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Patricia E. Salkin
Touro Law Center, psalkin@tourolaw.edu

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Zoning and Land Use Planning

*Patricia E. Salkin**

Regulating Controversial Land Uses

Introduction

Recently, the American Planning Association sponsored a national teleconference on regulating controversial land uses. It caught my attention since we have been regulating all types of unpopular uses since the dawn of zoning. While new types of uses have become controversial recently, such as payday lenders, backyard burials, and medical marijuana dispensaries, other uses like tattoo parlors, adult businesses, fraternity and sorority houses, and billboards remain just as controversial today as they were decades ago. And while lawyers and planners may have a more fully developed body of case law and regulations to study with respect to the latter, case law is just now developing to help with a better understanding of any constitutional and common law implications for emerging controversial uses.

There are a number of criteria for what may make uses "controversial." For example, neighborhood residents may believe that a particular use is incompatible with existing uses because it is aesthetically unpleasing, or because of the type of traffic or clientele that it might generate. Furthermore, residential property owners may believe that certain uses will decrease property values, and in commercial corridors, business owners may believe that certain uses will be bad for existing businesses because they may keep patrons away. Sometimes these are well founded concerns based on evidence; other times these concerns may be perpetuated based on stereotypes. No matter how undesirable some controversial uses may be in a given community, the uses in and of themselves are legal, and many often may be subject to additional layers of local, state or federal regulation.

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*Patricia E. Salkin is the Raymond & Ella Smith Distinguished Professor of Law at Albany Law School where she is also Associate Dean and Director of the Government Law Center. Salkin is the author of American Law of Zoning, 5th ed. (Thomson Reuters) and New York Zoning Law & Practice, 4th ed. (Thomson Reuters).

General Techniques to Regulate Controversial Uses

Planners and municipal attorneys may employ a number of trusted zoning and land use regulatory techniques to effectively regulate controversial land uses. These tools may address some of the articulated concerns of adjacent and nearby property owners and business operators. For example, if a particular use is undesirable because it tends to generate a lot of noise—such as bars or businesses that use heavy equipment—municipalities might regulate hours of operation for these uses. Buffering is another tool that can be used both to hide and screen the controversial use from other uses in the area, and certain types of buffering may be able to help minimize noise, and possibly redirect traffic patterns to and from the use. However, when limiting hours of operation, officials must be careful to do so in a manner that is not arbitrary and capricious. For example, in a recent case a New Jersey municipality sought to prevent a formula based retail store (a 7-Eleven) from operating 24 hours.[1] The trial court found that the public justification asserted by the Borough, to protect the "peace and repose" of the nearby residential neighborhoods, was not supported by any evidence because in enacting the Ordinance there was no reference to any studies, or statistical data that would support the position and the Borough was unable to identify any incident which illustrated the disturbance that the 24 hour operation of a convenience store would cause.[2] The Court pointed out that the Borough failed to address the question why the 24 hour operation of another formula based retail shop (a Dunkin Donuts) at the same location as the 7-Eleven would not equally disturb the "peace and repose" of the surrounding neighborhood.[3]

Where a particular use is especially out of character with

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[1] *NOH, Inc. and 7-Eleven, Inc. v. Borough of Rutherford Council and Mary B. Kriston, No. BER-L-5173-07 (N.J. Super. Ct. 11/10/2009).*

[2] *NOH, Inc. and 7-Eleven, Inc. v. Borough of Rutherford Council and Mary B. Kriston, No. BER-L-5173-07 (N.J. Super. Ct. 11/10/2009).*

[3] *NOH, Inc. and 7-Eleven, Inc. v. Borough of Rutherford Council and Mary B. Kriston, No. BER-L-5173-07 (N.J. Super. Ct. 11/10/2009)* (The Court held that the Ordinance being predicated on unsupported findings established that its enactment was arbitrary, capricious and unreasonable. The Court noted that the Borough's failure to regulate all businesses in the same manner was discriminatory. The Court went on to reason that the already existent regulatory means that address noise, littering, loitering and lights are sufficient and are less intrusive upon Plaintiff's property rights than the Ordinance. Therefore, since the Ordinance was not reasonably related to a public need, unreasonably discriminated against a

the neighborhood, municipalities may decide to amend the zoning and eliminate the use outright in certain districts. When this happens, communities may still find that where such uses already existed prior to the new ban, the uses may acquire legally pre-existing non-conforming use status. Remember, though, the general rule is that municipalities are able to legally extinguish these nonconforming uses through amortization so long as the owner has been able to realize a reasonable return on investment.[4]

The special use permit may be another effective tool to regulate controversial land uses.[5] While the zoning may not prohibit certain uses outright, especially in situations where case law has mandated that particular uses be allowed somewhere in the municipality (e.g., mobile homes and adult uses), local governments may choose to allow them in select zoning districts subject to additional layers of review that can be applied through the special use permit process. This will enable more careful consideration of how the particular use as proposed will impact the community.

Municipalities also may grant permits for certain uses subject to reasonable conditions. However, when imposing conditions, planners and lawyers must be mindful to ensure that there is sufficient evidence in the record to support them. For example, a recent appeals court in New York determined that a number of conditions imposed on the approval of a site plan application for the remodeling of a big box store were arbitrary and hence impermissible.[6] Specifically, the court found that the Town Board's attempt to restrict the hours during which Home Depot could operate its business and clean the parking area was arbitrary and capricious since the Town offered no findings or rationale to sup-

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particular business, and was not the least restrictive means to address the public need, the Court declared the Ordinance to be an invalid exercise of the Borough's police power.).

[4]*See generally*, Salkin, Abandonment, Discontinuance and Amortization of Nonconforming Uses: Lessons for Drafters of Zoning Regulations, 38 Real Est. L.J. 482 (Spring 2010); Campbell, Amortization in the Twenty-First Century, 26 No. 11 ZPLR 1 (2004); and Salkin, Anderson's American Law of Zoning 5th §§ 12:1 et seq.

[5]*See, e.g.*, Salkin, Anderson's American Law of Zoning 5th §§ 14:1 et seq.

[6]Home Depot, U.S.A. v. Town Bd. of Town of Hempstead, 63 A.D.3d 938, 881 N.Y.S.2d 160 (2d Dep't 2009).

port the imposition of such restrictions.[7] The Court acknowledged that although time restrictions could be used to effectively reduce traffic and noise during certain hours, the Town made no specific findings as applied to this application.[8] Further, the Court also found arbitrary the Board's condition requiring the installation of a closed circuit television recording system since no findings were made to support the conclusion that this system would affect the "safety and general welfare of the adjacent areas."[9]

Backyard Burials

There have been a number of cases lately dealing with individual property owners' desires to bury loved ones in their backyards. In fact, the New York Times reported last year that amid the recession, people have been looking to cut back on funerals and the number of at-home burials has increased dramatically over the last five years. The paper reported that in 2002 there were two companies that specialized in aiding families to bury their loved ones at home, and as of last year there were at least 45 companies.[10]

In a recent case from Connecticut, it seems as though a couple made a pact that they would be buried next to each other when they died. Since there were no burial plots in the Town when the husband died, his wife buried him in their backyard.[11] Eight months later, the zoning compliance officer issued a cease and desist order on the grounds that a private burial was not a permitted use under the zoning regulations.[12] The wife sought a declaratory judgment that she had a right to use her private property to bury her late husband on her property and that upon her death she could

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[7]Home Depot, U.S.A. v. Town Bd. of Town of Hempstead, 63 A.D.3d 938, 881 N.Y.S.2d 160 (2d Dep't 2009).

[8]Home Depot, U.S.A. v. Town Bd. of Town of Hempstead, 63 A.D.3d 938, 881 N.Y.S.2d 160 (2d Dep't 2009).

[9]Home Depot, U.S.A. v. Town Bd. of Town of Hempstead, 63 A.D.3d 938, 881 N.Y.S.2d 160 (2d Dep't 2009).

[10]Zezima, "Home Burials Offer and Intimate Alternative," N.Y. Times 7/20/2009, available at: http://www.nytimes.com/2009/07/21/us/21funeral.html.

[11]Piquet v. Town of Chester, 2008 WL 4635473 (Conn. Super. Ct. 2008), judgment rev'd, 124 Conn. App. 518, 5 A.3d 947 (2010), certification granted in part, 299 Conn. 917 (2010).

[12]Piquet v. Town of Chester, 2008 WL 4635473 (Conn. Super. Ct. 2008), judgment rev'd, 124 Conn. App. 518, 5 A.3d 947 (2010), certification granted in part, 299 Conn. 917 (2010).

be buried there too, and she further argued that the burial of her husband constitutes an accessory use of her lot.[13] Upon review of the zoning regulations, the Court concluded that cemeteries are allowed subject to special use permit but that the permits may only be issued to a church or a cemetery association.[14] Furthermore, since the Town's zoning scheme is permissive (uses not specifically permitted are prohibited), the Plaintiff needed to show some language in the regulations that permitted the burial. With no express language, the wife argued that the burial was an accessory use, but the Court found insufficient evidence to support this argument, and concluded that the section of the zoning regulations that deals with cemeteries prevailed over more general language regarding accessory uses.[15]

In 2009, a Baptist minister in Uniontown, Pennsylvania, buried his 18-year-old son, who died three days after a car crash, in the backyard of the pastor's church. While state law doesn't prohibit this, some county and local ordinances do, and this county, Fayette County, only allows burials on large parcels zoned for agricultural use. The church has only five acres and is in a residential zone. Fines for violations rack up quickly at $500 per day. Just last month, the pastor agreed to settle with the town after his request for a variance was denied by the zoning board of appeals. He agreed to move the grave from church grounds and according to the settlement, the church will withdraw its appeal of the zoning board's decision and the county will not pursue any fines, court costs or other penalties related to the case.[16]

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[13]Piquet v. Town of Chester, 2008 WL 4635473 (Conn. Super. Ct. 2008), judgment rev'd, 124 Conn. App. 518, 5 A.3d 947 (2010), certification granted in part, 299 Conn. 917 (2010).

[14]Piquet v. Town of Chester, 2008 WL 4635473 (Conn. Super. Ct. 2008), judgment rev'd, 124 Conn. App. 518, 5 A.3d 947 (2010), certification granted in part, 299 Conn. 917 (2010).

[15]Piquet v. Town of Chester, 2008 WL 4635473 (Conn. Super. Ct. 2008), judgment rev'd, 124 Conn. App. 518, 5 A.3d 947 (2010), certification granted in part, 299 Conn. 917 (2010).

[16]Jennifer Harr, "Pastor to Move Son to a New Grave," Herald Standard, 10/20/2010. Available at: http://www.heraldstandard.com/news__detail/article/1631/2010/october/20/pastor-to-move-son-to-new-grave.html.

Regulating Off-Campus Fraternity and Sorority Housing[17]

By 1990, nearly 700,000 students at hundreds of colleges and universities belonged to fraternities or sororities, and enrollment has continued to increase.[18] While in some cases members live together on-campus, it is more common for fraternities and sororities to own or operate off-campus housing for their members. As fraternity and sorority houses have proliferated, so have their impacts on the communities where they are located. As the Supreme Court has noted, "The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds."[19] The Town of Gorham, Maine recently banned fraternity and sorority houses and adopted a set of regulations requiring the two existing houses to pay an annual license fee and undergo semi-annual safety code inspections.[20] In Salt Lake City, Utah, the city is currently at odds with a fraternity house occupying a former Episcopal Church over the need for it to obtain a new use permit.[21] Problems can also arise if a fraternity becomes suspended and no longer qualifies as a permitted use under zoning that allows fraternities. At the University of Pittsburgh, for example, a fraternity was subject to a drug raid and became a "nonrecognized student organization." As a result, its occupancy permit was revoked by the city, which meant that it could no longer use its building unless the city issued a new permit. The matter was resolved when the University decided to recognize the fraternity again on a

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[17]This section is based on Salkin and Lavine, Zoning for Off-Campus Fraternity and Sorority Houses, Zoning & Plan. L. Rep. (December 2010).

[18]Craig L. Torbenson, From the Beginning: A History of College Fraternities and Sororities, in Brothers and Sisters: Diversity in College Fraternities and Sororities 37–38 (Craig L. Torbenson and Gregory S. Parks, eds.) (2009).

[19]Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797, 6 Env't. Rep. Cas. (BNA) 1417, 4 Envtl. L. Rep. 20302 (1974).

[20]Meleanie Creamer, "Gorham Prohibits New Frats, Allows Existing Ones to Stay," Portland Press Herald, 10/6/2010. *See*, http://www.pressherald.com/news/gorham-prohibits-new-frats-allows-current-ones-to-stay_2010-10-06.html (site checked October 25, 2010).

[21]http://www.allbusiness.com/legal/property-law-real-property-zoning-land-use/14335621-1.html.

probational basis.[22] Similar zoning issues have arisen in many other cities across the country.[23]

Zoning for fraternities and sororities can present unique challenges, however. Aside from determining the type and severity of regulations that should be applied, fraternity and sorority houses do not easily fit within traditional zoning categories. Many definitions of "family" prevent unrelated groups of people from living in single-family zoning districts, and different designations may need to be created for student housing.[24]

Zoning restrictions placed on fraternities and sororities are reviewed under a rational basis standard, and will generally be upheld so long as they are reasonable. *Chico Corp. v. Delaware-Muncie Board of Zoning*, for example, involved certain lot area and setback requirements imposed on fraternities located in the "Student Social Service Zoning District." The zoning board denied a permit for a fraternity on a lot that was smaller than required under the ordinance, and the fraternity claimed that the regulations were "arbitrary and capricious." The court disagreed, explaining that the lot size and setback restrictions were reasonably re-

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[22] Jon Schmitz, *Pitt to Reinstate Fraternity; Zoning Reprieve Possible*, PITTSBURGH POST-GAZETTE (Nov. 27, 1996).

[23] *See, e.g.*, http://blog.mlive.com/annarbornews/2007/09/city_says_exfrat_house_violati.html; http://www.collegian.psu.edu/archive/2009/02/11/borough_defers_frat_zoning_vot.aspx; http://dailysentinel.com/news/article_a243265c-c3a2-11df-85de-001cc4c002e0.html; http://www.dailycal.org/article/110930/zoning_laws_may_force_fraternity_s_eviction; http://usmfreepress.org/2010/09/3899910/; http://www.troyrecord.com/articles/2010/09/08/news/doc4c8709d84e5f5292177156.txt; Marv Cermak, *Fraternity House Needs Permit*, TIMES UNION, Feb. 19, 2002, at B8, available at http://albarchive.merlinone.net/mweb/wmsql.wm.request?oneimage&imageid=6159195; Sijai Cai, *Brothers (and Friends) Weigh Housing Choices*, THE YALE HERALD ONLINE, available at http://yaleherald.com/news/brothers-and-friends-weigh-housing-choices-2/ (Oct. 27, 2009) (the fraternity Sigma Alpha Epsilon was fined because its members had been living in the building for 13 years without submitting the required documentation for a special use permit); Kelly House & Nico Rubello, *Zoning Problems Leave MSU Fraternity Homeless*, THE STATE NEWS (Aug. 6, 2008).

[24] *See, e.g.*, City of Syracuse v. Snow, 123 Misc. 568, 205 N.Y.S. 785 (Sup 1924). *See also* Adam Lubow, *Not Related by Blood, Marriage, or Adoption: A History of the Definition of "Family" in Zoning Law*, 16 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 144, FN 329 (2007).

lated to the municipality's interest in buffering the neighborhood from noise, traffic, and congestion problems.[25]

To deal with the encroachment of student housing into residential neighborhoods, some local governments have enacted student housing ordinances. In some cases, fraternities and sororities are limited to certain zoning districts.[26] Many ordinances deal with smaller groups of students, however. In *Smith v. Lower Marion Township*, for example, the District Court for the Eastern District of Pennsylvania upheld an ordinance that limited "student homes" to no more than three students and subjected them to strict district and special permit requirements. Fraternities and sororities were classified separately, and were permitted only by special exception.[27] In upholding these restrictions, the court explained that the ordinance was aimed at maintaining the township's residential character, limiting noise and congestion, and maintaining property values.[28] A similar ordinance was upheld against an equal protection challenge in *Farley v. Zoning Hearing Board*. The court determined that it was reasonable for the board to impose different standards on student homes given testimony from various people demonstrating that existing student homes created a "dormitory-like" atmosphere with excessive noise, frequent parties, cars parked on sidewalks, congestion, trash, and public urination.[29]

Many zoning ordinances subject fraternities and sororities to special permit requirements, and under this type of restriction municipalities retain a great deal of discretion to grant or deny approval. In *Grand Chapter of Phi Sigma Kappa v. Grosberg*, for example, the petitioner owned a fraternity house in the City of Troy, New York, and sought approval to use an adjoining lot as a dormitory and study

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[25]*See* Chico Corp. v. Delaware-Muncie Bd. of Zoning Appeals, 466 N.E.2d 472 (Ind. Ct. App. 1984).

[26]*See, e.g.*, City of Long Beach v. California Lambda Chapter of Sigma Alpha Epsilon Fraternity, 255 Cal. App. 2d 789, 63 Cal. Rptr. 419, 25 A.L.R.3d 912 (2d Dist. 1967) (fraternities permitted in commercial districts and multiple dwelling districts by special permit).

[27]Smith v. Lower Merion Tp., 1991 U.S. Dist. LEXIS 11100, *3 (Aug. 6, 1991).

[28]Smith v. Lower Merion Tp., 1991 U.S. Dist. LEXIS 11100, *3 (Aug. 6, 1991); Smith v. Lower Merion Tp., 1992 U.S. Dist. LEXIS 7177 (May 11, 1992).

[29]Farley v. Zoning Hearing Bd. of Lower Merion Tp., 161 Pa. Commw. 229, 636 A.2d 1232 (1994).

hall. The zoning board denied the application, stating that the additional fraternity use would lower property values in the neighborhood and noting that the poor maintenance of the first building did not indicate that any improvement would be made by permitting the dormitory and study hall. The court found this explanation to be reasonable and upheld the denial of the special use permit.[30]

However, to deny a permit application for a fraternity or sorority, a municipality must rely on more evidence than neighborhood opposition. In *Tempo Holding Co. v. Oxford City Council*, the company filed an application for an additional use permit for fraternity and sorority housing in an Urban Business Commercial District. Despite testimony from the city's planning director and a retired building and zoning administrator that the use would be compatible with the surrounding area, the city council denied the permit request based on negative comments made by nearby property owners. The court held that this decision was arbitrary and capricious, as the evidence showed that the area contained a number of residential uses, including multiple-resident student housing complexes, and the comments made in opposition to the application were conclusory and speculative.[31] In a similar case, *Franklin and Marshall College v. Zoning Hearing Board of City of Lancaster*, the city's zoning board rejected a permit to convert a single-family home in a Conversion Apartment district into a fraternity based on community opposition rather than the objective requirements of the ordinance. The court held that there was no substantial evidence that the fraternity would be incompatible with the surrounding area because the neighbors did not show how the impact would be any "greater than that normally to be expected from such uses."[32]

Tattoo Parlors

Tattoo parlors and body piercing establishments have recently garnered more attention as controversial land uses. A common concern expressed by municipalities when drafting zoning ordinances that preclude or limit tattoo parlors is the health and safety of the community, and the belief that

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[30]Grand Chapter of Phi Sigma Kappa v. Grosberg, 30 A.D.2d 887, 291 N.Y.S.2d 606 (3d Dep't 1968).

[31]Tempo Holding Co. v. Oxford City Council, 78 Ohio App. 3d 1, 603 N.E.2d 414, 415 (12th Dist. Butler County 1992).

[32]Franklin and Marshall College v. Zoning Hearing Bd. of City of Lancaster, 29 Pa. Commw. 478, 371 A.2d 557, 559 (1977).

the area may be blighted by the presence of such establishments. However, practitioners must be mindful of conflicting case law discussing whether tattooing is expressive conduct, which could afford First Amendment protection to the use.

In *Hold Fast Tattoo, LLC v. City of North Chicago*,[33] a federal district court upheld the city council's denial of a special use permit for the operation of a tattoo studio where the Council informed the plaintiff that it was "not the kind of business" the council wanted in the neighborhood. Following the denial, the plaintiff alleged that his constitutional rights were violated, asserting that the denial violated his right to equal protection, substantive due process and procedural due process, and that the zoning ordinance is an unconstitutional exercise of the state's police power on its face and as applied to the plaintiff. While the plaintiff argued that his right to free speech under the First Amendment was violated, asserting that the right to draw tattoos is protected speech, the Court said that the act of tattooing is not constitutionally-protected free speech because the act itself is not intended to convey a particularized message. Finding no fundamental right or suspect class, the Court held that the government's decision to deny the permit could be rationally related to a legitimate state interest, as the City explained numerous planning goals are advanced by the requirement of a special use permit for this use including: "character, stability, or intended development of the City's central business district; suitability of the location to the proposed use; necessity and desirability of a proposed use in a particular location; and protection of the health and/or safety of the community." After finding that the plaintiff is not entitled to relief for an Equal Protection violation, nor for due process violations, and further finding that since the zoning ordinance itself is rationally related to a legitimate state interest, and plaintiff has neglected to include in the complaint any grounds upon which the zoning ordinance could be unrelated to a legitimate state interest, the police powers challenge to the zoning ordinance also failed.

In a second case, decided by the Ninth Circuit Court of Appeals in September 2010,[34] the Court's position was different on the First Amendment issue. In the case, Anderson

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[33]Hold Fast Tattoo, LLC v. City of North Chicago, 580 F. Supp. 2d 656 (N.D. Ill. 2008).

[34]Anderson v. City of Hermosa Beach, 621 F.3d 1051 (9th Cir. 2010).

sought to establish a tattoo parlor in the City of Hermosa Beach, but the City Code effectively banned tattoo parlors by not including them in the zoning of permitted businesses. Tattooing, according to the Centers for Disease Control and Prevention, and the Food and Drug Administration, could have adverse health implications (the transmission of hepatitis, syphilis, tuberculosis, leprosy, and HIV), and because of this, the State of California imposed certain requirements on tattooing businesses. After Anderson's request for the City's permission to open a tattoo business was denied, he brought a Section 1983 suit alleging that the ban was facially unconstitutional under the First and 14th Amendments. The Ninth Circuit began by deciding that tattooing *was* purely expressive activity, more akin to writing, than just conduct potentially expressive of an idea, and as such, it was entitled to full First Amendment protection. The Court found that tattooing was a process like writing words or drawing a picture, except that it was done on a person's skin, and, as with writing or painting, the tattooing process was inextricably intertwined with the purely expressive product. The fact that the City's ban related to tattooing businesses rather than the tattooing process itself did not affect whether the activity regulated was protected by the First Amendment: the sale or business of tattooing was entitled to full constitutional protection, and the City's regulation would be constitutional only if it was a reasonable "time, place, or manner" restriction on protected speech. Anderson did not dispute that the City had a significant interest in regulating tattooing because of the health and safety concerns; rather, he argued that the regulation was substantially broader than needed because the interests could be met through sanitary and sterilization requirements. The court agreed. Further, the ban "completely foreclosed" a venerable and unique means of communication and accordingly, the ban failed the time, place or manner analysis. Perhaps another distinction between this case and *Hold Fast Tattoo*, is the fact that in the previous case the use was subject to special permit review, as compared to the total ban in *Anderson*.

Medical Marijuana

Fourteen states and the District of Columbia currently permit the medical use of marijuana for qualified patients (Alaska, California, Colorado, Hawaii, Maine, Michigan, Montana, New Jersey, New Mexico, Nevada, Oregon, Rhode

Island, Vermont and Washington),[35] yet the land use implications for the cultivation, distribution and use of the drug are just beginning to be dealt with through zoning ordinances.[36] Exploring nuisance theories, the San Jose, California Deputy City Attorney opined that the City code does not allow for a land use that is a nuisance, and that which is illegal under state or federal law, constitutes a nuisance.[37] Since the cultivation, sale, and use of marijuana is illegal under federal law, he asserted that medical marijuana dispensing facilities would constitute a nuisance.[38] One California court recently held that failure to comply with the City's procedural requirements related to medical marijuana dispensaries cre-

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[35]Uses of Marijuana for Persons Suffering from Debilitating Medical Conditions Act, Alaska Stat. §§ 17-37-010 to 17-37-080; Compassionate Use Act of 1996, Cal. Health & Safety Code § 11362.5; Colo. Const. Art. XVIII, § 14; Haw. Rev. Stat. Ann. §§ 329-121 to 329-128; Me. Rev. Stat. Ann. tit. 22, §§ 2421 to 2429; Michigan Medical Marijuana Act, Mich. Comp. Laws Ann. §§ 333.26421 to 333.26430; Montana, Medicinal Marijuana Act, Mont. Code Ann. §§ 50-46-101 to 50-46-210; Nevada, Nev. Rev. Stat. Ann. §§ 453A.101 to 435A.810; New Jersey Compassionate Use Medicinal Marijuana Act, N.J. Stat. Ann. 24:6I-1 to 24:6I-16; Lynn and Erin Compassionate Use Act, N.M. Stat. Ann. §§ 26-2B-1 to 26-2B-7; Oregon Medical Marijuana Act, Or. Rev. Stat. §§ 475.300 to 475.346; The Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act, R.I. Gen. Laws §§ 21-28.6-1 to 21-28.6-12; Vt. Stat. Ann. tit. 18, §§ 4472 to 4474d; Washington State Medical Use of Marijuana Act, Wash. Rev. Code Ann. §§ 69.51A.005 to 69.51A.902.

[36]*See generally*, Salkin and Kansler, Medical Marijuana Meets Zoning: Can You Grow, Sell and Smoke that Here? 62 PLAN. & ENVTL. L. 3 (August 2010).

[37]Doyle, City Attorney, Workload Assessment-Medical Marijuana (Jan. 21, 2010), available at http://docs.google.com/viewer?a=v&q=cache:ofFIx-G1n6EJ:www.sanjoseca.gov/clerk/Agenda/20100330/20100330__0402sup.pdf+Doyle,+City+Attorney,+Workload+Assessment-Medical+Marijuana&hl=en&gl=us&pid=bl&srcid=ADGEEShveXtBOGUH8__2TbjdoaAU__rp__N5ae4Drsb3I5lRNsxCrQIss6oDOqGZ4KDlIaJdAXCyP76taUIu8g8MgNoy7kU7OOO-XIW6nzlHueKOhtizUYVRH7KbUCbUMkk1KkMG-dK62W0&sig=AHIEtbSVkB-I6DOPXU7wkKsbjRR1VyPyZQ.

[38]Doyle, City Attorney, Workload Assessment-Medical Marijuana (Jan. 21, 2010), available at http://docs.google.com/viewer?a=v&q=cache:ofFIx-G1n6EJ:www.sanjoseca.gov/clerk/Agenda/20100330/20100330__0402sup.pdf+Doyle,+City+Attorney,+Workload+Assessment-Medical+Marijuana&hl=en&gl=us&pid=bl&srcid=ADGEEShveXtBOGUH8__2TbjdoaAU__rp__N5ae4Drsb3I5lRNsxCrQIss6oDOqGZ4KDlIaJdAXCyP76taUIu8g8MgNoy7kU7OOO-XIW6nzlHueKOhtizUYVRH7KbUCbUMkk1KkMG-dK62W0&sig=AHIEtbSVkB-I6DOPXU7wkKsbjRR1VyPyZQ.

ated a nuisance per se and the imposition of a preliminary injunction was within the court's discretion.[39]

A number of municipalities have chosen to regulate the cultivation and sale of medical marijuana by imposing distance restrictions similar to those used in regulating adult businesses and those attempted to impose restrictions on where convicted sex offenders can reside and work.[40] Some municipalities require a one thousand foot distance between the property lines of a medical marijuana dispensing facility and any residential zone districts.[41] Other municipalities require a distance of five hundred feet.[42] 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,[43] and Santa Cruz, California, where a dispensing facility may be within fifty feet of a residential unit if it can be proven that it will not have an adverse affect on the residential unit.[44] The City of Los Angeles is somewhat more lenient, allowing dispensing facilities to come into close contact with residential uses, but requiring that the dispensing facility not abut, be across the street or alley from, or share a corner with a lot zoned for residential use or improved with a residential use.[45] San Mateo County's regulation contains no distance requirement, but allows for the subjective assessment that there must be a sufficient distance between the dispensing facility and res-

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[39]City of Corona v. Naulls, 166 Cal. App. 4th 418, 83 Cal. Rptr. 3d 1 (4th Dist. 2008).

[40]*See*, Salkin and Merriam, Residency Restrictions for Convicted Sex Offenders: A Popular Approach on Questionable Footing, 9 N.Y. Zoning & Plan. L. Rep. 4 (Jan/Feb 2009).

[41]*See, e.g.*, Oakland, Cal., Code of Ordinances § 5-80-020; Commerce City, Colo., Land Development Code § 21-5249(1)(b) to (d), available at http://www.c3gov.com/DocumentView.aspx?DID=495; Monument, Colo., Code of Ordinances § 17.36.030(C)(1)(a to c), available at http://library2.municode.com:80/default-test/template.htm?view=browse&doc__action=setdoc&doc__keytype=tocid&doc__key=aa67106b61997920f7e715ad31edc974&infobase=16718.

[42]*See, e.g.*, Fort Bragg, Cal., Municipal Code § 9-30.040(B)(12)(b).

[43]Arcata, Cal., Municipal Code § 9-42-105(E)(1)(b), available at http://www.codepublishing.com/ca/arcata/.

[44]Santa Cruz, Cal., Municipal Code§ 24-12-1300(2)(B), available at http://www.codepublishing.com/ca/santacruz/.

[45]City of Los Angeles, Cal., Municipal Code § 45.19.6.2(A)(2)(b), available at http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:lamc__ca.

idential zone districts so as not to adversely affect the residential use.[46]

Another method used for keeping medical marijuana dispensing facilities out of residential districts is to prohibit the dispensing of medical marijuana as a home occupation.[47] Furthermore, some municipalities disallow the cultivation and sale of medical marijuana as an accessory use to another home occupation.[48] 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.[49] In *Grand Rapids*, Michigan, an ordinance requires medicinal marijuana caregivers (those that grow or provide medical marijuana to patients) to register this use with the city as a home occupation. The ordinance also requires that the primary caregiver obtain a business license.[50]

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[46]San Mateo County, Cal., Code § 5.148.040(b)(3), available at http://library.municode.com/HTML/16029/level2/T5__C5.148.html#T5__C5.148__5.148.040.

[47]*See, e.g.*, Santa Cruz, Cal., Municipal Code § 24-22-539; Durango, Colo., Code of Ordinances § 13-110(a); Freemont County, Colo., Bd. County Comm'rs Temp. Reg. 5.2.1 to 5.2.3; Louisville, Colo., Code § 17.16.040.H; Arcata, Cal., Municipal Code § 9-42-105(D)(1)(c); San Jose, Cal., Code § 20.08.1230.

[48]*See, e.g.*, Arcata, Cal., Municipal Code § 9-42-105(D)(1)(c), available at http://www.codepublishing.com/ca/arcata/; Santa Cruz, Cal., Municipal Code § 24.22.539 (2010). *See* http://www.codepublishing.com/CA/SantaCruz/.

[49]*See, e.g.*, Arcata, Cal., Municipal Code § 9-42-105(D)(1)(g), available at http://www.codepublishing.com/ca/arcata; Fort Bragg, Cal., Municipal Code § 9-32.020(C)(12), available at http://city.fortbragg.com/pages/searchResults.lasso?-token.editChoice=9.0.0&SearchType=MCsuperSearch&CurrentAction=viewResult#9.30.0.

[50]Kyla King, Grand Rapids Requires Medical Marijuana Caregivers to Register with City, The Grand Rapids Press, Mar. 9, 2010, available at http://www.mlive.com/news/grand-rapids/index.ssf/2010/03/grand__rapids__requires__medical.html.

Other strategies have included limitations on the number of dispensaries and various licensing and permitting schemes.[51]

Pawn Shops

Even as early at 1904, there have been issues surrounding the regulation of pawn shops. In *Butte v. Paltrovich*,[52] a pawn shop owner was convicted for violating an ordinance which regulated the hours a pawn shop, loan office or second-hand store could operate. Appellant alleged that the ordinance denied him equal protection of the law and unlawfully interfered with the operation of his business. The court dismissed the claim that the ordinance prohibited the operation of his business noting a distinction between prohibition and regulation. And in response to the equal protection challenge, the court noted that the appellant failed to allege that any other pawnbrokers were exempt from the ordinance. The court concluded that the City had the authority to enact such an ordinance and that the ordinance was a reasonable use of the City's police powers.

In August 2010, a city ordinance regulating pawn shops was upheld in *Pawn America Minnesota, LLC v. City of St. Louis Park*.[53] A pawn shop operator applied for a license to operate a shop and the City denied the application. At the time the pawn shop operator applied for a license, the City zoning code permitted two pawnbroker licenses in the City, one of which had previously been issued. Based on conversations with several city representatives, the pawn shop operator was under the assumption the license would be granted so long as it could provide a valid certificate of occupancy. The shop operator submitted the certificate of occupancy as well as a land use registration application but the City would not issue the license because of a pending moratorium on new pawnshops. The pawn shop operator sought a writ of mandamus to compel the City to issue the license but instead, the court issued a writ of mandamus requiring the

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[51]*See generally*, Salkin and Kansler, Medical Marijuana Meets Zoning: Can You Grow, Sell and Smoke that Here? 62 Plan. & Envtl. L. 3 (August 2010).

[52]Butte v. Paltrovich, 30 Mont. 18, 1904 Mont. Lexis 44 (1904). *See also*, Cash Inn of Dade, Inc. v. Metropolitan Dade County, 938 F.2d 1239, 20 Fed. R. Serv. 3d 906 (11th Cir. 1991), for another example of an ordinance which limited the hours of operation being upheld.

[53]Pawn America Minnesota, LLC v. City of St. Louis Park, 787 N.W.2d 565 (Minn. 2010).

City to appear before the court or, in the alternative, to issue the license. The court denied the pawn shop operator's request for a writ of mandamus. The City adopted an interim ordinance and later adopted a permanent ordinance effectively prohibiting new or pending applications for pawnbroker licenses. The pawn shop operator argued that the interim ordinance was adopted for improper purposes, and the district court found in favor of the City. The pawn shop operator appealed to the court of appeals, which affirmed.

The pawn shop operator appealed, alleging the ordinance was adopted to prevent it from obtaining a license. The standard of review for an interim ordinance was a case of first impression for the Minnesota court, which ultimately said that if a municipality enacts a moratorium in good faith and for a limited period of time, it is valid so long as appropriate zoning ordinances are enacted promptly. The Court also stated that the City's actions were not arbitrary or unreasonable because the City was concerned with legitimate issues surrounding pawn shops, including proper locations and the impacts on land use. Here, the Court found that the district court did not err and that the pawn shop operator was properly denied a license.

Conclusion

This column just begins to scratch the surface on controversial land uses. There are undoubtedly dozens of uses that could be added to the discussion. However, the lessons gleaned from these uses lead to some common themes that are instructive for all controversial land uses. First, municipalities can regulate these uses through their zoning and police powers, within the confines of federal and state constitutions and so long as the regulations and conditions imposed are reasonable and not arbitrary. Second, when designing appropriate land use regulations to deal with controversial uses, it is a good idea to encourage public participation for the purposes of ascertaining the crux of community opposition and determining whether these concerns can be addressed through the imposition of appropriate conditions and limitations on permits. Third, although not discussed in this column, practitioners must be mindful of social justice considerations when deciding where to locate controversial land uses to ensure that they are not disproportionately placed in traditionally underrepresented communities where there tend to be more residents who are low-income and minority.