems to be a requirement that is part of substantive due process, but the connection is not clear from the cases. Neither do the courts apply rational basis review. The control of competition rule is a standalone rule, and courts interpret it much as they would interpret a rule included in a statute.

Spacing requirements for marijuana dispensaries may violate the control of competition rule, and product substitution can aggravate the control of competition problem. Bunting & Lammendola argue that "[t]here is a growing empirical literature . . . that suggests that cannabis and alcohol are substitutes."[54] Their point is that "[i]f this substitution effect holds true, then a ban on cannabis 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."[55]

The control of competition rule does not apply under an exception adopted by the California Supreme Court in a case upholding a ban on furniture stores outside a downtown area to prohibit competition with downtown furniture stores.[56] The court held that a regulation does not violate the control of competition rule, even if economic competition is regulated, if its "primary purpose" is the advancement of a legitimate public purpose that benefits the entire municipality, such as downtown preservation. An ordinance that reasonably relates to the general welfare of the municipality and is a legitimate exercise of the municipality's police power provides a primary purpose.[57]

The primary purpose rule is an acceptable basis for deciding when there is control of competition if you believe that primary governmental purposes preempt anticompetitive outcomes. If you do, then the primary purpose rule should save a zoning ordinance from being anticompetitive, just as secondary effects saved a spacing ordinance for an adult-oriented use from violating the free speech clause. The difficulty is that the "primary purpose" rule is a vague invocation that invites rescue from an anticompetitive outcome based on any purpose that satisfies the police power test, though negative secondary effects should pass this test.

B. SPACING REQUIREMENTS AND THE CONTROL OF COMPETITION

Spacing requirements test the control of competition rule. Municipalities adopt spacing requirements to separate a variety of businesses, including liquor stores and automobile dealerships. Spacing requirements for gasoline filling stations are another example. They began early in the last century as a response to gasoline filling stations that were unlike their contemporary counterparts. Spacing requirements were intended to prevent hazardous and damaging secondary effects from gasoline filling stations, such as noise, fire safety and traffic hazards, and unpleasant appearance,[58] although defenders of gasoline filling stations strongly objected that secondary effects did not exist.[59] Marijuana dispensaries are claimed to produce similar secondary effects, such as increased crime and a negative effect on surrounding property values.[60]

Most courts held by the middle of the last century that spacing requirements for gasoline filling stations were reasonably related to the public welfare because they mitigated fire and traffic hazards,[61] although some courts refused to find that these hazards existed.[62] The contemporary gasoline filling station does not present these problems, and the cases did not consider the secondary effects and control of competition issues, but they support a rule that secondary effects support spacing. There are other examples. Courts upheld spacing requirements for liquor store licenses to prevent their secondary effects.[63] Courts have also held that aesthetic effects are secondary effects that justify spacing limitations on gasoline filling stations.[64]

V. Marijuana Dispensary Spacing as a Control of Competition

Spacing requirements for marijuana dispensaries can create a control of competition problem. Arizona illustrates the problem. It has a 500-foot school distance requirement,[65] limits the number of licenses to "no more than two Marijuana Establishments per county,"[66] and gives license priority to "early applicants."[67] This combination of restrictions can limit competition and is similar to the "complete ban" held unconstitutional in the *Lorillard* case:

> With only 15 counties, and when you chart the locations of existing dispensaries, and cross-

> reference against the "two or fewer per county" cap . . ., there just are not that many locations presently available or apt to be available for Marijuana Establishment licenses after existing dispensaries have completed their early applications.[68]

A spacing requirement for marijuana dispensaries faced hostility from an Arizona court in *Dreem Green, Inc. v. City of Phoenix*.[69] A property owner obtained a license from the state for a medical dispensary, but could not use the license in the zoning district where the license applied without a variance from a spacing requirement. It created a one mile, 5,280-foot spacing requirement between medical marijuana dispensaries, and the property violated the requirement because it was too close to another dispensary; it also was too close to a residentially-zoned lot.[70] Other properties in the same zoning district, but outside the area covered by the license, could be used for a medical dispensary because they were not affected by the spacing requirement.

The court upheld the board of adjustment's decision to granted area variances from the spacing requirement. It concluded that "[c]redible evidence supports the Board's implicit conclusion that due to the Property's location and surroundings, strict application of the Ordinance will deprive the Property of privileges enjoyed by similarly-zoned parcels in the district."[71] *Dreem* was a variance case, but the interplay of the spacing and licensing requirements was a factor in the court's decision. It disapproved a complete ban on a dispensary in a zoning district, just as the Supreme Court disapproved a complete ban on outdoor advertising in *Lorillard*.

Absent a complete ban, marijuana dispensaries could create secondary effects. One article argued that marijuana's "legal limbo . . . prevents many [dispensaries] from obtaining banking services," which "greatly increases the risks to which these businesses are exposed in that they must deal with vast amounts of cash, thereby increasing the risk of robbery."[72]

The cash basis problem convinced a California court that a county's more restrictive regulations for marijuana dispensaries than for pharmacies did not violate equal protection.[73] An ordinance included a requirement that "[d]ispensaries shall not be located within a 1,000 foot radius of schools, playgrounds, parks, libraries, places of religious worship, child care facilities, and youth facilities." Expert testimony submitted by the county distinguished marijuana dispensaries from pharmacies. It showed that most dispensaries are cash only businesses, and that their large amounts of cash and marijuana make them, their employees, and qualified patients "the target of a disproportionate amount of violent crime." Testimony also showed that marijuana dispensaries attract loitering and marijuana smoking on or near the premises, which negatively affects the "quality of life" in the neighborhood.[74]

The problem with this decision is that a recent survey of a number of studies of marijuana dispensaries disputes the secondary effects claim.[75] Here are some conclusions from the studies:

> Dispensaries cause an overall reduction in crime in neighborhoods, with no evidence of spillovers to surrounding neighborhoods. There is no evidence that ordinances allowing for marijuana dispensaries lead to an increase in crime. There is some evidence of a reduction in property crime. There is a positive relationship between the decision to allow cannabis-related businesses and home prices. Cities with more dispensaries are positively correlated with higher home values. Legalization leads to an average six percent increase in housing values. The distance from school to the nearest medical marijuana dispensary is not associated with adolescent use of marijuana or susceptibility to use.[76]

The survey also found that Cannabis retailers were not selling to minors and that their products were not being diverted to the underage market. As one study stated, "Our findings indicate that policymakers should be careful in how they regulate the presence of dispensaries, while not jumping to the conclusion that dispensaries are clearly crime generating hot-spots."[77]

VI. Conclusion

Spacing requirements are an impromptu zoning strategy. They reflect bias against targeted businesses and fears about negative secondary effects. Spacing for marijuana dispensaries may

be supported by local concerns about their impact, but studies show that they do not create negative secondary effects. Spacing is not necessary.

Spacing has been litigated for outdoor advertising and adult-oriented uses. The Supreme Court struck down a spacing requirement for outdoor advertising under the free speech clause because it was a complete ban on advertising, but upheld a spacing requirement for adult-oriented uses under the free speech clause because it was necessary to mitigate negative secondary effects.

The legal status of spacing for marijuana dispensaries is uncertain. Spacing may be invalid as a control of competition, but the California Supreme Court held that this rule does not apply when the "primary purpose" of zoning is the advancement of a legitimate governmental purpose. Spacing for marijuana dispensaries is valid as a legitimate governmental purpose if courts decide that it is necessary to prevent negative secondary effects. It will fail the control of competition rule if marijuana dispensaries do not create negative secondary effects. If courts apply the complete ban rule adopted in the *Lorillard* case, they could invalidate spacing for marijuana dispensaries in extreme cases as a violation of substantive due process.

Spacing for marijuana dispensaries is a zoning strategy that can create excessive and fatal restrictions on business opportunity. They are an important land use restriction that requires careful evaluation. Comprehensive planning and zoning must provide policies that can determine whether spacing is necessary, and that can provide a fair and balanced response if spacing is required.

ENDNOTES:

[1]*See generally* Stephanie Zimmerman, *Successful Ballot Measures for Marijuana and Other Drugs Create Opportunities for Lawyers*, ABA JOURNAL (Feb. 1, 2021), https://www.abajournal.com/magazine/article/successful-ballot-measures-for-marijuana-and-other-substances-create-opportunities-for-lawyers/.

[2]*See, e.g.*, Marijuana Regulation and Taxation Act, S.B. 854-A, Jan. 6, 2021, N.Y. CANBIS § 72 (retail sales license), https://legislation.nysenate.gov/pdf/bills/2021/s854a.

[3]Manufactured housing is another example of a land use that has faced exclusion. The judicial response is mixed to total exclusion from a municipality. Daniel R. Mandelker, *Zoning Barriers to Manufactured Housing*, 48 URB. LAW. 233, 259 n. 121 (2016). Exclusion from residential zones is usually upheld. Mandelker at 254-261.

[4]In New York, municipalities may "opt-out of allowing adult-use cannabis retail dispensaries . . . however, municipalities cannot opt-out of adult use legalization." Office of Cannabis Management, WHAT IS IN THE LAW: LOCAL GOVERNMENTS 1 (2021); N.Y. CANBIS § 131 ("Local opt-out; municipal control and preemption").

[5]*See, e.g.,* ALASKA STAT. ANN. § 17.38.210(a) ("A local government may prohibit the operation of . . . marijuana retail stores through the enactment of an ordinance or by a vote initiative."); ARIZ. REV. STAT. ANN. § 36-2857(A)(3) (substantially the same); MICH. COMP. LAWS ANN. § 333.27956 (municipalities "may completely prohibit or limit the number of marijuana establishments"). The California Supreme Court read into relevant state law the ability of municipalities to ban medical marijuana dispensaries. *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.*, 56 Cal. 4th 729, 156 Cal. Rptr. 3d 409, 300 P.3d 494, 506 28 A.D. Cas. (BNA) 144 (2013). *See also* Muara Dolan, *California's High Court Upholds City Bans of Pot Stores*, L.A. TIMES, (Aug. 29, 2013, 10:00 p.m.), https://www.latimes.com/local/lanow/la-me-ln-med-pot-bans-20130506-story.html.

[6]MICH. COMP. LAWS ANN. § 333.27959(3)(c).

[7]COLO. CONST. art. XVIII, § 16(5)(f) ("A locality may enact ordinances or regulations, not in conflict with this section or with regulations or legislation enacted pursuant to this section, governing the time, place, manner and number of marijuana establishment operations.").

[8]OKLA. STAT. ANN. tit. 63, § 425(F) ("No city or local municipality may unduly change or restrict zoning laws to prevent the opening of a medical marijuana dispensary."). Bunting & Lammendola point out that, "In part due to [Oklahoma's] relatively restrictive framework, Oklahoma has more licensed [medicinal] cannabis dispensaries than any other state." William C. Bunting & James M. Lammendola, *Why Localism is Bad for Business: Land Use Regulation of the Cannabis Industry*, 17 N.Y.U. J. L. & BUS. 267, 274-275 (2021), (citing Ed Keating, *Which State Has the Most Licensed Cannabis Dispensaries? The Answer May Surprise You*, CANNABIZ MEDIA (Sept. 18,

2019).

[9]Bunting & Lammendola, *supra* note 8, at 278-279 (discussing local regulations).

[10]*See, e.g.*, Alaska Admin. Code § 306.010(a) & (c); Or. Admin. R. 845-025-2840; 18 Va. Admin. Code 110-60-135(B)(1).

[11]*See, e.g.*, N.Y. Canbis § 77(4) (McKinney). *See also* Okla. Stat. Ann. tit. 63, § 425(G) (requirement for medicinal marijuana dispensaries).

[12]There are other methods of keeping marijuana dispensaries away from vulnerable uses. *See* Bunting & Lammendola at 278 (citing local ordinance creating distance requirement between residential zoning and dispensaries). *See also* Mich. Comp. Laws. Ann. § 333.27959(3)(c) (excluding dispensaries from residential zones); N.Y. Canbis § 131(2) ("[T]owns, cities, and villages may pass local laws and regulations governing the time, place, and manner of the operation of licensed adult-use cannabis retail dispensaries and/or on-site consumption sites, provided such law or regulation does not make the operation of such licensed retail dispensaries or on-site consumption sites unreasonably impracticable as determined by the Board."). Oregon, defines "reasonable regulations" to include "reasonable conditions" for obtaining a dispensary license and the "manner in which" the dispensary holds the license. Or. Rev. Stat. § 475B.486. Accord Mass. Gen. Laws ch. 94G, § 3.

States may also preempt local regulation. Colo. Const. art. XVIII, § 16(5)(f) ("A [municipality] may enact ordinances or regulations, not in conflict with this section or with regulations or legislation enacted pursuant to this section, governing the time, place, manner and number of marijuana establishment operations.") *Accord*. Mass Gen. Laws ch. 94G, § 3; N.Y. Canbis § 131(2). *Cf*. Cal. Health & Safety Code § 11362.768(f) ("Nothing in this section shall prohibit a city, county, or city and county from adopting ordinances or policies that further restrict the location or establishment of a dispensary.").

[13]*See, e.g.*, Alaska Admin. Code § 306.010(a); Cal. Health & Safety Code § 11362.768(b) (600-foot school distance requirement); Colo. Rev. Stat. Ann. § 44-10-311(1)(d)(I); Me. Rev. Stat. tit. 28-B, § 402(2)(A); Mich. Comp. Laws Ann. § 333.27959(3)(c); Or. Admin. R. 845-025-2840. *See also* Okla. Stat. Ann. tit. 63, § 425(G) (requirement for medicinal marijuana dispensaries). Note that these statutes may be either permissive or mandatory. *Compare* Ballot Initiative No. 190, Section 13(b)(4)(a)(ii) (Montana 2020) ("The department may deny a license for an adult-use . . . dispensary . . . if the applicant's proposed registered premises: . . . (ii) is within 500 feet of . . . a school."), https://sosmt.gov/wp-content/uploads/I-190.pdf, *with* N.Y. Canbis § 77(4) ("No applicant shall be granted an adult-use on-site consumption license for any premises within [500] feet of school grounds."); Wash. Rev. Code Ann. § 69.50.331(8) (providing, with exceptions, that "the board may not issue a license for any premises within [1,000] feet" of any "elementary or secondary school").

[14]*See, e.g.*, 410 Ill. Comp. Stat. Ann. 705/15-25. *See also* Oklahoma Medical Marijuana Authority, Proof of Distance from a School for Dispensaries (2019).

[15]Colo. Rev. Stat. Ann. § 44-10-311(d)(I); Me. Rev. Stat. tit. 28-B, § 402; Mich. Comp. Laws Ann. 333.27959(3)(c); Nev. Rev. Stat. Ann. § 678B.250(II); Or. Rev. Stat. Ann. § 475B.105(2)(d); 18 Va. Admin. Code 110-60-135(B)(1); Wash. Rev. Code Ann. § 69.50.331(8)(a).

[16]*See* 3 Alaska Admin. Code § 306.010 (a).

[17]Mass. Code Regs. § 500.110(3) ("Security Requirements for Marijuana Establishments"); NY CANBS § 77(4) (McKinney).

[18]Cal. Bus. & Prof. Code § 26054 (recreational marijuana); Cal. Health & Safety Code § 11362.768(b) (medical marijuana).

[19]R.I. Gen. Laws Ann. § 21-28.11-16 ("ordinances and by-laws that impose reasonable safeguards on the operation of cannabis establishments . . . that: (1) Govern the time, place and manner of cannabis establishment operations").

[20]Va. Code Ann.§ 4.1-222(2)(c).

[21]N.Y. Canbis § 77(4). *See also* Or. Rev. Stat. § 475B.070 (prohibiting certain setback requirements unrelated to schools).

[22]Ariz. Admin. Code R9-17-321.

[23]Ariz. Rev. Stat. Ann. § 36-2857(B)(1).

[24]Me. Rev. Stat. tit. 28-B, § 402 (dispensaries cannot be "located within 1,000 feet of the property line of a preexisting public or private school, except that, if a municipality by ordinance or other regulation prohibits the location of marijuana establishments at distances less than 1,000 feet but not less than 500 feet from the property line of a preexisting public or private school, that lesser distance applies").

[25]935 Mass. Code Regs. § 500.110(3) ("Security Requirements for Marijuana Establishments") ("A Marijuana Establishment Entrance may not be closer than 500 feet from the nearest School Entrance, unless a city or town adopts an ordinance or bylaw that reduces the distance requirement."). *But seeLittle Children Schoolhouse, Inc. v. Town of Brookline Zoning Board of Appeals ex rel. Geller*, 2016 WL 4162455, at *5 (Mass. Land Ct. 2016) (Mass. Land Ct. Aug. 4, 2016) (implying that a different Massachusetts' regulation permits

municipalities to alter the state-prescribed school distance requirement for medical marijuana dispensaries in either direction). *See also* MICH. COMP. LAWS ANN. § 333.27959(3)(c) ("The property where the proposed marijuana establishment is to be located is not within an area zoned exclusively for residential use and is not within 1,000 feet of a pre-existing public or private school . . . unless a municipality adopts an ordinance that reduces this distance requirement.").

[26]*See generally* OR. REV. STAT. ANN. § 475B.109. *See* OR. REV. STAT. ANN. § 475B.109(1)(b) (providing that a dispensary must not be "located within 500 feet" of the school, OR. REV. STAT. ANN. § 475B.109(1)(a), and that the state agency responsible for licenses "determines that there is a physical or geographic barrier capable of preventing children from traversing to the premises of the marijuana retailer." Alternatively, there is a provision grandfathering dispensaries "established before August 1, 2017." Or. REV. STAT. ANN. § 475B.109(2).

[27]COLO. REV. STAT. ANN. § 44-10-311.

[28]CAL. BUS. & PROF. CODE § 26054 (West). *But see* CAL. HEALTH & SAFETY CODE § 11362.768(b) & (f). CAL. HEALTH & SAFETY CODE § 11362.768(b), which provides that "No medicinal cannabis cooperative, collective, dispensary, operator, establishment . . . shall be located within a 600-foot radius of a school." Subsection (f) of the same provision allows municipalities to make this requirement more restrictive: "Nothing in this section shall prohibit a [municipality] from adopting ordinances or policies that further restrict the location . . . of a medicinal cannabis cooperative, collective, dispensary, [etc.]."

New Mexico does not use a baseline but provides a ceiling under which municipalities may set school distance requirements. N.M STAT. ANN. § 26-2C-12(A)(2) (permitting municipalities to decide the school distance requirement from dispensaries where cannabis products will be consumed). The minimum distance shall not be set at any more than [300] feet from a school . . . that was in existence at the time the establishment or microbusiness was licensed. N.M STAT. ANN. § 26-2C-12(A)(2)(b).

[29]Daniel R. Mandelker, *Housing Quotas for People with Disabilities: Legislating Exclusion*, 43 URB. LAW. 915, 934-943 (2011) (discussing statutory requirements). The leading decision is *Larkin v. State of Mich. Dept. of Social Services*, 89 F.3d 285, 17 A.D.D. 867, 1996 Fed. App. 0211P (6th Cir. 1996) (holding invalid the denial of a license for an adult foster care facility for persons with disabilities under a statute that prohibited such facilities within 1500 feet of another facility unless permitted by local zoning, discussed. Mandelker, *Housing Quotas for People with Disabilities: Legislating Exclusion* at 936-937).

[30]*Cannatonics v. City of Tacoma*, 190 Wash. App. 1005, 2015 WL 5350873 (Div. 2 2015) (unpublished) (upholding under rational basis review an ordinance declaring any collective garden located within 600 feet of any day care or park and other places was a nuisance). Courts have also upheld derivative requirements. *See, e.g.*, , *"I Am" School, Inc. v. City of Mount Shasta*, 2021 WL 3721409, at *1 (Cal. App. 3d Dist. 2021), unpublished/noncitable, (Aug. 23, 2021) and review denied, (Nov. 10, 2021) and cert. denied, 142 S. Ct. 1370, 212 L. Ed. 2d 327 (2022) ("This case addresses whether the 600 feet is measured from the parcel upon which a school is located or from additional parcels owned by the school upon which no school building currently exists."); *Top Cat Enterprises, LLC v. City of Arlington*, 11 Wash. App. 2d 754, 455 P.3d 225 (Div. 1 2020) (addressing issue of correct interpretation of "property line" under another relevant statute). *See alsoJH2K I LLC v. Arizona Department of Health Services*, 246 Ariz. 307, 438 P.3d 676, 364 Ed. Law Rep. 1238 (Ct. App. Div. 1 2019), as amended, (Mar. 15, 2019) and as amended, (Mar. 19, 2019) (medical marijuana dispensary).

[31]*See generally* Daniel R. Mandelker, FREE SPEECH LAW FOR ON-PREMISE SIGNS (4th Ed. 2022), https://cpb-us-w2.wpmucdn.com/sites.wustl.edu/dist/a/3075/files/2022/09/Free-Speech-Law-for-On-Premise-Signs-Handbook-2022-09.07.2022.pdf.

[32]*Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341, 6 Media L. Rep. (BNA) 1497, 34 Pub. Util. Rep. 4th (PUR) 178 (1980) (holding unconstitutional, a regulation of the New York Public Service Commission that completely banned promotional advertising by the utility).

[33]*Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 121 S. Ct. 2404, 150 L. Ed. 2d 532, 29 Media L. Rep. (BNA) 2121 (2001). For discussion of these cases see Mandelker, *supra* note 31, at §§ 2:6[2], 2:6[5].

[34]Mandelker, FREE SPEECH LAW FOR ON-PREMISE SIGNS at 533.

[35]Mandelker, FREE SPEECH LAW FOR ON-PREMISE SIGNS at 561.

[36]Mandelker, FREE SPEECH LAW FOR ON-PREMISE SIGNS at 561.

[37]Mandelker, FREE SPEECH LAW FOR ON-PREMISE SIGNS at 562-563.

[38]Mandelker, FREE SPEECH LAW FOR ON-PREMISE SIGNS at 562.

[39]Mandelker, FREE SPEECH LAW FOR ON-PREMISE

SIGNS at 562.

[40]A ban could be struck down under rational basis judicial review. *Cf.City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (relying on rational basis judicial review to strike down as an equal protection violation the denial of a permit for a group home for the mentally disabled based on neighbor objections.

[41]*See*, *e.g.*, Stanton, California Zoning Code § 14.11(i)(2)(iii) (enacting spacing requirement from sensitive uses and to separate adult-oriented uses), https://stantononline.com/wp-content/uploads/2019/01/Stanton-Zoning-Ordinance-190109-2.pdf.

[42]*City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29, 12 Media L. Rep. (BNA) 1721 (1986). For criticism of *Renton* see *The Supreme Court, 1985 Term*, 100 HARV. L. REV. 190, 195, 196 (1986) ("reasoning marks a startling break with traditional first amendment jurisprudence").

[43]*Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310, 1 Media L. Rep. (BNA) 1151 (1976).

[44]*Renton*, 475 U.S., at 47.

[45]*Renton*, 475 U.S., at 48.

[46]*Renton*, 475 U.S., at 50.

[47]*Renton*, 475 U.S., at 51-52. *But see City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438-439, 122 S. Ct. 1728, 152 L. Ed. 2d 670, 30 Media L. Rep. (BNA) 1769 (2002) (repeated *Renton* holding that a city could rely on studies "reasonably believed to be relevant," but a city could not get away with shoddy data or reasoning; a city has the burden to supplement the record with additional evidence to "fairly support the municipality's rationale for its ordinance" if a plaintiff casts doubt on a city's justification.)

[48]*Renton*, 475 U.S., at 53-54.

[49]*See, e.g.*, *LLEH, Inc. v. Wichita County, Tex.*, 289 F.3d 358 (5th Cir. 2002) (upholding ordinance located within 1,500 feet of a child care facility, school, dwelling, park, or place of religious worship, or within one mile of a penal institution); *Ambassador Books & Video, Inc. v. City of Little Rock, Ark.*, 20 F.3d 858 (8th Cir. 1994)(ordinance prohibiting sexually oriented businesses from operating within 750 feet of religious facilities, public or private schools, boundaries of residential zones or any single-family or multiple-family use, public parks, medical facilities, properties on the National Register of Historical Places or local historical districts, or another sexually oriented business held a content-neutral time, place and manner regulation).

[50]*Cricket Store 17, L.L.C. v. City of Columbia*, 676 Fed. Appx. 162, 165 (4th Cir. 2017) (quoting *D.G. Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140, 146 (4th Cir. 1991)).

[51]"Ultimately, a thorough review of municipality reports reveals that cities' erogenous zoning rationales are justified largely by reference to scant and flawed sources of evidence purporting to show that crime, property devaluation, and blight are significant secondary effects that accompany the presence of adult establishments in the community. This evidence in turn appears to lead to the nearly uniform conclusion that a cracking approach is the desired method for abatement of these societal ills." Britt Cramer, *Zoning Adult Businesses: Evaluating the Secondary Effects Doctrine*, 86 TEMP. L. REV. 577, 614 (2014). The article defines cracking as the separation of adult-oriented businesses. *See also* Bryant Paul, Daniel Linz & Bradley J. Shafer, *Government Regulation of "Adult" Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects*, 6 COMM. L. & POL'Y 355 (2001).

[52]*Doctor John's, Inc. v. City of Roy*, 2007 WL 1302757, at *7-*10 (D. Utah 2007), aff'd, 542 F.3d 787, (10th Cir. 2008), (criticizing article), aff'd sub nom. on other grounds *Doctor John's v. Wahlen*, 542 F.3d 787 (10th Cir. 2008).

[53]Frederic A. Strom, *Land Use Controls: Effect on Business Competition,* 3 PLANNING & ZONING REP. 33, 33 (1980) (noting that courts frequently refer to the virtues of free enterprise and the dangers of abuse to that system), file:///C:/Users/Daniel/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/ASFMWLD5/Zoning%20and%20Planning%20Law%20Report.pdf; *Attar v. DMS Tollgate, LLC*, 451 Md. 272, 152 A.3d 765, 775 (2017) ("We have held that the prevention of competition is not a proper element of zoning. The economic effects of zoning should be considered only as they affect the general welfare.").

[54]Bunting & Lammendola, *supra* note 8, at 301 (citing studies).

[55]Bunting & Lammendola at 301-02.

[56] *Hernandez v. City of Hanford*, 41 Cal. 4th 279, 59 Cal. Rptr. 3d 442, 159 P.3d 33 (2007).

[57]*Hernandez* at 44-45. *See* Daniel R. Mandelker & Michael Allen Wolf, LAND USE LAW §§ 5:43-5:44 (6th ed. 2015, updated 2021) (discussing control of competition cases). *See also* Daniel R. Mandelker, *Control of Competition as a Proper Purpose in Zoning*, 14 ZONING DIG. 33 (1962).

[58]Charles J. Williams, *The Numbers Game: Gasoline Service Stations and Land Use Controls*, 3 URB. L. ANN. 23, 25-28 (1969) (discussing prob-

lems created by noise, light, traffic, fire hazards, and aesthetics), file:///C:/Users/Daniel/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/ASFMWLD5/2UrbLAnn23.pdf.

[59]Am. Soc'y of Planning Officials, Gasoline Station Location and Design, Planning Advisory Serv., Information Rpt. No. 140, at 20 (1960) (fire hazards eliminated); Benjamin Mosher, *Proximity Regulation of the Modern Service Station*, 17 Syr. L. Rev. 1, 3-8 (1965) (claiming no problems with fire, safety, and traffic hazards), file:///C:/Users/Daniel/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/ASFMWLD5/17SyracuseLRev1.pdf.

[60]*See* Williams, *supra* note 58.

[61]Mosher, *supra* note 20, at 10-13; *Radco, Inc. v. Zoning Commission of Town of Berlin*, 27 Conn. Supp. 362, 367, 238 A.2d 799, 802 (C.P. 1967)(citing cases).

[62]*E.g.*, *Mobil Oil Corp. v. Board of Adjustment of Town of Newport*, 283 A.2d 837, 839 (Del. Super. Ct. 1971) ("It is difficult to understand why the 200 ft. restriction was enacted. A filling station is no greater threat to safety than many other businesses that could be located there . . ."); *Chicago Title & Trust Co. v. Village of Lombard*, 19 Ill. 2d 98, 166 N.E.2d 41, 45 (1960) ("The inducements to burglary, and the problems of traffic, snow removal and drainage, to which reference was made by defendant's witness, were not shown to be any different with respect to filling stations than with respect to other businesses."); *Atlantic Refining Co. v. Township Committee of Haddon Tp.*, 125 N.J.L. 202, 14 A.2d 786,787 (N.J. Sup. Ct. 1940) ("From the evidence it does not appear that gasoline service stations present such a fire hazard as to justify their enforced separation by the distance required in this ordinance.").

[63]E.g., *Orange County v. Costco Wholesale Corp.*, 823 So. 2d 732 (Fla. 2002) (upholding one mile requirement to avoid secondary effects, including the effect on residential property values, an extraordinary amount of traffic, and problematic activities).

[64]*Stone v. City of Maitland*, 446 F.2d 83, 2 Env't. Rep. Cas. (BNA) 1851, 1 Envtl. L. Rep. 20374, 3 Envtl. L. Rep. 20443 (5th Cir. 1971) (upholding requirement to avoid aesthetic effects of abandonment created by having too many filling stations). *See also Taylor v. Town of Plaistow*, 152 N.H. 142, 872 A.2d 769, 772 (2005) (town primarily focused on aesthetics, safety and planning concerns when enacting 1,000-foot buffer between vehicular dealerships).

[65]Ariz. Admin. Code R9-17-321.

[66]Ariz. Rev. Stat. Ann. § 36-2854(A)(1)(c).

[67]Ariz. Rev. Stat. Ann. § 36-2850(10) (defining "early applicant" as "(a) An entity seeking to operate a marijuana establishment in a county with fewer than two registered nonprofit medical marijuana dispensaries," and "(b) A nonprofit medical marijuana dispensary that is registered and in good standing with the department."). See Ariz. Rev. Stat. Ann. § 36-2854(d)(e) (giving licensing priority to early applicants).

[68]*See* Gary Michael Smith, *Licensing, Zoning and Recreational Cannabis' Post-Election Obstacles*, 57 Ariz. Att'y 28, 28 (Mar. 2021) (discussing the relevant statutes).

[69]*Dreem Green Inc v. City of Phoenix*, 2019 WL 1959618 (Ariz. Ct. App. Div. 1 2019).

[70]*Dreem Green Inc v. City of Phoenix*, 2019 WL 1959618, at *1, ¶ 5 (Ariz. Ct. App. Div. 1 2019). The Court appeared to accept the dispensary's argument that special circumstances prevented use of the property for a medical marijuana dispensary:

> The property cannot be used for a medical marijuana dispensary because it is too close to another dispensary and too close to a residentially-zoned lot. Neither the [dispensary] nor their lessor are responsible for the locations of the other dispensary or the residential lot. Further, the [dispensary] and their lessor can do nothing about the density of other uses in the area that require setbacks for medical marijuana dispensaries.

Dreem Green Inc v. City of Phoenix, 2019 WL 1959618, at 4, ¶ 24 (Ariz. Ct. App. Div. 1 2019).

[71]*Dreem Green Inc v. City of Phoenix*, 2019 WL 1959618, at *3, ¶ 19 (Ariz. Ct. App. Div. 1 2019), citing Ordinance § 623(D)(124)(e).

[72]James J. Black & Marc-Alain Galeazzi, *Cannabis Banking: Proceed with Caution*, American Bar Ass'n (Feb. 6, 2020), https://perma.cc/525C-CGD9. *See also* Julie Andersen Hill, *Cannabis Banking: What Marijuana Can Learn from Hemp*, 101 B.U. L. Rev. 1043, 1049-1061 (2021) (explaining that marijuana-related businesses have banking problems, that many banks will not serve the industry, and that marijuana-related businesses have trouble accepting credit cards and getting loans.

[73]*County of Los Angeles v. Hill*, 192 Cal. App. 4th 861, 121 Cal. Rptr. 3d 722, 731 (2d Dist. 2011).

[74]*But cf. Gamut Group, LLC v. City of Lansing*, 2019 WL 1265161 at *3 (Mich. Ct. App. 2019) (reversing refusal to rezone for continuation of medical marijuana dispensary that had operated since 2011, when rezoning granted on other three corners of intersection, zoning administrator determined that proposed use would not have negative impacts on vehicular or pedestrian traffic, would have no environmental impact, would not

negatively impact future patterns of development in the area, and would be consistent with the commercial zoning already in existence, and city offered no real explanation for denial).

[75]NORML, Societal Impacts of Cannabis Dispensaries/Retailers (n.d.) (quoting studies from 2016 and a 2006 study), https://norml.org/marijuana/fact-sheets/societal-impacts-of-cannabis-dispensaries-retailers/.

An earlier detailed review of several police surveys and city-based studies similarly found that "these studies have routinely shown that . . . dispensaries are not magnets for crime. Instead, these studies suggest that dispensaries are no more likely to attract crime than any other business." Marijuana Policy Project, Medical Marijuana Dispensaries and Their Effect on Crime (n.d) (discussing studies from 2006 to 2014), file:///C:/Users/Daniel/Downloads/Medical-Marijuana-Dispensaries-and-Their-Effect-on-Crime.pdf. The report adds that "in many cases, by bringing new business and economic activity to previously abandoned or run-down retail spaces, dispensaries actually contribute to a reduction in crime."

[76]NORML, Societal Impacts of Cannabis Dispensaries/Retailers. A contrary Denver study found that "the density of marijuana outlets in spatially adjacent areas was positively related to property crime in spatially adjacent areas over time. Further, the density of marijuana outlets in local and spatially adjacent blocks groups was related to higher rates of marijuana-specific crime." Bridget Freisthler, et al., *From Medical to Recreational Marijuana Sales: Marijuana Outlets and Crime in an Era of Changing Marijuana Legislation*, 38 J. Primary Prevention 249 (2017) (abstract), https://link.springer.com/article/10.1007/s10935-017-0472-9, discussed in Ohio State News, Legal Marijuana Stores Lead to Increases in Property Crime (April 27, 2017), https://news.osu.edu/legal-marijuana-stores-lead-to-increases-in-property-crime/.

See accord Bridget Freisthler, et al., *A Micro-temporal Geospatial Analysis of Medical Marijuana Dispensaries and Crime in Long Beach, California*, 111 Addiction 1027 (2016) (finding that density of medical marijuana dispensaries was unrelated to property and violent crimes in local areas but related positively to crime in spatially adjacent areas), https://onlinelibrary.wiley.com/doi/abs/10.1111/add.13301. *Cf*. Andrew M. Subica, et al., *The Geography of Crime and Violence Surrounding Tobacco Shops, Medical Marijuana Dispensaries, and Off-sale Alcohol Outlets in a Large, Urban Low-income Community of Color*, 108 Preventive Medicine 8 (2018) (abstract) ("mean property and violent crime rates within 100-foot buffers of tobacco shops and alcohol outlets—but not [medical marijuana dispensaries]—substantially exceeded community-wide mean crime rates and rates around grocery/convenience stores (i.e., comparison properties licensed to sell both alcohol and tobacco"), https://www.sciencedirect.com/science/article/abs/pii/S0091743517305078.

[77]Priscillia Hunt, Rosalie Liccardo Pacula, & Gabriel Weinberger, High on Crime? Exploring the Effects of Marijuana Dispensary Laws on Crime in California Counties 29 (IZA Institute of Labor Economics 2018), https://docs.iza.org/dp11567.pdf.

