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Medical Marijuana Meets Zoning: Can  
You Grow, Sell, and Smoke That Here?

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# Medical Marijuana Meets Zoning: Can You Grow, Sell, and Smoke That Here?

*Patricia E. Salkin and Zachary Kansler*

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## Commentary

*Editor's Note: This month's commentary addresses an emerging hot topic in many communities—regulating the land use and community impacts of medicinal marijuana dispensaries. The authors have compiled a list of many of the newly enacted state and local laws on the subject, highlighted on page 4.*

# Medical Marijuana Meets Zoning: Can You Grow, Sell, and Smoke That Here?

Patricia E. Salkin and Zachary Kansler

## INTRODUCTION

Although the federal government does not explicitly allow it,<sup>1</sup> 14 states (Alaska, California, Colorado, Hawaii, Maine, Michigan, Montana, New Jersey, New Mexico, Nevada, Oregon, Rhode Island, Vermont, and Washington)<sup>2</sup> currently permit the medical use of marijuana for qualified patients. State statutes, however, fail to account for the challenges that confront municipal planners and officials whose agenda includes the public health, safety, and welfare of residents, including minor children. The intensity of the problem is perhaps most evident in Los Angeles, where there are approximately 800 dispensaries.<sup>3</sup>

Varying statutory approaches are provided for individuals to legitimately acquire the drug—they may grow it themselves, they may obtain it from their primary caregiver, or they may obtain it from a licensed dispensary. This raises a number of land use regulatory questions, including: whether state law preempts local zoning when it comes to growing, buying, and using marijuana for medicinal purposes; whether distance requirements, similar to those used in the regulation of adult business uses, can be utilized to regulate the use of medical marijuana; and what types of special use permit considerations may be appropriate for considering activities related to the use of medical marijuana. In addition, questions as to whether growing and selling the drug may constitute a valid home occupation,

and whether marijuana is or should be considered an agricultural crop (and if so, what impact this would have on the relationship between agricultural regulation/policy and zoning), suggest a growing number of unanswered land use law-related questions in this emerging area.

This commentary pulls together information about how municipalities in the 14 states with legalized medical marijuana are beginning to sort through and address the challenging land use issues that confront communities faced with the growth, sale, and use of the drug.

## LAND USE LAW AND MEDICAL MARIJUANA

### Land Use Moratoria

Whenever new and seemingly controversial land uses arrive on the scene, it is not uncommon for planners and municipal officials to enact moratoria to buy some time to study and develop appropriate regulations. The advent of medical marijuana is no exception, with a number of municipalities using this tool.<sup>4</sup> Some local governments have enacted temporary bans on the use of land as a medical marijuana dispensing facility with the purpose of developing appropriate regulations.<sup>5</sup> Fresno, California, for example, has enacted a moratorium while at the same time statutorily defining and setting out guidelines for the permitting of medical marijuana dispensing facilities.<sup>6</sup> At least one court has upheld the use of moratoria in this regard.<sup>7</sup>

## Nuisance Law

Municipal attorneys are beginning to test legal theories in an effort to slow or prevent the growth and sale of the drug in their jurisdictions. For example, the San Jose, California, deputy city attorney has opined that because the cultivation, sale, and use of marijuana is illegal under federal law, medical marijuana dispensing facilities would constitute a nuisance that is not allowed by city code.<sup>8</sup> San Jose's existing municipal code effectively bans medical marijuana dispensaries, and the attorney has advised that the adoption of a moratorium is unnecessary. One California court recently held that failure to comply with the city's procedural requirements related to medical marijuana dispensaries creates a nuisance *per se*.<sup>9</sup>

## Zoning Definitions

Perhaps the most important part of the zoning ordinance is the definition section. Municipalities are inserting various terms related to the regulation of medicinal marijuana into local zoning codes. For example, a "medical marijuana dispensary" has been defined as a location or facility that is used to make available or distribute medical marijuana to primary caregivers, qualified patients, or people with an identification card.<sup>10</sup> A "medical marijuana collective or cooperative" is commonly defined as an association of people whose intent is to educate about medical marijuana and to assist in the lawful distribution of medical marijuana.<sup>11</sup>

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Many municipalities that acknowledge medical marijuana dispensing facilities have included in their zoning ordinances provisions that seek to distance these facilities from residential uses of land.

## LOCAL GOVERNMENTS

- Alameda County, California—Medical Marijuana Dispensaries, §§ 6.108.010–6.108-230 (2009), *available at* <http://tiny.cc/sopjq>
- Arcata, California—Municipal Code § 9-42-105; § 9-26-030 (2009), *available at* <http://tiny.cc/udmvp>
- Basalt, Colorado—Town Ordinance No. 12 (2009), *available at* <http://tiny.cc/wwwv0q>
- Berkeley, California—Patients Access to Medical Cannabis Act of 2008, §§12-26-010–140 (2008), *available at* <http://codepublishing.com/ca/berkeley>
- Commerce City, Colorado—Land Development Code § 21-5249 (2009), *available at* <http://tiny.cc/4qbph>
- Denver, Colorado—Medical Marijuana Dispensaries, §§ 24-401–24-410 (2010), *available at* <http://tiny.cc/6gxht>
- Durango, Colorado—Medical Marijuana Dispensaries, Art. III, Div. 16, §§ 13-110–13-120 (2009), *available at* <http://tiny.cc/drzn2>
- Fort Bragg, California—Medical Marijuana Dispensaries, § 9-30-101–9-30-270 (2009), *available at* <http://tiny.cc/egg3p>
- Freemont County, Colorado, Resolution #19—Adoption of Temporary Regulations to Limit the Location of Medical Marijuana Dispensaries and Medical Marijuana Growing Operations Within Unincorporated Fremont County, *available at* <http://tiny.cc/vda96>
- Los Angeles, California—Medical Marijuana Collective, § 45.19.6–14.19.6.10 (2010), *available at* <http://tiny.cc/0v8nm>
- Los Angeles County, California—Medical Marijuana Dispensaries, §§ 7.55.010–7.55.340, 22.56.196(1)(a) (2010), *available at* <http://tiny.cc/0ui3s>
- Louisville, Colorado—Municipal Code § 17.16.040.H (2009), *available at* <http://tiny.cc/k8fp4>
- Mendocino County, California—Municipal Code §§ 9.31.010–9.31.160 (2009), *available at* <http://tiny.cc/zgrhr>
- Monument, Colorado—Municipal Code § 17.36.030 (2009), *available at* <http://tiny.cc/b7v59>
- Oakland, California—Medical Cannabis Dispensary Permits, § 5-80-020 (2009), *available at* <http://tiny.cc/v7w5y>
- San Francisco, California—Medical Cannabis Act, §§ 3301–3321 (2010), *available at* <http://tiny.cc/1904r>
- San Luis Obispo County, California—Land Use Ordinance § 22-30-225 (2009), *available at* <http://tiny.cc/qn1yc>
- San Mateo County, California—Regulation of Collective Cultivation and Distribution of Medical Marijuana §§ 5.148.010–5.148.090 (2009), *available at* <http://tiny.cc/of1mb>
- Santa Cruz, California—Medical Marijuana Provider Association Dispensaries, § 24-12-14 (2010), *available at* <http://tiny.cc/a9zpw> and §24-22-539 (2010)
- Santa Rosa, California—Medical Cannabis Dispensaries §10-40.010–10-40.290 (2009) *available at* <http://tiny.cc/vazcr>
- Sebastopol, California—Municipal Code §§ 17.140.010–17.140.280 (2010), *available at* <http://tiny.cc/6ihoc>
- Sonoma County, California—County Code § 26-88-126 (2009), *available at* <http://tiny.cc/8pl4l>

## STATES

- Colorado—COLO. REV. STAT. ANN. § 25-1.5–106 (2010), *available at* <http://tiny.cc/m1com>
- Maine—Maine Medical Marijuana Act, ME. REV. STAT. tit. 22, Chapter 558-C (2010), *available at* <http://tiny.cc/kxtix>
- New Mexico—Medical Use of Marijuana, ADMIN. CODE § 7.34.4.8 (2010), *available at* <http://tiny.cc/07mkh>
- Rhode Island—The Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act, R.I. GEN. LAWS § 21-28.6 (2009), *available at* <http://tiny.cc/jxr07>

When regulating dispensaries, collectives, and cooperatives, some municipalities allow all forms; others are restrictive. In San Francisco, for example, only cooperatives or collectives are allowed, but the City Code refers to them as dispensaries. Throughout this commentary, when discussing these types of facilities in relation to land use, they will be called marijuana dispensing facilities, unless otherwise noted.

## Distance Restrictions

*State statutes and regulations.* A number of states have recognized the land use dilemma. New Mexico provides, among other things, that personal grow sites and nonprofit dispensing entities may not be located within 300 feet of any school, church, or day care center. In addition, the applicant must demonstrate that the marijuana is not visible from streets or public areas and that the location is secure, and illustrate what security devices are to be utilized. Maine and Rhode Island similarly require that the dispensaries not be located within 500 feet of the property line of any existing public or private school, that there be a security plan, and the cultivation of medical marijuana must take place in an enclosed, locked facility.

A new law in Colorado provides that state or local licenses may not be issued to dispensing facilities if the facilities are within 1,000 feet of where a permit for a similar license was denied due to of the nature of the use or of the effect of the use on the surrounding area.<sup>12</sup> Also, a license for the sale of medical marijuana may not be issued if the location is within 1,000 feet of any school; alcohol or drug abuse treatment facility; principal campus of a seminary, college, or university; or a child care facility.

*Local land use regulations.* Many municipalities that acknowledge medical marijuana dispensing facilities have included in their zoning ordinances provisions that seek to distance these facilities from residential uses of land. Some municipalities require a 1,000-foot distance between the property lines of a medical marijuana dispensing facility and any residential districts.

Of the jurisdictions that allow medical marijuana dispensing facilities, many limit the number of dispensaries by express limits or through the imposition of use permits that have additional obligations.

Other municipalities require a distance of 500 feet.

Some municipalities allow less of a distance between the property lines of a dispensing facility and residential district, such as Arcata, California, where a dispensing facility may operate 300 feet from a residential zone district, and in Santa Cruz, California, where a dispensing facility may be within 50 feet of a residential unit if it can be proven that it will not have an adverse affect on the residential unit. Los Angeles is somewhat more lenient, allowing dispensing facilities to come into close contact with residential uses while requiring that the dispensing facility not abut, be across the street or alley from, or share a corner with a lot which is zoned for residential use or has been improved with a residential use. Another municipal regulation contains no distance requirement, but allows for the subjective assessment that there must be a sufficient distance between the dispensing facility and residential zone districts so as not to adversely affect the residential use.

In addition to distance from residential uses, local governments may wish to keep medical marijuana dispensing facilities a sufficient distance from locations that are frequented by children, including schools, parks, playgrounds, day care centers, and youth facilities. For example, to further insulate children from medical marijuana dispensing facilities, Mendocino County, California, requires that dispensing facilities not be operated within 1,000 feet of any school bus stop. In Alameda County, California, if a dispensary is within 1,000 feet of any school, it must cease operations for an hour and a half after school lets out.

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. Furthermore, in some cases, dispensing facilities are required to be a certain distance from smoke shops, marijuana paraphernalia shops, and other dispensing facilities.

### **Is Growing Marijuana a Legitimate Home Occupation?**

One method used for keeping medical marijuana dispensing facilities out of residential districts is to prohibit the dispensing of medical marijuana as a home occupation. Furthermore, some municipalities disallow the cultivation and sale of medical marijuana as an accessory use to another home occupation. In an attempt to ensure that personal residential cultivation conducted by a qualified patient does not convert to a large-scale cultivation and dispensing operation, qualified patients are compelled in some jurisdictions to retain the functional aspects or structures of a residential dwelling, such as bathrooms, bedrooms, a kitchen, and a living room. In Grand Rapids, Michigan, an ordinance requires medicinal marijuana caregivers to register with the city as a home occupation.<sup>15</sup> The ordinance also requires that the primary caregiver obtain a business license.

### **Medicinal Marijuana Permitted As-of-Right**

If one goal in regulating the growing and sale of medical marijuana is to keep it as far away as possible from residential areas, municipalities may opt to allow these activities only in certain districts or areas. Some municipalities provide that the dispensing facility may not be located within a residential zone district. Marijuana dispensaries are typically allowed to operate in business, commercial, and industrial districts.

Some local zoning ordinances allow medical marijuana dispensing facilities to be located outside of specific zone districts if they are located in medical-related buildings, such as medical offices, medical centers, hospital buildings, or hospice facilities. San Mateo and Alameda counties in California allow medical marijuana dispensing facilities to be located only in the unincorporated areas of the counties. Perhaps in an attempt to keep dispensaries from operating near residential districts and to keep their location static, Fremont, Colorado prohibits dispensing facilities from being located in mobile facilities.

### **Limiting the Number of Dispensing Facilities**

Of the jurisdictions that allow medical marijuana dispensing facilities, many limit the number of dispensaries by express limits or through the imposition of use permits that have additional obligations. The number of dispensaries allowed by statute varies greatly. Los Angeles, addressing the rampant expansion of dispensaries in the city, allows a maximum of 70 dispensaries. However, due to the number of dispensaries already present, if a dispensing facility began its operation prior to the city's initial ordinance in 2007, it may be allowed to continue its operation if it follows a prescribed procedure. Other municipalities have allowed far fewer dispensaries. For example, Oakland, California, allows four and Berkeley, California, allows three. Santa Rosa, California, allows two permits for dispensing facilities to be issued during the initial six-month period; after that, additional permits may be considered.

Some jurisdictions also limit the number of dispensaries that can be located within a certain area. The Los Angeles plan, for example, allows for the 70 dispensaries to be distributed proportionally throughout the city based on individualized areas and their population in relation to the entire city's population. To illustrate, Arleta-Pacoima has 2.63 percent of the city's population and is allotted two dispensary permits, whereas Bel Air-Beverly Crest has 0.54 percent of the population and will be granted no dispensary permits. Alameda allows three dispensaries within its jurisdiction, one in each of three distinct districts.

### **Medical Marijuana Licenses and Permits**

A number of municipalities require a special permit or license for the operation of a dispensing facility and require facilities to satisfy certain land use regulations and restrictions in the form of operational requirements if they are to be issued a license or permit.

Fort Bragg, California, requires dispensing facilities to obtain a medical marijuana dispensing permit from the chief of police. The chief of police

Many local governments restrict the publicity that a dispensing facility is allowed through the limitation on signage.

receives an application, then conducts a background check on the applicants and their employees and also executes an investigation into the application. This application is filed under penalty of perjury, and it is the duty of the chief of police to determine if the application should be granted under the terms of the chapter, taking into account factors such as the security plan and location of the property in relation to other land uses. The ordinance also discusses several reasons for the application to be denied, such as if the use does not comply with the Land Use and Development Code, or if the applicant or their employees have been convicted of a felony, or if applicable fees have not been paid.

Oakland also requires that a permit be obtained before a dispensing facility may begin operation. The Oakland ordinance does not apply a specific standard created precisely for medical marijuana dispensaries, but rather uses the standard for business permits with a few additional criteria. For example, the permit application is subject to a public hearing and the permit can be denied if the investigating officer feels that the applicant is not a fit and proper person (financially or morally) able to run a business. During this process, the clerk is also to determine whether the location is in the proper zone for the business. In addition to the business permit criteria, the investigating officer is to determine whether the use passes specific dispensing facility requirements, such as distance requirements and additional zoning requirements. Further, the investigating officer can use discretion in giving consideration to what is necessary to protect the order, peace, and welfare of the public, such as the complaint history of the applicant.

Colorado requires a Medical Marijuana Center License, an Optional Premises Cultivation License, or a Medical Marijuana Infused Products Manufacturing License to be issued by a local licensing authority before operation may commence. Such licenses are not issued unless the municipal governing body has adopted an ordinance or

resolution including detailed standards for the issuance. During the local licensing process, a public hearing on the matter must be held and, if passed, the application is then forwarded to the state licensing authority. Before the local authority may issue the license, they must do an inspection of the proposed location to determine if the use conforms to the law and the plans submitted in the application. Once the application reaches the state licensing authority, the authority may grant or reject the application. The state licensing authority is to promulgate rules and regulations concerning, among other topics, the licensing procedure, including the initial license granting, and the broad operation of the authority.

#### **Other Licensing Restrictions**

Many local governments have enacted restrictions limiting what the dispensing facility can do; for example, the facility may do no more than dispense medical marijuana, or restrictions may be placed on what can be sold or produced other than the medical marijuana. Some jurisdictions do not allow for the cultivation of the medical marijuana on site. Other jurisdictions do not allow for the sale of marijuana smoking devices or paraphernalia. Some dispensing facilities may also be prohibited from producing or distributing any food on-site. If sale or production is allowed to occur on-site, the jurisdiction must know about it. Some regulations also require that no other goods or services be provided on the dispensing facility's site.

In some municipalities, dispensing facilities are not allowed to hold liquor licenses nor is alcohol permitted to be consumed on the premises. Similarly, many municipalities do not allow for medical marijuana consumption—whether through smoking or by consumption of edibles—on the dispensary premises. The prohibition on the consumption of marijuana, in some instances, also applies to the exterior of the building, with some distance requirements. While San Francisco does allow on-site smoking of medical marijuana, it imposes some restrictions,

including that the smoking of the medical marijuana takes place in a facility with air purification and that water, seating, and restrooms be available for the patients.

On-site consumption of medical marijuana is typically addressed at the municipal level, but the new law in Colorado states that it is illegal for medical marijuana to be consumed on the premises of a distribution facility and that it is illegal for the facility to allow consumption of medical marijuana on the premises.

The security of medical marijuana dispensing facilities is also a common concern. Some municipalities require that the dispensing facility be in a highly visible location that provides good views of the facility and its points of access. A few jurisdictions require that dispensing facility doors remain locked at all times and that access be granted with the use of strict controls. Another common requirement placed on these facilities is that they must employ a security system that includes lights and alarms. Some localities require the security system of the dispensing facilities to include security cameras with video play of the preceding days. Los Angeles also requires that a dispensary provide a security patrol of the surrounding two-block radius.

#### **Signage**

Many local governments restrict the publicity that a dispensing facility is allowed through the limitation on signage. Ordinances often contain restrictions on signs posted on the exterior of the dispensing facility. One such restriction is on the size of exterior signs. These restrictions vary from a maximum area of four square feet to 20 square feet. Other regulations prohibit illuminated business identification signs. Some jurisdictions do not allow the signs to block the windows or the door.

Raising First Amendment issues, some municipalities have enacted regulations focusing on content, specifically prohibiting medical marijuana dispensing facilities from advertising the availability of cannabis, including

The cultivation of agricultural crops sometimes results in certain state agricultural preferences that may have a preemptive effect on municipal regulations seeking to limit or prohibit agricultural-related uses.

exterior signs and also interior signs that are visible from the outside. Content restrictions also ban promotional material that depicts medical marijuana use in any way, whether by on-premise signs that are visible to the right-of-way or off-site promotions. In Colorado, the new state law not only requires signs to satisfy local ordinances, but also disallows advertisements that are misleading, deceptive, false, or constructed to entice minors.<sup>14</sup>

#### Miscellaneous Restrictions

Zoning ordinances have also imposed a duty on dispensing facilities to ensure the cleanliness of the neighborhood. Some localities require dispensing facilities to frequently retrieve litter from around the building and the surrounding sidewalks. Others ordinances require that graffiti on dispensary facility walls be removed promptly.

Some municipalities require that the marijuana inside the facility not be visible from the exterior of the building or the public right-of-way, and it is common to require that produced medical marijuana be kept in a secured, locked location. Furthermore, a majority of the jurisdictions impose restrictions on when the dispensing facilities may open, and when they must close. For example, dispensaries may not open before times ranging from 7:00 a.m. to 10:00 a.m. and must close within the range of 5:00 p.m. and 9:00 p.m. The Colorado statute allows dispensaries to operate between the hours of 8:00 a.m. and 7:00 p.m.<sup>15</sup> San Francisco allows two dispensing facilities to remain open for 24 hours a day.<sup>16</sup> Due to the importance of these two unique facilities, the city exercises further control over these sites so the population can use the facilities to their fullest extent. Specifically, these facilities are to be located where it is determined that the population most needs such a facility. The facilities must be accessible to late-night transportation routes; they cannot be within a mile of one another, and cannot be located in certain zone districts.

Restrictions on the use of the land for dispensing medical marijuana are

also evident in the size or attributes of the building itself. Some municipalities require that there be a lobby in the facility and a separate area within the facility for dispensing the medical marijuana. Regarding the building size, jurisdictions have taken two approaches—to limit the physical size of the dispensing facility and to limit the number of patients. Sonoma County, California, ties both of these types of dispensing facility limitations together and adds another restriction limiting the size of the dispensing facility by stating how many total patients it may accommodate, the square footage of the building, and the maximum number of patients served on a daily basis.<sup>17</sup> In some jurisdictions, the size limitations are not absolute, and if the dispensing facility wishes to increase the size of the facility, the owners must obtain prior approval.

#### Growing Marijuana for Medical Purposes

The cultivation of agricultural crops sometimes results in certain state agricultural preferences that may have a preemptive effect on municipal regulations seeking to limit or prohibit agricultural-related uses. It remains to be seen whether medical marijuana will be treated as an agricultural crop for purposes of special protections and for tax exemptions (e.g., whether land being used primarily for the growing of medical marijuana is eligible for inclusion in agricultural districts).

The use of zoning districts is another common tool to restrict the location of medical marijuana growing operations. In some jurisdictions, medical marijuana cultivation, when not for personal use, is considered an agricultural resource or industrial use and is allowed in those districts. Aspen, Colorado has found that since the cultivation of medical marijuana is an agricultural use, it is not permitted in Service/Commercial/Industrial zone districts and should be permitted only in agricultural use zone districts.<sup>18</sup>

Medical marijuana may also be cultivated by qualified patients for personal use and by dispensing facilities for their members. Various land use regulations have been placed upon cultivation for

both personal use and for distribution.

#### *Limitations on size of cultivation.*

Some municipalities impose a limit on how much medical marijuana can be cultivated on site, ranging from the number of plants to the amount of space occupied by the plants. For example, Mendocino County, California, allows 25 plants to be planted, whether indoors or outdoors, before the cultivation becomes a nuisance and is no longer permitted.<sup>19</sup> The marijuana plants must also have a zip tie issued by the sheriff's office for a fee attached to each individual plant.

In Arcata, California, cultivation area for medical marijuana cannot exceed 50 square feet and 10 feet in height.<sup>20</sup> An additional 50 square feet of cultivation for personal use is permitted where the zoning administrator determines it is warranted. Additionally, the patient must install a one-hour green board firewall assembly, and must show that the cultivation area is part of a detached single-family residence or is an accessory building that is enclosed, secured, and locked.

In dealing with the cultivation of medical marijuana by a cooperative or a collective, Arcata permits substantially more cultivation than what is permitted for personal use. Subject to the use permit, limited on-site cultivation of medical marijuana may reach up to 25 percent of the floor space, so long as the cultivation does not exceed 1,500 square feet and ten feet in height. Arcata does not limit the amount of off-site cultivation, only requiring that the cultivation comply with local zoning ordinances. Also addressing this concern, San Francisco allows cultivation of 99 plants in up to 100 square feet of canopy space.<sup>21</sup>

Fort Bragg, California, also allows medical marijuana and it has instituted limitations on the amount that may be cultivated.<sup>22</sup> The city authorizes cultivation that is not to exceed 50 square feet and 250 cubic feet. Fort Bragg allows additional medical marijuana to be cultivated, up to 100 square feet and 500 cubic feet, provided that a minor use permit is acquired and a minimum one-hour green board firewall assembly is installed.

State and local legislative bodies and the courts will undoubtedly be sorting through many of the land use related issues in the years to come.

*Distance requirements for the cultivation of medical marijuana.* Limitations on the cultivation of medical marijuana also apply to the distance that the cultivation site can be from certain sensitive locations. These regulations are similar to the distance requirements that localities have imposed on medical marijuana dispensaries, collectives, and cooperatives. If cultivation is authorized to take place on the dispensing facility site, the distance requirements placed on the dispensing location would logically flow to the cultivation aspect of the operation. Mendocino and Fort Bragg have such distance requirements. Mendocino measures this distance from the exterior line of the cultivation site to the exterior line of the sensitive property, including youth-oriented facilities, schools, school bus stops, parks, and churches.<sup>23</sup>

*Use restrictions on cultivation.* Municipalities that permit the cultivation of medical marijuana, whether for personal use or for the use of a dispensing facility, may require that certain restrictions be applied. Colorado specifically allows municipalities to entirely prohibit or enact reasonable regulations on cultivation.<sup>24</sup> When addressing the cultivation of medical marijuana, one common concern is the sensory presence of the drug, whether through scent or vision. If the medical marijuana is authorized to be grown outside, many jurisdictions require it to be fenced in or out of the view of the public.

Some jurisdictions do not allow cultivation to take place outdoors, considering it a nuisance. Due to the issues that nearby residents or businesses may observe, some jurisdictions have restricted the use to that which would not constitute a nuisance, embodied in excess odor, heat, glare, noxious gases, traffic, crime, and other impacts. Nuisance from the cultivation of medical marijuana has been broadly defined in one jurisdiction to encompass disturbing odors, repeat responses (more than three a year) by law enforcement personnel to the site, excessive noise, or any distributive impact created by the cultivation.

As to personal use medical marijuana cultivation, some jurisdictions place

restrictions on how the marijuana is cultivated, requiring that the lighting not exceed 1200 watts, prohibiting the use of certain gases, and requiring that cultivation not create humidity or mold problems. Also, some jurisdictions require residential dwellings to remain as such with bathrooms, bedrooms, and a kitchen, and not be expanded to a commercial or agricultural use. Some jurisdictions apply extra requirements to those who do not own the property they intend to cultivate, specifically requiring the user must have permission from the owner. In some instances, requirements exist for firewall assemblies, venting, and the satisfaction of building and fire codes.

#### CONCLUSION

With a growing number of states enacting statutes authorizing the use of medical marijuana, land use and community development issues are certain to increase. Planners and land use lawyers in these states are challenged to update local zoning and land use regulations to ensure that this use meets public health, safety, and welfare concerns of host communities. State and local legislative bodies and the courts will undoubtedly be sorting through many of the land use related issues in the years to come.

#### ENDNOTES

1. Deputy U.S. Attorney General David W. Ogden's memorandum regarding the medical use of marijuana provides that those who follow state law to use, acquire, and supply medical marijuana will not be prosecuted by the federal government. See Memorandum from David W. Ogden, Deputy Attorney General, U.S. Department of Justice, Authorizing the Medicinal Use of Marijuana (Oct. 19, 2009).

2. Alaska: Medical Uses of Marijuana for Persons Suffering from Debilitating Medical Conditions Act, ALASKA STAT. §§ 17-37-010—17-37-080 (2009); California: Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE §11362.5 (2009); Colorado: COLO. CONST. ART. XVIII §14 (2009); Hawaii: HAW. REV. STAT. ANN. §§ 329-121—329-128 (2010); Maine: ME. REV. STAT. ANN. tit. 22, §§ 2421—2429 (2010); Michigan: Michigan Medical Marijuana Act, MICH. COMP. LAWS ANN. §§333.26421—333.26430 (2009); Montana: Medicinal Marijuana Act, MONT. CODE ANN. §§ 50-46-101—50-46-210 (2009); Nevada: NEV. REV. STAT. ANN. §§ 453A.101—435A.810 (2008); New Jersey: New Jersey Compassionate Use Medicinal Marijuana Act, N.J. REV. STAT. §§ 24:6l-1—24:6l-16 (2010); New Mexico: Lynn and Erin Compassionate Use Act, N.M. STAT. ANN. §§ 26-2B-1—26-2B-7 (2009); Oregon: Oregon Medical Marijuana Act, OR. REV. STAT. ANN. §§ 475.300-475.346 (2009); Rhode Island: The Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act, R.I. GEN. LAWS §§ 21-28.6-1—21-28.6-12 (2009); Vermont: VT. STAT. ANN. tit. 18, §§ 4472—4474d (2009); Washington: Washington State Medical Use of Marijuana Act, WASH. REV. CODE ANN. §§

69.51A.005—69.51A.902 (2010).

3. John Hoeffel, *Judge Grants Injunction Against City's Medical Marijuana Dispensary Ban*, L.A. TIMES, Oct. 19, 2009. Available at <http://tiny.cc/u39jg>.

4. See, e.g., New Castle (Colo.) ORDINANCE 2009-13 (Nov. 17, 2009) available at <http://tiny.cc/xqjn4>.

5. Tehama County (Cal.) MUNICIPAL CODE § 17-08-070 (2009); Aurora (Colo.) ORD. 2009-57 (Nov. 16, 2009); Florence (Colo.) ORD. 16-2009 (Oct. 19, 2009); Louisville (Colo.) ORD. 1561 (Oct. 20, 2009); Manitou Springs (Colo.) ORD. 2109 (Dec. 15, 2009); New Castle (Colo.) ORD. 2009-13 (Nov. 17, 2009).

6. Fresno (Cal.) MUNICIPAL CODE § 12-306-N-56 (2010). Currently all dispensaries are enjoined from operating in Fresno, pending litigation, on the theory that federal law does not allow for the sale of medical marijuana. See, *People of the State of Cal. v. Marejg Props., LLC*, No. 09 CECG 02906 AMS Dept. 97 C, (Super. Ct. of Cal., County of Fresno, Central Div, 2009).

7. *City of Claremont v. Kruse*, 100 Cal.Rptr.3d 1 (Cal. App. 2009).

8. Doyle, City Attorney, *Workload Assessment—Medical Marijuana* (Jan. 21, 2010). Available at <http://tiny.cc/joek1>.

9. *City of Corona v. Naulls*, 83 Cal.Rptr.3d 1 (Cal. App. 2008).

10. Fort Bragg (Cal.), MUNICIPAL CODE § 9-30-020 (2009); Tehama County (Cal.) MUNICIPAL CODE § 17-08-070(B)(1) (2009); Denver (Colo.) CODE OF ORDINANCES § 24-402-3 (2010).

11. Arcata (Cal.) MUNICIPAL CODE § 9-100.020 (2009).

12. COLO. REV. STAT. ANN. § 12-43.3-308(1)(a) (2010).

13. Kyla King, *Grand Rapids Requires Medical Marijuana Caregivers to Register with City*, THE GRAND RAPIDS PRESS, Mar. 9, 2010, available at <http://tiny.cc/24rss>.

14. COLO. REV. STAT. ANN. §§ 12-43.3-901(4)(b), 12-43.3-901(4)(a)(2010).

15. COLO. REV. STAT. ANN. § 12-43.3-901(4)(f) (2010).

16. San Francisco (Cal.) HEALTH CODE § 3308 (e) (2010).

17. Sonoma County (Cal.) MUNICIPAL CODE § 26-02-140 (2009). Size requirements allow the county to apply additional regulations due to higher patient traffic to the facility.

18. Res. 6, Aspen (Colo.) City Council (2010). Available at <http://tiny.cc/m4927> and <http://tiny.cc/vh2zg>.

19. Mendocino County (Cal.) MUNICIPAL CODE § 9-32-060 (2009).

20. Arcata (Cal.) MUNICIPAL CODE § 9-42-105(D)(1) and §9-42-105(D)(2) (2009).

21. San Francisco (Cal.) HEALTH CODE § 3308 (e) (2010).

22. Fort Bragg (Cal.) MUNICIPAL CODE § 9-32-010 (2009).

23. Mendocino County (Cal.) MUNICIPAL CODE § 9-31-090 (B) (2009).

24. COLO. REV. STAT. ANN. § 12-43.3-310(1) (2010).