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Kyle A. Harvey

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Even Marijuana Needs a Zone: Utah's H.B. 3001 as the Next Battleground for Zoning Ordinances and State Medical Marijuana Laws

Kyle A. Harvey

I. INTRODUCTION

The Passage of Utah's Medical Cannabis Act (the "Act" or "H.B. 3001")—signed into law by Utah's Governor in December of 2018—marked a watershed event in Utah's political and legislative history. Although the Act's adoption came after much debate and compromise by key interested parties,¹ one portion of the Act remains fairly untouched (and perhaps unnoticed) by scholarly and political debate: its land-use related provisions and their interaction with municipal and county zoning ordinances.

When we think of medical marijuana, we do not intuitively ask ourselves: "I wonder how medical cannabis will interact with zoning?" Rather, and this is mere speculation, we likely focus on the impacts legalization of the drug will have on families, society, the economy, etc.² Each one of us seems to have an opinion on the benefits and costs of this drug and, additionally, whether it should be legalized. This article, as the first of its kind to review the Act's land-use provisions and

1. Compare Kirton McConkie, *Legal Analysis of Utah Medical Marijuana Initiative*, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS: NEWSROOM (May 11, 2018), <https://newsroom.churchofjesuschrist.org/multimedia/file/Legal-Analysis-of-Utah-Medical-Marijuana-Initiative.pdf> (analyzing "some of the legal issues raised by the proposed Utah Medical Marijuana Initiative"), with *A Rebuttal of Kirton McConkie's Analysis of the Utah Medical Cannabis Act*, LIBERTAS INSTITUTE (May 14, 2018), <https://libertasutah.org/personal-freedom/a-rebuttal-of-kirton-mcconkies-analysis-of-the-utah-medical-cannabis-act/> (providing counter-analysis to Kirton McConkie's memorandum, and arguing for the positive merits of the Act).

2. Even my brief research into these debates revealed that the arguments surrounding medical marijuana and its effects have been going on for well over forty years. See Henry Brill et al., *Marijuana*, Panel Discussion (Feb. 9, 1973), in 2 CONTEMP. DRUG PROBS. 267 (1973) (providing a panel discussion on numerous marijuana-related questions, including "Is marijuana dangerous?"). As such, I will not poke this bear, as I am comfortable that my audience understands how controversial marijuana regulation and use, especially medical, can be. For some thoughtful insight on perspectives regarding medical marijuana, see generally Arthur Cotter et al., *2012 Symposium: Practical, Legal, and Ethical Perspectives on Medical Marijuana*, 16 MICH. ST. U. J. MED. & L. 505 (2012).

their interaction with local zoning,³ avoids these typical debates. Instead, I focus my analysis on the zoning and land-use portions of H.B. 3001, addressing how such provisions interact with local zoning ordinances and how this interaction may impose practical and confusing difficulties on the Utah localities hosting cannabis locations.

This article proceeds in the following manner. In Part II, I provide background information on the passage of the Act, review basic zoning principles, and address how the Act's provisions bring zoning into the medical marijuana equation. In Part III, I delineate the localism-regionalism debate inherent in this article's thesis and review situations in which state medical marijuana laws have run afoul of, or avoided conflict with, local zoning ordinances. Then, in Part IV, I analyze certain land-use pros and cons of the Act, ultimately reviewing many of the unknown impacts it may have by using Provo, Utah as a location for further insight into the hypothetical zoning difficulties inherent in this law (and medical cannabis regulation in general).

II. BACKGROUND PRINCIPLES

A. Passage of *H.B. 3001*

On December 3, 2018, Governor Gary Herbert made history for the state of Utah when he signed the Utah Medical Cannabis Act into

3. Zoning and marijuana are not meeting for the first time. To the contrary, numerous other authors and blogs have discussed how state medical marijuana laws can often interact with or run afoul of local zoning ordinances. See, e.g., Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74 (2015); Patricia E. Salkin & Zachary Kansler, *Medical Marijuana Meets Zoning: Can You Grow, Sell, and Smoke That Here?*, 62 PLAN. & ENVTL. L. 3 (2010); Patricia E. Salkin & Zachary Kansler, *Medical Marijuana Zoned Out: Local Regulation Meets State Acceptance and Federal Quiet Acquiescence*, 16 DRAKE J. AGRIC. L. 295 (2011) (discussing the implications and interaction of state medical marijuana statutes with regard to zoning); Patricia Salkin, *Archive for the 'Medical Marijuana' Category*, L. LAND: BLOG ON LAND USE L. & ZONING, <https://lawoftheland.wordpress.com/category/medical-marijuana/> (last visited Oct. 23, 2019); Lora A. Lucero, *The Marijuana Haze – Federalism, Localism and Commonsense*, 39 ZONING & PLAN. L. REP. 1 (June 2016). This article is, however, the first to look at Utah's act in connection with zoning ordinances, and it is the first of its kind to apply the act to a local city: Provo, Utah – which application will be done in the last Part of this paper.

law,⁴ making Utah one of thirty-three states to legalize medical marijuana.⁵ The Governor's signing of the Act came after months (and years) of debate between proponents and opponents of medical marijuana,⁶ and is the final product of what Utah lawmakers optimistically call "the best-designed medical cannabis program in the country."⁷

To trace a small portion of this Act's life cycle, Utah voters cast their votes on November 6, 2018 to decide whether the State would adopt its medical marijuana initiative: Proposition 2. Prop 2 had a controversial genesis,⁸ but November 6, 2018 marked a pivotal date because the proposition received approval from 52.7 percent of Utah voters, making medical use of marijuana in Utah a reality for the first time.⁹ Not all interested parties, however, were satisfied with the voters' decision, and certain groups called for a compromise to ameliorate allegedly concerning provisions of the Act. Of note, officials of the Church of Jesus Christ of Latter-day Saints,¹⁰ and even Governor Herbert himself, were concerned that Proposition 2 created serious unintended issues and consequences.¹¹ Accordingly, through a special legislative session, the Utah State Legislature undertook significant efforts to adopt a compromise bill that would not only recognize Utah voters' support of medical marijuana, but also tackle concerns with Prop 2 as it had passed in November.

It was this compromise bill that was signed by Governor Herbert on December 3, 2018, in the form of H.B. 3001, which provides the

4. See H.B. 3001, 62nd Leg., 3d Spec. Sess. (Utah 2018); see also *H.B. 3001 Utah Medical Cannabis Act: Status*, UTAH ST. LEGISLATURE, <https://le.utah.gov/~2018s3/bills/static/HB3001.html> (last visited Oct. 23, 2019).

5. See *State Medical Marijuana Laws*, NAT'L CONF. ST. LEGISLATURES (Oct. 16, 2019), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

6. See Nicole Nixon, *Utah Supreme Court Will Hear Arguments Against Lawmakers' Rewrite of Medical Cannabis Law on Monday*, KUER.ORG (Mar. 24, 2019), <https://www.kuer.org/post/utah-supreme-court-will-hear-arguments-against-lawmakers-rewrite-medical-cannabis-law-monday#stream/0> (discussing some of the lawsuits and other controversies both opponents and proponents of H.B. 3001 have raised).

7. Gary Herbert (@Govherbert), TWITTER (Dec. 3, 2018, 7:40 PM), <https://twitter.com/govherbert/status/1069798594998202368>.

8. See Bethany Rodgers, *Utahns approve medical marijuana as LDS Church, a Prop 2 foe, reaffirms backing for legislative approach*, SALT LAKE TRIBUNE (Nov. 6, 2018), <https://www.sltrib.com/news/politics/2018/11/07/medical-marijuana-leaps/>.

9. See *Utah Election Results*, N.Y. TIMES, (May 15, 2019, 02:12 PM), <https://www.nytimes.com/interactive/2018/11/06/us/elections/results-utah-elections.html>.

10. See Rodgers, *supra* note 8.

11. Medical Marijuana, GOVERNOR GARY R. HERBERT, <https://governor.utah.gov/issues/medical-marijuana/> (last visited Oct. 23, 2019).

backdrop for this article's focus on medical marijuana and local zoning ordinances.

B. What does H.B. 3001 Do? – A High-level Understanding

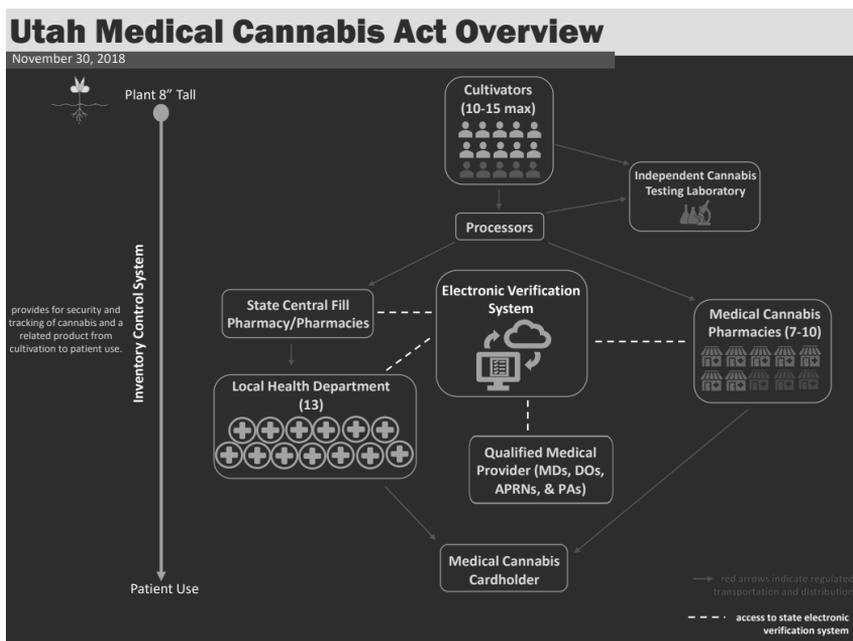
Put simply, H.B. 3001 "directs the Utah Department of Health (UDOH) to issue medical cannabis cards to patients, register medical providers who wish to recommend medical cannabis treatment for their patients, and license medical cannabis pharmacies."¹² Moreover, the Act "provides licensing and regulation" for other portions of the medical cannabis production and policing process—namely, regulation of cultivation facilities, processing facilities, and testing laboratories, and also creation of an electronic verification system to help track and dispense medical cannabis.¹³ For my purposes here, it is not necessary to address the entire text and scope of this law; this article's focus is on the zoning portions of the law, which I address in Part(II)(C) below.

12. *Utah Medical Cannabis Program*, UTAH DEP'T HEALTH, <https://health.utah.gov/medical-cannabis> (last visited Mar. 6, 2019).

13. H.B. 3001, lines 11–56 ("Highlighted Provisions"), 62nd Leg., 3d Spec. Sess. (Utah 2018).

Before doing so, it might benefit readers to see a graphic illustration of the Act's regulatory scheme, as provided by the Utah State Legislature:¹⁴

Table 1: Summary Chart of H.B. 3001



This graphic depicts the regulatory flow of medical cannabis from its cultivation at approved production establishments (at the top of the graphic) to reception by cardholders/users (at the bottom). By means of the electronic verification system (the middle box), the Act regulates the intermediary processing of the cannabis that passes through medical cannabis pharmacies—capped at seven to ten in the entire state of Utah—and state control pharmacies, before the drug ultimately reaches users. The regulated bodies of principal concern in this article's zoning analysis are the "cannabis production establishments"¹⁵ and "medical cannabis pharmac[ies],"¹⁶ which are the physical facilities

14. See *Utah Medical Cannabis Act Overview*, UTAH.GOV, <https://le.utah.gov/~2018S3/pdfdoc/Summary.pdf> (last visited February 27, 2019).

15. H.B. 3001, § 4-41a-102(7) (defining a "Cannabis production establishment" as "a cultivation facility, a cannabis processing facility, or an independent cannabis testing laboratory").

16. *Id.* § 26-61-102(25) (defining a medical cannabis pharmacy).

that will be hosted by Utah communities. As I will show later, these types of establishments and pharmacies have the highest likelihood of interacting with and perhaps running afoul of local zoning ordinances.

I make no effort in this article to take a stance on the general effectiveness of this Act. Whether it will have positive or negative medical, economic, and societal impacts on the citizens and economy of Utah is yet to be seen; and whether it is truly the "best-designed . . . program in the country"¹⁷ could be contested from many angles. As previously mentioned, however, my article instead focuses on the practical, perhaps contentious, intergovernmental¹⁸ interaction of local zoning ordinances with this statewide Act's land-use provisions.

C. What is Zoning, and How Does H.B. 3001 Relate to this Concept?

1. What is zoning?

Zoning, somewhat synonymous with *land use*, "deals with the way in which society enacts and implements governmental plans in order to regulate the use and reuse of land."¹⁹ How, then, does government practically implement these "plans"? The simple answer: by *municipal and/or local* ordinances; the long answer: by federal acts encouraging states to delegate zoning power to their localities, followed by state legislative action granting this delegation of power, and then city and county zoning ordinances and land-use regulations acting pursuant to this delegation. I will extrapolate these steps in turn.

At the federal level, the foundation of planning and zoning in the United States began with two early 20th-century acts: (I) the Standard

17. Gary Herbert, *supra* note 7.

18. This term carries a very loaded meaning, as it captures the localism and regionalism debate at the heart of this article – that is, the interaction of H.B. 3001, as a state act, with local zoning ordinances. *See infra* Part III.

19. DAVID L. CALLIES ET AL., *LAND USE CASES AND MATERIALS* 1 (7th ed. 2017), *accord* George N. Skrubbs, *Zoning and the Public Interest*, 41 MICH. ST. B.J. 16, 16 (1962) ("Zoning is a governmental regulation which controls and directs the development and use of land and buildings.").

State Zoning Enabling Act²⁰ and (II) the Standard City Planning Enabling Act.²¹ These acts created and still "supply the institutional structure" for states to adopt acts that enable their municipalities to appropriately zone their territories.²² The acts emphasize that such zoning is for the "purpose of promoting health, safety, morals, or the general welfare of the community."²³

At the state level, Utah is a practical example of a state player acting under federal delegation to ultimately grant power to the localities. Relevant to county and municipal zoning, the Utah Legislature adopted the Land Use, Development, and Management Act,²⁴ which "empowers cities and [counties] in Utah to divide or 'zone' the territory within their boundaries . . . and to regulate land uses therein."²⁵ The Municipal Land Use Act thus delegates to Utah localities the police power to create zoning ordinances. The localities practically accomplish this duty through a formal text and zoning map, which work together to define key terms and implement them in a visual format.²⁶ Through these two resources, the municipality divides its relevant territory into districts with formal classifications and use restrictions.²⁷ Provo, Utah, for example, has forty-nine zones, as illustrated by the city's map.²⁸

So, each time this article refers to *zoning* or *land use*, recall that these terms, generally stated, refer to the way our municipalities and cities regulate how the land within their boundaries may be used. And to put the terms more concretely, zoning and land use are the means

20. A STANDARD STATE ZONING ENABLING ACT (SZEa) (Dep't. of Commerce 1926).

21. A STANDARD CITY PLANNING ENABLING ACT (SCPEA) (Dep't of Commerce 1928).

22. *Standard State Zoning Enabling Act and Standard City Planning Enabling Act*, AM. PLAN. ASS'N, <https://www.planning.org/growingsmart/enablingacts.htm> (last visited Oct. 25, 2019).

23. SZEa, *supra* note 20, at 4 ("Section 1") (footnotes omitted).

24. UTAH CODE ANN. §§ 10-9a-101 to 10-9a-803 (West 2019). For clarification, Utah has two version of this act, one for counties and one for municipalities. See *The Land Use, Development, and Management Act (LUDMA)*, OFF. PROP. RTS. OMBUDSMAN, <https://propertyrights.utah.gov/the-land-use-development-and-management-act-ludma/> (last visited Oct. 25, 2019).

25. Richard S. Dalebout, *Utah Zoning Law: The Zoning Ordinance*, 14 UTAH B.J. 13, 14 (2001).

26. *Id.*

27. *Id.*

28. *Zone Map of Provo City, Utah*, PROVO.ORG, <https://www.provo.org/home/show-document?id=8772> (last visited Oct. 25, 2019).

by which all of us know where, and according to what restrictions, we may permissibly build our homes and locate our businesses, schools, hospitals, industry areas, and other buildings.

2. *Zoning in the H.B. 3001.*

This article now turns to the interaction of H.B. 3001 with municipal zoning and land use regulations. There are numerous provisions of H.B. 3001 that bring zoning and land use into the medical marijuana equation. For example, the Utah Legislature's "Summary" of the Act broadly states that all cultivation facilities, processing facilities, testing laboratories (collectively, such facilities are referred to in the Act as "cannabis production establishments"²⁹), and medical cannabis pharmacies "[m]ust comply with local zoning and land use permitting requirements."³⁰

This statement, albeit not inaccurate, does not adequately explain the portions of the Act relevant to zoning and land use. As such, here is a summary of the Act's specific provisions relating to zoning and land use for (1) cannabis production establishments and (2) medical cannabis pharmacies:³¹

(1) Zoning Provisions Relevant to Cannabis Production Establishments, Chapter 41a.

- 'Permit Requirements' and 'Distance Requirements': Sections 4-41a-201(2)(b)(i) and 4-41a-201(2)(b)(v) state that a cannabis production establishment will only receive UDOH approval if it is "located in a zone described in Subsection 4-41a-406" – either an industrial or agricultural zone – that is not within "1,000 feet of a community location or 600 feet of an area zoned primarily for residential use," and that any such production establishment must provide its "approved application for

29. H.B. 3001, § 4-41a-102(7), 62nd Leg., 3d Spec. Sess. (Utah 2018) ("Cannabis production establishment" means a cannabis cultivation facility, a cannabis processing facility, or an independent cannabis testing laboratory.").

30. *Utah Medical Cannabis Act Overview*, *supra* note 14.

31. As a disclaimer, this is not meant to be an exhaustive list of every single zoning portion of the Act. In this list I have attempted to highlight the most concerning and noteworthy sections that incorporate zoning and land use as they relate to production establishments and pharmacies.

[a] local land use permit," if such is required by the municipality or county where the production establishment wishes to operate.³²

- Section 4-41a-406(1) mandates that a "municipality's or county's zoning ordinances provide for" a cannabis production establishment "in at least one type of industrial zone" and "at least one type of agricultural zone."³³ Section 4-41a-406(2) then restricts any county or municipality from "deny[ing] or revok[ing] a land use permit to operate a cannabis production establishment on the sole basis that the applicant [or establishment] violates federal law because of the legal status of cannabis."³⁴

(2) Zoning Provisions Relevant to Medical Cannabis Pharmacies, Chapter 61a.

- Section 26-61a-301(2)(b)(v) states that a "proposed medical cannabis pharmacy" must acquire a "local land use permit" if such is required by the municipality or county where the pharmacy intends to operate.³⁵
- Section 26-61a-301(2)(c) sets forth certain limitations and mandates relevant to medical marijuana pharmacies. Specifically, this section states that "[a] person may not locate a medical cannabis pharmacy in or within 600 feet of an area . . . zoned as primarily residential."³⁶ However, Section 26-61a-301(2)(d) then mandates that "a medical cannabis pharmacy is *a permitted use in all zoning districts* within a municipality or county."³⁷

32. H.B. 3001, §§ 4-41a-201(2)(b)(i), 4-41a-201(2)(b)(v) (found on pages 20-21 of the Act). I will often refer to these sections, respectively, as the "permit requirement" and "distance regulation" sections.

33. *Id.* § 4-41a-406(1) ("Local Control").

34. *Id.* § 4-41a-406(2). H.B. 3001 also amended Utah Code Sections 10-9a-104 and 17-27a-104 to state that a county or municipality "may enact a land use regulation imposing stricter requirements . . . than are required by" state law. *Id.*

35. *Id.* § 26-61a-301(2)(b)(v).

36. *Id.* § 26-61a-301(2)(c).

37. *Id.* § 26-61a-301(2)(d) (emphasis added).

- Section 26-61a-507 delineates the "[l]ocal control" that each municipality or county may exercise over medical cannabis pharmacies. This section states that no person is "eligible to obtain or maintain a license" to sell unless he or she demonstrates that the pharmacy is located at least (1) "600 feet from a community location's property boundary", (2) "200 feet from the patron entrance to the community location's property boundary," and (3) "600 feet from an area zoned primarily residential."³⁸ This section then limits the power of local authorities such that they cannot "deny or revoke a land use permit," or "a business license," solely because "the applicant or medical cannabis pharmacy violates federal law."³⁹ Finally, this section leaves the local authorities with the right to "enact an ordinance that (a) is not in conflict with this chapter; and (b) governs the time, place, or manner of medical cannabis pharmacy operations in the municipality or county."⁴⁰

This onslaught of information may be overwhelming at first take, but we can break down a few of these provisions into more readily understandable groupings. H.B. 3001 sets (1) 'zoning mandates' declaring the zones in which both cannabis production establishments and medical pharmacies are permitted, and (2) 'distance regulations' and 'land-use permit requirements' for both types of facilities. This basic understanding of the Act's zoning-relevant provisions is important to fully grasp how localities may have practical difficulties when zoning for and approving cannabis facilities. These zoning-relevant sections also set the backdrop for much of the analysis and critique that follow.

Before turning to this analysis and critique, however, I want to direct your attention back to the Act's two sections that make a medical cannabis pharmacy "a permitted use in all zoning districts,"⁴¹ and then constrain this general zoning mandate through distance regulations.⁴² In practice, the interaction of these sections limits medical cannabis pharmacies to substantially fewer zones than the all-zoning-district language might indicate. It strikes me that such an order will inevitably

38. *Id.* § 26-61a-507(1)(a).

39. *Id.* §§ 26-61a-507(1)(b)(i), 26-61a-507(1)(b)(ii).

40. *Id.* § 26-61a-507(2)(a) to (b).

41. *Id.* § 26-61a-301(2)(d).

42. *Id.* § 26-61a-301(2)(c), 26-61a-507.

require amendment of local zoning ordinances, whether the localities desire change or not. But even so, this strange language creates some confusion as to the legislature's disposition with regard to medical cannabis pharmacies. If cannabis has already been approved by a majority of Utah citizens, why not outright permit it in all zoning locations? Conversely, if the distance regulations are any indication, why not treat medical cannabis pharmacies more akin to a locally-undesirable use, like a sexually oriented business?⁴³ The legislature has muddied the zoning waters by trying to strike some balance between outright approval and appropriate limitations. I will address this issue in more detail in Part IV, but keep this and the other zoning-relevant sections of the Act in mind while reading Part III.

III. LOCALISM AND REGIONALISM: THE CANNABIS AND ZONING INTERGOVERNMENTAL CONFLICT

From the zoning provisions highlighted in Part II above, we begin to see that H.B. 3001 sets certain zoning requirements for and delegates land-use powers to the municipalities and counties where cannabis production establishments and medical pharmacies will be located. These requirements and powers are a perfect example of the intergovernmental⁴⁴ give-and-take often occurring in the land-use context between states and local entities, like cities and counties. To attach a name to this land use give-and-take, we might call it the interaction between localism and regionalism.⁴⁵ In light of this, this Part of the article will address basic principles of localism and regionalism and will briefly look to specific examples of intergovernmental conflicts that have arisen from medical marijuana and local zoning ordinances.

43. See *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 430 (2002) (reviewing the city of Los Angeles's ordinance that required sexually oriented businesses to not be "within 500 feet of any religious institution, school, or public park").

44. For purposes of this article, "intergovernmental conflict" will refer to the dispute between local authorities (like municipalities) and regional authorities (like the state). See generally George D. Vaubel, *Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule*, 24 STETSON L. REV. 417 (1995) (discussing the intergovernmental land use disputes between cities and the state).

45. See CALLIES ET AL., *supra* note 19, at 84-89.

A. Localism v. Regionalism

What is localism? What is regionalism? Attaching a catch-all definition to these terms could be an article in and of itself—and has been such a topic for certain authors⁴⁶—but what does this article mean when it discusses the localism-regionalism conflict underlying municipal zoning and medical marijuana?

For my purposes here, "localism is about the legal and political empowerment of local areas, . . . rest[ing] on a set of arguments about the role of local governments in promoting governmental efficiency, democracy, and community."⁴⁷ As another scholar explained, localism encompasses "the idea that local governance ought to be protected to a greater or lesser degree from control by central governments, whether at the [state] or federal level."⁴⁸ In contrast, regionalism is the idea "that a region, [and not localities], is [the] real economic, social, and ecological unit" best equipped for coordinating the interconnected needs of cities and municipalities.⁴⁹ Regionalism centers on the principle that local entities, like cities, "do[] not operate in a vacuum;" rather, each municipality invariably interacts with its bordering neighbors.⁵⁰ For cities to ignore this interaction would be to feign ignorance to the fact that land, and land use, do not always end at a city's border.

In order to review the localism-regionalism conflict underlying municipal zoning and medical marijuana, I would like to put some practical legwork into the definitions of localism and regionalism, especially their application to medical marijuana and zoning. Beginning with localism, a localism approach to zoning revolves around the argument that each city (or county) should hold final responsibility—with minimal interference from regional entities like the state—for what zoning uses, and where such uses, are permissible within its boundaries. From this viewpoint, each zone's permitted uses⁵¹ would and

46. See, e.g., Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627 (2001); Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1 (2000).

47. Briffault, *supra* note 46, at 2.

48. Rodriguez, *supra* note 46, at 627.

49. Briffault, *supra* note 46, at 3; see also CALLIES ET AL., *supra* note 19, at 84 (discussing basic principles of localism and regionalism).

50. See CALLIES ET AL., *supra* note 19, at 84.

51. See *id.* This discussion becomes even more interesting when "LULUs (locally undesirable land uses)" enter the localism equation. See Victor P. Filippini, Jr., *Dealing with Locally Unwanted Land Uses (LULUs): A Municipal Perspective*, 26 PRAC. REAL EST. LAW. 21 (2010)

should be left to *local* municipal decision-making.⁵² A proponent of localism might raise the argument that a city has the tools and insight to appropriately zone (if at all) for a medical marijuana pharmacy or production establishment rather than be subjected to a mandate outright permitting such pharmacies.⁵³

In a practical sense, states have delegated broad police power to local authorities to establish their own comprehensive plans through zoning texts and maps.⁵⁴ Even H.B. 3001, with all its zoning provisions, does not specifically mandate exactly where medical marijuana establishments and pharmacies must be located. But it does require municipal zoning ordinances to accommodate these establishments and pharmacies in certain zoning districts.⁵⁵ The relationship between local and state authorities, as evidenced in H.B. 3001, is not one in which the two powers look eye-to-eye as equals. Instead, it is the state that delegates police power to local authorities, who, in turn, must act within the appropriate bounds of this power.

To reinforce this idea, I now address regionalism in the context of land use decision making and medical marijuana. Regionalism at the state level looks at the practical realities of land use and zoning not only in one given municipality, but also in adjacent and interrelated localities. Arguably, the foundation of land-use regionalism is that "each municipality must, in framing its land use plans and ordinances,

(explaining certain types of LULUs and discussing the practical difficulties they create for local authorities).

52. Perhaps this is because "[l]ocal autonomy is to a considerable extent the result of and reinforced by a systemic belief in the social and political value of local decision making." Richard Briffault, *Our Localism, Part 1:--The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 113 (1990).

53. Localism is not all roses and hurrahs; it has noteworthy limitations. For an extremely thoughtful review of the potential realities and pitfalls of localism, in a general view, see Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1993 (2000) (arguing that localism favors an "affluent" portion of the society and addressing the realities of localism in modern times; moreover, commenting that state governments have created a system in which local jurisdictions are rationally motivated "to use highly exclusionary zoning and developmental policies").

54. See Shelley Ross Saxon, *Local Autonomy or Regionalism?: Sharing the Benefits and Burdens of Suburban Commercial Development*, 30 IND. L. REV. 659 (1997) (discussing how land use decisions are often left to "local officials" but explaining that "[l]ocal decisions . . . often impose burdens on citizens outside the local municipality").

55. See *supra* Part II (B).

give consideration to impact on the surrounding area"⁵⁶ because localities are not always best equipped "to deal with regional issues and problems."⁵⁷ H.B. 3001 arguably does this by effectuating a specified range of medical marijuana establishments and pharmacies within the state and then leaving to the municipalities the decision of where to place such establishments—subject, of course, to the zoning ordinances mentioned in Part II.⁵⁸

Now, this brief look into localism and regionalism in the land-use and zoning context is not intended to be an assertion that H.B. 3001 essentially removes from Utah cities and counties all zoning power over medical marijuana pharmacies and production establishments, or, alternatively, that H.B. 3001 leaves all pertinent land-use power to these same entities. To the contrary, I hope this introduction to localism and regionalism triggers in your mind the idea that Utah local zoning ordinances may have some practical, and difficult, interaction with H.B. 3001's statewide scope. I will now introduce some real-life instances of state medical marijuana laws coming face-to-face with local zoning.

B. Localism in Action: The Kickback Against State Marijuana Laws

Nationwide, state legislative approval of medical marijuana has not been accomplished without zoning and land-use impediments. In many instances, local governments have refused to permissively zone for medical marijuana pharmacies, have adopted procedural steps for approval of such pharmacies (through special and conditional use permits), or have used nuisance claims to challenge and defeat the building of such pharmacies.⁵⁹ The following examples are not a comprehensive

56. CALLIES ET AL., *supra* note 19, at 84 (quoting Borough of Cresskill v. Borough of Dumont, 104 A.2d 441 (N.J. 1954)).

57. Rodriguez, *supra* note 46, at 641.

58. See *supra* Part II (C)(2).

59. See, e.g., River N. Props., LLC v. City & County of Denver, No. 13-cv-01410-CMA-CBS, 2014 WL 7437048 (D. Colo. Dec. 30, 2014) (upholding zoning laws and building codes that prevented property owner from leasing his property to a tenant who sought to grow medical marijuana); City of Monterey v. Carrnshimba, 156 Cal.Rptr. 3d 1 (Cal. Ct. App. 2013) (finding in favor of a city's nuisance action against medical marijuana dispensary operators because the dispensary was not listed as a permissible use within the city planning ordinances); Compassionate Care Dispensary Inc. v. Ariz. Dep't of Health Servs., 418 P.3d 978 (Ariz. Ct. App. 2018) (discussing the application of Arizona's Medical Marijuana Act and its two-step process for establishing zoning compliance); Diesel v. Jackson County, 391 P.3d 973 (Or. Ct. App. 2017) (holding that a county ordinance, which established the types of land on which medical marijuana

review of every land-use challenge to medical marijuana, but they do give an appropriate sample of the numerous issues facing state governments from within their own borders.⁶⁰

To provide a specific example, one author explained that in Colorado, "municipalities and counties are free to enact zoning restrictions on the sale of marijuana—including complete bans—and a number of local bodies have . . . chosen to ban it outright."⁶¹ This same author commented that "even in those states that have voted to make medical marijuana legally available, support for such policies is hardly uniform."⁶² Colorado localities are not alone in permitting bans of "retail marijuana shops that are otherwise legal under state law."⁶³ As of 2016, "Alaska, California, . . . Montana, Nevada, Vermont, and Washington" had all taken similar action.⁶⁴

In California, the state has received a number of mixed responses from its localities in regard to land-use decisions and medical marijuana. In the 2013 case of *City of Monterey v. Carrnshimba*, a California city successfully prevented the operation of a marijuana dispensary by arguing that such a use was not "permitted . . . under the City Code" and therefore constituted a nuisance per se.⁶⁵ In this and other California cases, zoning and land use ordinances are at the center of the resistance against medical cannabis dispensaries and operations.

Colorado and California are just two examples, but there are numerous controversies elsewhere that still plague the practical land-use implementation of state medical marijuana legislation.⁶⁶ The disputes

cultivation was permitted, was consistent with the county's comprehensive plan and was a reasonable regulation of marijuana under statute).

60. See Robert A. Mikos, *Marijuana Localism*, 65 CASE WESTERN RES. L. REV. 719, 720 (2015).

61. Sam Kamin, *Medical Marijuana in Colorado and the Future of Marijuana Regulation in the United States*, 43 MCGEORGE L. REV. 147, 162 (2012).

62. *Id.* at 163.

63. Mikos, *supra* note 60, at 764.

64. *Id.* at 764 n.196.

65. *City of Monterey v. Carrnshimba*, 156 Cal.Rptr. 3d 1, 5 (Cal. Ct. App. 2013).

66. For example, in July of 2018 the Michigan courts reviewed whether a township's zoning ordinance, which only allowed medical marijuana dispensaries as a home occupation and not under commercial use, was consistent with Michigan's Medical Marijuana Act. See Patricia Sal-kin, *MI Appeals Court Finds Zoning Ordinance Conflicted with the Provisions of the Michigan Medical Marijuana Act*, LAW LAND (July 23, 2018), <https://lawoftheland.wordpress.com/2018/07/23/mi-appeals-court-finds-zoning-ordinance-conflicted-with-the-provisions-of-the-michigan-medical-marihuana-act/> (discussing *Deruiter v. Township of Byron*, 926

often center on diverse questions, but one author eloquently summarized some of the main land-use issues raised by state-created medical marijuana acts:

[D]espite [states] authorizing the use of medical marijuana to covered citizens . . . [t]his 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.⁶⁷

Perhaps in response to these types of issues, a few states have "denied local governments the power to ban retail marijuana shops," while still allowing "local authorities to enact some reasonable regulations to govern them."⁶⁸ Utah's current scenario appears to take a similar approach through its mandated zones and distance regulations.⁶⁹ Although there is some doubt as to the effectiveness of this methodology, through this action Utah's legislature may have been making a good-faith effort to prevent future challenges from localities based on moratoria⁷⁰ or other bans related to zoning, while also leaving some decision-making power to these same localities. We can look to other states that have adopted this regime for some clarity as to the impacts this methodology may have. In Arizona, for example, cities and towns may enact zoning regulations that limit medical marijuana dispensaries to specified areas.⁷¹ Somewhat unsurprisingly, not all dispensaries have

N.W.2d 335 (2018)); *see also* Salkin, *supra* note 3 (providing an extensive list of the conflicts arising from medical marijuana and land use).

67. Salkin & Kansler, *Medical Marijuana Zoned Out*, *supra* note 3, at 296–97.

68. Mikos, *supra* note 61, at 765–66 & n.202 ("These states include Arizona, Delaware, Massachusetts, and Oregon.").

69. H.B. 3001, §§ 26-61a-301(2)(d), 26-61a-507, 62nd Leg., 3d Spec. Sess. (Utah 2018).

70. In California, 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 preparatory tool." Salkin & Kansler, *Medical Marijuana Zoned Out*, *supra* note 3, at 301–02.

71. *See* ARIZ. REV. STAT. § 36-2806.01 (2010).

been pleased, and challenges against zoning regulations still arise from disgruntled parties.⁷²

This review of marijuana's troubled past with zoning leaves us with very few answers as to the "best" approach for statewide legislation, but it does give some convincing evidence of what may lay before Utah. From a localism-type perspective, state legislation goes too far when it strips localities of the power to outright ban medical cannabis dispensaries through zoning methods. Conversely, localism perspectives must give some ground when we look to examples in which local entities have often used land-use ordinances to halt the operation of medical cannabis dispensaries—as evidenced in California and Colorado. I will now further explore these types of issues and discuss whether and how Utah may be the next state in line for land-use and medical marijuana centered debates.

IV. UTAH'S MEDICAL CANNABIS ACT AND ZONING: A PRACTICAL ANALYSIS

By this point, it should be evident that medical marijuana is intricately, if not noticeably, connected to local land use and zoning ordinances.⁷³ Utah's H.B. 3001, despite its supporters' optimism and its thoughtful design, is no exception. To further emphasize this point, I will review the land-use pros and cons of the Act and speculate as to some of the unknown impacts it may have by analyzing how it could hypothetically impact a Utah city (locality), using Provo, Utah as an example.

I recognize that labeling the Act's zoning provisions as pros or cons requires taking a stance from which I can cast such judgement. What may be a pro from a regionalism position may just as easily be a con from a localism viewpoint, and vice-versa. Accordingly, my goal in using the terms "pro" and "con" is to assess how effectively and rationally the Act avoids conflict between the state and local entities. For example, we might consider a pro of the Act to be that certain provisions help state and local entities avoid disputes over whether the Act preempts local zoning authority for medical cannabis pharmacies. We

72. See *Compassionate Care Dispensary Inc. v. Ariz. Dep't of Health Servs.*, 418 P.3d 978 (Ariz. Ct. App. 2018).

73. For more convincing evidence, see generally Salkin & Kansler, *Medical Marijuana Meets Zoning*, *supra* note 3; Mikos, *supra* note 61.

may consider it a con if the Act's zoning provisions create a confusing or muddled regulatory scheme that has little, if any, rational sense or comparison to other familiar zoning issues.

A. The Pros of H.B. 3001: Learning from the Past

So far in this Article, I may have unintentionally taken a somewhat negative outlook on Utah's H.B. 3001. However, this Act has several redeeming qualities in the land-use context, many of which could be a pre-emptive effort to avoid intergovernmental zoning conflicts.⁷⁴ Indeed, the interaction between specific portions of the Act supports this conclusion. For example, Sections 4-41a-201(2)(b)(v) and 26-61a-301(2)(b)(v) set forth a requirement that medical cannabis establishments and pharmacies both comply with local permitting; Sections 4-41a-201(2)(b)(i), 4-41a-406(a), and 26-61a-301(2)(d) establish the zones in which cannabis production establishments and medical pharmacies can be located; and Sections 4-41a-406 and 26-61a-507 provide some limited control powers to localities.⁷⁵ How exactly do these provisions work together to help the Act prevent intergovernmental conflicts evident in other states?

First, the Act *may* allow localities to create a conditional use application for operators of *cannabis production establishments*. A conditional use, or special use exception, is the approval process through which a local body retains the power to review building applications on a case-by-case basis, and then as necessary, approve or reject the application depending upon its compliance with zoning authority and law.⁷⁶ The Act's language leaves this power to local authorities based on a plain reading of H.B. 3001's permit-compliance sections and Utah Code Section 10-9a-104. From these sections, it is clear cannabis production establishments must obtain a local permit, if required by local zoning laws, and that a county or municipality may adopt its "own land use standards" so long as such standards do not conflict with other state or federal law.⁷⁷ This language arguably provides localities discretion

74. It is no mystery that local zoning, in other states, has often proved an impediment to medical marijuana establishments. *See supra* Part III.

75. *See supra* Part II (C)(2) for the citations to these sections.

76. *See CALLIES ET AL.*, *supra* note 19, at 139, 149–51.

77. This grant of power actually comes from Utah's land use act. *See* UTAH CODE ANN. § 10-9a-104 (West 2019).

in approving medical marijuana establishments based on the city or county's conditional use system that is consistent with or even stricter than the Act.⁷⁸

And as disputed as medical marijuana is in the zoning context,⁷⁹ it is arguably the perfect fit for such a conditional use application. As one author explained, "[c]ertain uses are conditional uses . . . because they may, but do not necessarily, have significant adverse effects."⁸⁰ If my prediction proves true, then the Utah Legislature's foresight in leaving this type of local power to cities should be lauded for recognizing that production of marijuana may fit into this type of zone.⁸¹ However, whether such a conditional use system is also relevant for medical cannabis pharmacies is skeptical, and as such, I will address that below in my con discussion.

As to the second argument supporting how H.B. 3001 prevents intergovernmental conflicts evident in other states, it appears the drafters of H.B. 3001 were aware of medical marijuana's checkered history with localities' moratoria temporarily banning any zoning for cannabis dispensaries.⁸² Rather than leave all zoning decisions to the cities and counties, the Act takes two affirmative steps of great import in this context: (1) it establishes the two zones in which cannabis production establishments may be located, and (2) it mandates that medical cannabis pharmacies are a permitted use in all zones.⁸³ Although local authorities may take issue with this, we cannot ignore the fact that questions regarding local zoning bans against cannabis dispensaries are likely resolved by these actions. In states like California and Colorado,

78. For more convincing, see generally *Conditional Uses*, OFF. PROP. RTS. OMBUDSMEN, UTAH DEP'T COM., <https://propertyrights.utah.gov/conditional-uses/> (last visited Oct. 25, 2019).

79. See *supra* Part III (B) for more convincing.

80. CALLIES ET AL., *supra* note 19, at 139–51.

81. *But see* Utah League of Cities and Towns, *Primer on Conditional Uses*, UTAH.GOV (2016), <https://luau.utah.gov/wp-content/uploads/sites/28/2016/05/Utah-League-of-Cities-and-Towns-Conditional-Uses-Handbook-2016-1-1.pdf> (explaining that conditional use may be "a problem because many cities and towns think they have more discretion than they actual do in granting or denying of a conditional use permit application"). As such, the 'good' of this delegation to local authorities might not be a resounding victory.

82. See H.B. 3001, §§ 26-61a-301(2)(d), 26-61a-507), 62nd Leg., 3d Spec. Sess. (Utah 2018).

83. H.B. 3001, §§ 4-41a-406(1), 26-61a-301(2)(d).

where this mandatory zoning action is absent, a slew of issues has appeared and litigation has followed.⁸⁴ While this zoning mandate may raise other concerns, it undoubtably removes any question as to the zones in which cannabis facilities will be a permitted use.

Third, H.B. 3001 imposes distance restrictions to keep the regulated growth and sale of medical cannabis away from primarily residential areas and community locations.⁸⁵ Such action is likely intended to insulate children and the portion of society not using medical marijuana from interaction with the pharmacies and production establishments, which might be considered a boon by some.⁸⁶ The true, positive impact of these distance requirements, however, is the insulation they provide against nuisance claims brought by parties who may be upset about legalization of cannabis or the location of a cannabis establishment/pharmacy. Under Utah law, "[a] nuisance is anything injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property."⁸⁷ While a well-run cannabis production establishment or pharmacy will not likely run afoul of nuisance law, H.B. 3001 does not specifically preempt nuisance actions.⁸⁸ As such, distance regulations might be an effective way to keep cannabis away from locations and parties inclined to consider a cannabis neighbor a nuisance.

Fourth, H.B. 3001 does strike some balance between regional concerns and local control. Although localism plays an important role in zoning, many authors agree regionalism is a necessary and desirable approach to land use development.⁸⁹ Without a doubt, Utah's H.B. 3001 attempts to strike a balance between regional concerns and local control, as exemplified above. Additionally, Section 26-61a-301(2)(e) requires the UDOH to "consult with the local land use authority" before approving more than "one application for a medical cannabis pharmacy within the same city or town."⁹⁰ This creates a duty for UDOH to constantly be aware of each pharmacy and its relation to

84. See *supra* notes 62–66 and accompanying text.

85. See H.B. 3001, § 4-41a-102(10) ("Community location' means a public or private school, a church, a public library, a public playground, or a public park.").

86. Professor Salkin expressed a similar view in her article. See Salkin & Kansler, *Medical Marijuana Meets Zoning*, *supra* note 3, at 5.

87. UTAH CODE ANN. § 78B-6-1101(1) (West 2019) (defining "nuisance," and setting for the right of action relevant for nuisance claims).

88. H.B. 3001. My personal reading of the Act did not reveal anything specifically precluding a nuisance claim.

89. Saxer, *supra* note 55; see generally Cashin, *supra* note 54.

90. H.B. 3001, § 26-61a-301(2)(e).

the community in which it is located. This is a definite plus for the local authorities, who will have the chance to voice their concerns directly to UDOH if more than one pharmacy application comes before their planning boards and commissions.

With the land-use pros of the Act addressed, I will now turn to some of the potentially negative effects of the Act. Interestingly, each of the benefits also carries the potential to create significant zoning issues, and perhaps even confusion.

B. The Cons of H.B. 3001: A Muddle of Regulation

The interplay between Sections 26-61a-301(2)(b)(v) and 26-61a-301(2)(d) creates doubt as to whether Utah localities have power to create a conditional use application for medical cannabis pharmacies. Unlike the conditional use process relevant for cannabis production establishments,⁹¹ the permitted-use and "Local Control"⁹² provisions for medical cannabis pharmacies provide no leeway for a land use regulation imposing stricter requirements on these pharmacies. At best, localities are free to adopt an ordinance that "is not in conflict" with the Act, one which "governs the time, place, or manner of medical cannabis pharmacy *operations*."⁹³

What implications does this raise? Localities likely cannot adopt a conditional-use process for cannabis pharmacies because H.B. 3001 has already made them *permitted* in all zones.⁹⁴ Thus, any local permit regulating such pharmacies must also evenly regulate all other uses in that same zone and not single out medical cannabis pharmacies. That is, an existing business permit required for operation in a particular zone will likely apply to medical cannabis pharmacies, but a conditional permit applicable only to pharmacies is preempted by H.B. 3001's provisions. This conclusion does not preclude other local regulations on cannabis "operations,"⁹⁵ but it does seem to impede a conditional application process for medical cannabis pharmacies.⁹⁶

91. *See supra* Part IV (A).

92. H.B. 3001, § 26-61a-507.

93. *Id.* (emphasis added).

94. *Id.* § 26-61a-301(2)(d). Utah's Municipal Zoning Act adopts a similar approach for "charter schools," which are a "permitted use" in all zones as well. *See also* UTAH CODE ANN. § 10-9a-305(7)(a) (West 2019).

95. H.B. 3001, § 26-61a-507.

96. *See generally* H.B. 3001, § 4-41a-201(2)(b)(i), 4-41a-406(a), 26-61a-301(2)(d). As a

A second con is that the Act fails to clearly delineate whether medical cannabis is more akin to a locally undesirable use (like a sexually oriented business) or a commercially appropriate business (like a pharmacy)—something that leaves scholars and lay persons alike wondering where the Utah legislature stands on the issue of medical marijuana.⁹⁷ From the language of the Act, we know that pharmacies and production establishments are permitted in all zones and certain zones, respectively—why then are distance regulations necessary for these operations? As I mentioned above, such regulations might insulate sensitive populations from the pharmacies.⁹⁸ But the distance regulations present a practical oddity when we consider that they are usually reserved for socially stigmatized businesses. Can Utah attorneys and land-use personnel then infer, from these distance regulations, that cannabis is in the same zoning class as sexually oriented businesses and other socially questionable operations? Because these questions involve significant speculation, I will further address them in Part IV(C) to follow. But the critique needs to be raised here because the Act creates a confusing dichotomy for land-use personnel.

Additionally, and in connection with my concerns above, the Act takes an unorthodox approach that distinguishes zoning for cannabis production establishments from medical cannabis pharmacies.⁹⁹ To illustrate, cannabis production establishments need only be appropriately zoned in one agricultural and one industry zone. Pharmacies, on the other hand, are permitted in *all* zones, excepted from community areas and residential zones due only to the distance regulations.¹⁰⁰ In the interest of even treatment, the Legislature could have taken a different approach for cannabis pharmacies. For example, the Legislature could have required that each municipality zone for pharmacies in at least one commercial zone. And if the distance regulations are so vital

minor concern, the zoning mandates in Sections 4-41a-201(2)(b)(i), 4-41a-406(a), and 26-61a-301(2)(d) will likely force every municipality in Utah to amend its zoning ordinances and consider where a pharmacy or establishment could best be located. With the enactment of H.B. 3001, the legislature set the general guidelines for cannabis production establishments and pharmacies but left the practical difficulties to the cities and counties. Local planners and land use attorneys in Utah will need to ensure that these new cannabis operations comply with the general land use standards of promoting public health, safety, and welfare in host communities.

97. See *infra* Part IV (C)(2), for further discussion on this con.

98. See *supra* Part IV (A).

99. Compare H.B. 3001, § 4-41a-406(1), with § 26-61a-301(2)(d).

100. See *id.* §§ 26-61a-301(2)(c), 26-61a-301(2)(d), 26-61a-507.

to the Act's scheme, then the Legislature could still require that the chosen commercial zone be offset from community and residential areas. Instead of a uniform approach, we are left with a zoning distinction between the cannabis production establishments and the pharmacies, with little explanation as to why.

Finally, as has occurred in other states, the Act may stir up local denizens to bring nuisance claims against owners of medical cannabis establishments and pharmacies.¹⁰¹ My analysis in Part IV(A) above gives some preliminary thoughts on how distance regulations for cannabis establishments and pharmacies might be a facial deterrent for nuisance activities; however, this does not mean nuisance claims are preempted by the Act. We can compare this to the example of California, where attorneys and cities have used nuisance claims (quite successfully) to challenge marijuana dispensaries.¹⁰² The same could happen in Utah, but from a different group of claimants: local citizens. The Act specifically prevents a city or municipality from denying an establishment or pharmacy on the sole ground that medical cannabis is illegal under federal law;¹⁰³ it does not, however, preclude other private and public nuisance claims. The present reality is that nuisance claims have been a common means to challenge medical marijuana dispensaries and Utah is likely no exception to this.

C. The Unknown: Where to Build These (Undesirable?) Pharmacies

The last portion of this article analyzes the unknown implications of this Act. Even with the pro and con analyses above, questions regarding the actual location of pharmacies and establishments still remain; and the cities of Utah must decide how to properly accommodate what may be a foregone eventuality: accepting a cannabis production establishment or pharmacy within their borders. I will use Provo, Utah as a hypothetical city to illustrate a few of these unknown ramifications. After this analysis, I will raise my own concern that the

101. See Salkin & Kansler, *Medical Marijuana Zoned Out*, *supra* note 3, at 300–01.

102. See *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 300 P.3d 494 (Cal. 2013) (holding that California's Compassionate Use Act and Medical Marijuana Program Act did not preempt a city's public nuisance claim against dispensary operators). California is not alone in this nuisance-zoning dilemma. See also *Michigan v. McQueen*, 828 N.W.2d 644 (Mich. 2013) (holding that a marijuana dispensary was not immune from Michigan's public nuisance claim against it).

103. See H.B. 3001, § 4-41a-406(2)(a)-(b), § 26-61a-507(1)(b)(i)-(ii).

Act creates significant confusion as to the Utah Legislature's disposition and attitude toward zoning for medical cannabis pharmacies and production establishments.

1. *Where to build a pharmacy?*

I start with a basic question: where could a medical cannabis pharmacy be located, in adherence to H.B. 3001, in Provo, Utah? A logical launching point to answer this question is Provo's zoning map and city code, which indicate Provo has forty-nine approved zones within its city.¹⁰⁴

104. *Zone Map of Provo City*, *supra* note 28; see also PROVO CITY CODE, Title 14: Zoning, (last visited Oct. 21, 2019) <https://provo.municipal.codes/Code/14>.

Figure 1: Forty-nine approved zones of the City of Provo.

DT1	General Downtown (DT1): established to provide a pedestrian-friendly, mixed-use, design-oriented environment complimentary to the more intensive Downtown Core (DT2) zone while providing an appropriate scale development between adjacent zones.	R18	One Family Residential (Chapter 14.10): Principal uses are one family detached dwellings with car-port/porch, on individual lots or attached one family dwellings in a planned open space dev. Min lot size: R1.8 8,000 sq. ft., 80 ft. width	SC1	Neighborhood Shopping Center (Chapter 14.18): The SC1 zone is established to provide an area in which the primary use of the land is for commercial and service uses to serve the daily convenience needs of the surrounding residential neighborhood.
DT2	Downtown Core (DT2): provides a pedestrian-friendly, regional urban core located around major transportation corridors. This area will be clearly identifiable as the center of the city by having the largest scale of building height and mass and a higher density of mixed uses.	R2	Two Family Residential (Chapter 14.11): Principal permitted uses are one family detached dwellings on min. 6,000 sq. foot lots, attached one family dwellings (duplexes) on 8,000 square foot lots.	SC2	Community Shopping Center (Chapter 14.19): The SC2 zone is established to provide an area in which a general shopping center facility can be established to satisfy the specialty shopping needs of a community or a group of neighborhoods.
GW	Downtown Gateway (GW): accommodates restaurants, hotels and a variety of retail uses to accommodate visitors as well as residents. Design guidelines are established for this zone to create a distinct sense of place. This zone is not intended for large scale retail.	R25	Low Multiple Residential (Chapter 14.12): The R25 zone is characterized by low rise multiple family residences. It is intended to provide an attractive setting for 3-4 family dwellings banded with existing and new 1-2 family dwellings.	SC3	Regional Shopping Center (Chapter 14.20): The SC3 zone provides an area in which the primary use of the land is for commercial and service uses to serve the needs of people living in an entire region. It is located close to freeways & major arterials for easy access.
WG	West Gateway Zone (Chapter 14.21): intended to accommodate large or small-scale restaurants, hotels and retail uses to service visitors and residents. The design criteria for the West Gateway is not as stringent as the Gateway zone to the east.	LDR	Low Density Residential Zone (Chapter 14.44): Established to provide a higher density residential environment with attractively landscaped one-family or two-family structures compatible with the character of one-family (R1) residential housing.	SSC	Specialty Support Commercial Zone (Chapter 14.47): The SSC zone provides areas for limited commercial activities, such as convenience retail and service businesses, in planned residential, retirement, office park, or research park mixed use developments.
FC1	Freeway Commercial (FC1): provides a district in which the primary use of the land is for commercial and service uses to serve regional population needs and to provide a place of employment in pleasant surroundings along the Interstate 15 corridor.	R3	Medium Multiple Residential Zone (Chapter 14.12A): A zone intended to provide an attractive setting for multiple family apartments and 1-2 family dwellings banded with existing and new 1-2 family dwellings in older neighborhoods.	M1	Light Manufacturing Zone (Chapter 14.27): The M1 zone provides areas for light manufacturing firms for processing, assembling, manufacturing, warehousing and storage; and for incidental service facilities and public facilities to serve the manufacturing area.
FC2	Freeway Commercial Two Zone (Chapter 14.20B): The FC2 zone provides a transition between the FC area and the gateway into downtown. The primary use for the land is for commercial and service uses to serve regional and local needs.	MDR	Medium Density Residential Zone (Chapter 14.14B): Provides a sustainable environment for medium density residential uses located in or near the central area of the City and in areas where there is a demand for medium density housing units as indicated in the General Plan.	M2	Heavy Manufacturing Zone (Chapter 14.28): The M2 zone provides areas for light manufacturing firms for processing, assembling, manufacturing, and extractive uses may be located in an environment which protects them from the encroachment of commercial and residential areas.
A11	Agricultural Zone (Chapter 14.08): Principal uses include agricultural pursuits, unrestricted animal rights, and one family detached dwellings. Minimum lot size varies according to sub-zone. A1.1 - 1.40 Acres	R4	High Multiple Residential Zone (Chapter 14.13): A zone established for medium density apartments and professional office uses. Dwellings may form one family units to apartments for family or housing single occupied and professional offices.	FI	Freeway Industrial Zone (Chapter 14.27A): The FI zone is for locations along I-15. It provides flexibility of land uses in areas where the primary use is for industrial and manufacturing uses may be located without encroaching upon surrounding residential areas.
A15	Agricultural Zone (Chapter 14.08): Principal uses include agricultural pursuits, unrestricted animal rights, and one family detached dwellings. Minimum lot size varies according to sub-zone. A1.5 - 5 Acres	HDR	High Density Residential Zone (Chapter 14.14C): A zone established to provide a high-density multiple residential character in areas located in downtown, near BYU and other selected high-density areas. The uses typically permitted are apartments and condos.	MP	Manufacturing Professional Office Zone (Chapter 14.30): The MP zone provides an area more restrictive than a conventional manufacturing zone, but conducive to the establishment of quality laboratory, processing & light manufacturing uses in a park-like setting.
A110	Agricultural Zone (Chapter 14.08): Principal uses include agricultural pursuits, unrestricted animal rights, and one family detached dwellings. Minimum lot size varies according to sub-zone. A1.10 - 10 Acres	CMU	Campus Mixed-Use Zone (Chapter 14.14E): Intended to provide high density housing and a mix of residential and commercial uses near BYU. The uses permitted are intended to provide an attractive setting for residential uses with commercial services for residents.	PIC	Planned Industrial Commercial Zone (Chapter 14.29): The PIC zone provides an exclusive environment for quality research laboratories (non-polluting light manufacturing) and professional offices, research and professional office uses in a park-like setting.
A120	Agricultural Zone (Chapter 14.08): Principal uses include agricultural pursuits, unrestricted animal rights, and one family detached dwellings. Minimum lot size varies according to sub-zone. A1.20 - 20 Acres	CHDR	Campus High Density Residential (Chapter 14.14D): A zone established to provide a high density multiple residential character near Brigham Young University. Typical permitted uses in this zone are apartments, housing apartments and condominiums.	RBP	Research and Business Park Zone (Chapter 14.44): The RBP zone provides areas for offices, research & development institutions, and specialized light manufacturing. This zone requires architectural and landscaping encroachment of residential areas.
A140	Agricultural Zone (Chapter 14.08): Principal uses include agricultural pursuits, unrestricted animal rights, and one family detached dwellings with limited agricultural pursuits. Minimum lot size varies according to sub-zone. A1.40 - 40 Acres	RM	Mobile Home Residential Zone (Chapter 14.15): A zone to provide a residential environment for the accommodation of manufactured homes and modular housing units. Density of 5.7 units per acre located on arterial or collector streets.	PRO	Project Redevelopment Cluster (Chapter 14.50): The PRO zone permits initiative and flexibility in creating a well-planned development. The intent is to encourage creative developments that utilize land efficiently and harmonize with the past.
RA	Residential Agricultural Zone (Chapter 14.09): A zone to harmoniously integrate residential uses with incidental agricultural pursuits. Principal uses include one family detached dwellings with limited animal rights. Minimum lot size is one-half acre.	RC	Residential Conservation Zone (Chapter 14.32): A zone to encourage conservation of existing housing by limiting the uses of a given lot or parcel to the legal use existing. Project is restricted to uses encouraged through use of the PRO zone.	SDP	Specific Development Plan Overlay Zone (Chapter 14.49): The SDP Overlay zone creates a regulatory tool to implement Specific Development Plans adopted as part of the City's General Plan, resulting in framework for enacting unique zone regulations.
R110	One Family Residential (Chapter 14.10): Principal uses are one family detached dwellings with car-port/porch, on individual lots or attached one family dwellings in a planned open space dev. Min lot size: R1.10 10,000 sq. ft., 90 ft. width	CA	Automotive Commercial (Chapter 14.25): The CA zone is established to provide an area which will promote a mix of new car dealerships, automotive repair and maintenance, light commercial, and establishments to support primary automotive uses.	PF	Public Facilities Zone (Chapter 14.17): Areas of a min. 10,000 sq ft for the establishment of facilities which are maintained in public and quasi-public ownership, such as libraries, hospitals, parks and recreation, utilities etc.
R120	One Family Residential (Chapter 14.10): Principal uses are one family detached dwellings with car-port/porch, on individual lots or attached one family dwellings in a planned open space dev. Min lot size: R1.20 20,000 sq. ft., 100 ft. width	CG	General Commercial Zone (Chapter 14.22): The CG zone provides a district for commercial uses and commercial areas which have been established in locations away from the central core of the City and not within shopping centers of integrated design.	TF	Training Facilities Zone (Chapter 14.17C): A zone applying to privately owned lands operated for educational, training and/or religious instruction where patrons reside on a short-term basis. Typical uses include dormitory and support facilities.
R16	One Family Residential (Chapter 14.10): Principal uses are one family detached dwellings with car-port/porch, on individual lots or attached one family dwellings in a planned open space dev. Min lot size: R1.6 6,000 sq. ft., 60 ft. width	PO	Professional Office Zone (Chapter 14.16): The PO zone provides locations beyond the central area of the City, primarily along arterial or major collector streets which will accommodate offices for doctors, dentists, accountants, and other similar professions.	HCF	Health Care Facilities Zone (Chapter 14.17B): Zone established to provide areas for location of facilities that provide healthcare services and which utilize relatively large areas of land. Typical uses: hospitals, physician/office offices, medical centers, rehab, etc.
R17	One Family Residential (Chapter 14.10): Principal uses are one family detached dwellings with car-port/porch, on individual lots or attached one family dwellings in a planned open space dev. Min lot size: R1.7 7,000 sq. ft., 70 ft. width	CM	Heavy Commercial Zone (Chapter 14.24): The CM zone is a transition zone between industrial areas and residential areas and/or lighter commercial districts. It provides a mixture of retail commercial, warehousing, heavy commercial, & LI manufacturing.	ITOD	Interim Transit Oriented Development Zone (Chapter 14.23): Established to provide interim zoning measures while more comprehensive transit oriented development plans and ordinances are formulated for the planned intermodal hub area.
				SOB	SOB - Sexually-Oriented Business Overlay Zone (Chapter 14.48): Establishes an overlay zone that governs the location of sexually-oriented businesses in order to avoid adverse security-related effects which may result from the operation of such business.

Some zone labels contain supplemental codes:
 PD - Planned Unit Development,
 S - Supplementary Residential Overlay, A - Apartment Overlay, or other numbers or letters which signify zone variations which are explained in the Provo City codebook,
 e.g. PRO-A20 or SDPS. For more detailed information on individual zones, please visit code.provo.org (Ch. 4) for online access to Provo City codes. Also, visit www.provo.org for zoning questions, contacts, forms, and information.

The plain text of H.B. 3001 defines a medical cannabis pharmacy as a permitted use in every one of these zones¹⁰⁵ — a somewhat daunting thought when we look at how many there are. However, the distance restrictions on cannabis pharmacies narrow my hypothetical locations in this Part. Specifically, a medical cannabis pharmacy cannot be located in or within 600 feet of an area zoned primarily residential,¹⁰⁶ which strikes zones RA through RC (seventeen zones) from the list of potential areas and leaves us with thirty-two candidates. Looking to

105. H.B. 3001, § 26-61a-301(2)(d).

106. *Id.* § 26-61a-301(2)(c)(i).

the Act's other provisions for medical cannabis pharmacies, such pharmacies must be "600 feet from a community location's property boundary" and "200 feet from the patron entrance to the community location's property boundary."¹⁰⁷ Based on these community restrictions, public facilities and training facilities (labeled as zones PF and TF) can also be eliminated,¹⁰⁸ because these two zones are primarily for "schools, universities, . . . parks and recreation" and "support facilities" incidental to such uses.¹⁰⁹ Looking at Provo's map, this takes a substantial portion of the city out of my hypothetical inquiry.

What, then, is left? Rather than walk step by step through the remaining thirty zones, I will confine my analysis to the likeliest potential candidates; and I do so by looking at the uses and buildings already designated for these remaining zones. Keep in mind, a pharmacy is a permitted use in *all* the remaining zones. My task, then, is to try and discern the likelihood of a particular zone being chosen for a medical cannabis pharmacy, not whether the pharmacy is permitted in the given area. I have provided a list of my top picks, so to speak, and included a brief justification for their inclusion; additionally, I have marked these areas with a '📍' on Provo's zoning map.¹¹⁰

- *RBP* (Zoning Map 1): Located in the far north of Provo, RBP is offset from residential and community areas. This zone "provides area for offices, research & development institutions and specialized light manufacturing."¹¹¹
- *SC3* (Zoning Maps 1 and 3): Provo's northern SC3 zone abuts the RBP zone mentioned above and is also offset, in part, from residential and community areas. This zone allows for "commercial and service uses to serve needs of people living in an

107. *Id.* § 26-61a-507(1)(a)(i)(A) to (B).

108. *Zone Map of Provo City, supra* note 28 (PF is for "public facilities . . . which are maintained in public and quasi-public ownership, i.e., schools, university, . . . etc . . ." and TF is for training facilities incidental to these public uses). Because "community locations" incorporates schools and public areas, like parks, it is reasonable to assume that a cannabis pharmacy will not be located in these zones.

109. *Id.*

110. Rather than mash the entire zoning map into this article (which would have been a tricky task at best), I have included small 'snapshots' of the zones identified in the list to come. If need be, please compare these snapshots to the entire map.

111. *Id.*

entire region."¹¹² Controversial or not, medical cannabis is designed to serve a wide variety of needs. In addition to the northern SC3, there are a few other SC3's zones that might also meet the requisite distance requirements (see my marks on the maps below).

- *DT1 and DT2* (Zoning Map 2): These two zones serve as Provo's "General Downtown" and "Downtown Core." The middle portions of these two zones are sufficiently offset from residential areas such that distance is not an issue. Provo does, however, describe these two zones as "pedestrian friendly, mixed-use" environments that serve as the "urban core" of the city. Provo citizens might find a medical pharmacy in this core area to be inconsistent with the current use and feel of the area. And yet, once again, a medical cannabis pharmacy is already permitted in these zones thanks to H.B. 3001.
- *M2* (Zoning Map 3): Located in Provo's southeastern corner, this zone is designed for heavy manufacturing. I include it here because uses in this area are designed to "protect[] . . . them from encroachment and commercial and residential uses."¹¹³ Meaning, this zone will not likely face issues with distance requirements from residential and community areas.
- *PIC* (Zoning Map 3 and 4): There are two large PIC zones in the south and southeastern portion of Provo, both of which could potentially avoid distance issues related to medical cannabis pharmacies. This zone "provides an exclusive environment for quality research laboratories . . . [and] commercial uses."¹¹⁴

[Graphics follow on next page]

112. *Id.*

113. *Id.*

114. *Id.*

Figure 2: Zoning Map 1

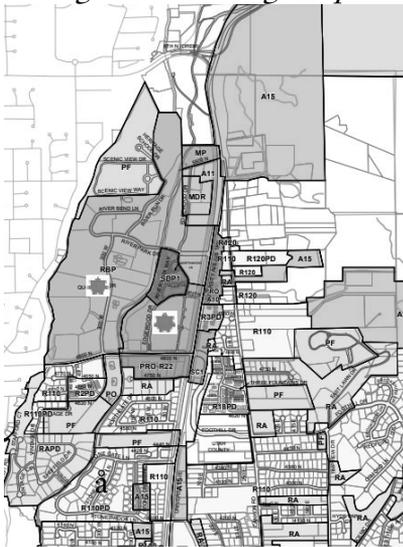


Figure 3: Zoning Map 2

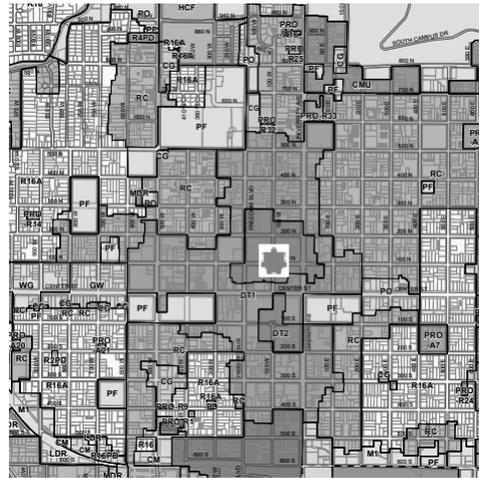


Figure 2: Zoning Map 3

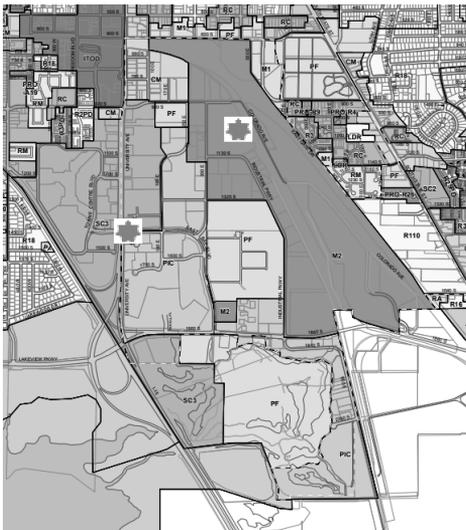
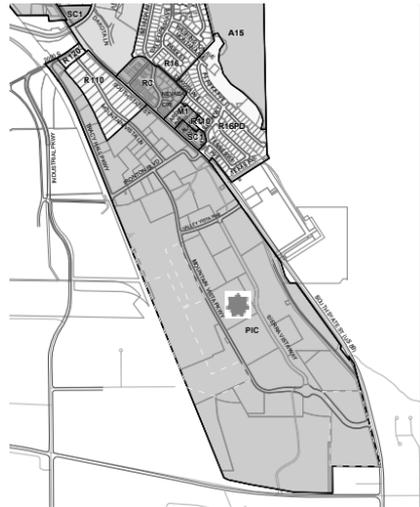


Figure 5: Zoning Map 4



This preliminary, hypothetical look into potential locations for medical cannabis pharmacies in Provo is not a perfect science. However, it does highlight a portion of the inquiry a planning commission or board will have to undertake because of H.B. 3001.¹¹⁵ As further evidence, I could repeat this process for cannabis production establishments, which would require another review of Provo's zoning code and text. But doing so is unnecessary for the first point this Part seeks to emphasize: that the act's zoning provisions leave land-use attorneys and citizens with an interesting, yet-undecided analysis when zoning for pharmacies.¹¹⁶

2. *Medical cannabis pharmacies: (un)desirable?*

As a last point of analysis, I address a question that arises from the Utah Legislature's zoning methodology for medical cannabis pharmacies in H.B. 3001, one I raised above: why is the Legislature regulating, in the zoning context, medical cannabis in this way? In other words, was the Legislature concerned that zoning for medical cannabis pharmacies might be more akin to sex-related businesses and operations that sell alcohol, or something comparable to traditionally accepted healthcare businesses (like pharmacies selling opioid drugs)? By asking these questions, I hope to raise concerns as to whether the Legislature's zoning choices are a rational approach for regulating medical cannabis.¹¹⁷

115. PROVO CITY CODE § 14.04.010 (2019) (creates the planning commission responsible for the bulk of Provo City's zoning and land use decisions).

116. As you read through the above analysis, you may have taken notice of the extreme care and planning the city put into its zoning text and map. This is not coincidence and is a direct consequence of the long-standing doctrine that a zoning body's general plan (the map and text) must promote the general health, safety, and welfare of the community. H.B. 3001's forceful entry of medical cannabis into the zoning equation must still comport with these goals. As such, it is likely that counties and cities will need to undertake drafting changes to include cannabis pharmacies in their zone descriptions and general plan. In which particular zones they should be placed, and using what language, are questions to which we currently have no answer. But I am confident that county planners and zoning commissions are not ignorant of the consequences that may stem from H.B. 3001 and the practical consequences it entails for their workload.

117. Let me be clear, I am not challenging the constitutionality of the Legislature's zoning provision, as this question has been readily decided in long-standing case law. *See generally* Vill. of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926) (holding that a zoning ordinance in its general scope was a "valid exercise of authority."). Rather, you might say I am questioning whether this Act is indeed a rational means to zone for medical marijuana facilities, and not a compromise that has created more confusion than answers.

The Act's zoning language, perhaps unintentionally, creates an awkward balance between the undesirable and traditionally acceptable classifications named above, one that may only confuse localities. H.B. 3001 initially takes a strong stance by mandatorily permitting pharmacies in all zones, but then uses distance regulations and pharmacy caps (7-10 in the entire state) to soften the blow, limiting the zones in which a pharmacy may actually be built and the total number of pharmacies in operation. As emphasized throughout this article, distance regulations have more commonly been reserved for locally undesirable businesses—like sexually oriented ones and liquor stores (in Utah, at least)—because of society's desire to push such establishments away from sensitive populations and areas.¹¹⁸ When we look at this comparison to substances and businesses traditionally regulated through unique zoning, a distorted picture of H.B. 3001's zoning provisions begins to paint itself. It is not unreasonable to think that citizens and cities may take issue with this Act because medical cannabis was already approved by a majority of Utah's voters, but the regulatory scheme (at least for zoning) has since been altered in an awkward way through muddled zoning regulations.¹¹⁹

What I hope to emphasize by following this line of inquiry is that it is impossible to ascertain the Utah Legislature's land use disposition regarding medical cannabis. Although there may be much good from the Act's balancing scheme, there is also much uncertainty as to whether this zoning approach is rational, or even necessary, for medical cannabis. Perhaps the route of least resistance, at least for medical cannabis pharmacies, would have been to permit such pharmacies in zones and at locations where other controlled drugs have already been sold.¹²⁰ Concerns regarding the abuse and use of medical cannabis

118. See Eric Damian Kelly, *Current and Critical Legal Issues in Regulating Sexually Oriented Businesses*, 56 PLAN. & ENVTL. L. 3, 4 (2004) (discussing the "spacing requirement[s]" and "distance requirements used to control adult uses in the land-use context). See also Utah's Department of Alcoholic Beverage Control has set certain "Proximity Restrictions" so that liquor stores cannot be near a "community location." *Licenses & Permits: Proximity Restrictions*, UTAH.GOV, <https://abc.utah.gov/license/proximity.html> (last visited Oct. 25, 2019).

119. One need not look too far to find a disgruntled audience. See *Utah Organizations React to Passage of 'Compromise' Bill*, ABC4.COM, <https://www.abc4.com/news/local-news/utah-organizations-react-to-passage-of-compromise-bill/1638394866> (last updated Dec. 4, 2018, 7:12 AM).

120. See PROVO CITY CODE § 14.16.010 (2019). If we look at the text of the code, it allows pharmacies in various locations, many of which could have arguably been appropriate for cannabis pharmacies—as, for example, in the Professional Office (PO) zone.

would be easily solved by the other intense regulatory portions of the Act,¹²¹ and zoning could then become a lesser issue.

Even if that suggestion is too strong, the Legislature could have regulated zoning for medical pharmacies through a similar manner as that used for cannabis production establishments, where the Act sets forth the two zones in which at least one establishment must be allowed.¹²² What stopped the Utah legislature from doing the same for cannabis pharmacies? For example, why not require localities to permit a pharmacy in one principally commercial zone? Arguably, the pharmacies are the point of true interest for both proponents and opponents of medical cannabis, but I cannot see the rationale for distinguishing pharmacies from production establishments in this manner.

In closing this Part, I admit I have no simple answers to the questions raised above and can only leave these critiques as food for thought that this Act is not as well-designed as its drafters originally hoped. Of course, attacking the efforts of others is far easier than seeking a solution, which is why I proposed some basic solutions in the text above. In any event, I find that the Act's zoning regulation of medical cannabis takes a somewhat confusing and irrational approach with negative ramifications.

V. CONCLUSION

Utah's legislature took a politically charged and progressive step with the passage of the Medical Cannabis Act. However, this step forward is unlikely to proceed without some hinderance from a common impediment to state medical marijuana legislation: local zoning ordinances and land use regulations. It is difficult, at this juncture in time, to say whether H.B. 3001's zoning-relevant provisions will help cannabis production establishments and medical cannabis pharmacies avoid intergovernmental zoning hiccups, and Utah's legislature has arguably taken many actions to try and curtail pushback from localities in this regard. Even so, the Act's confusing zoning scheme leaves questions regarding the legislature's zoning disposition and classification of

121. *See generally* H.B. 3001, 62nd Leg., 3d Spec. Sess. (Utah 2018). The Act has extensive licensing and verification requirements that are completely independent of zoning and deal more with the pharmacies themselves and cardholders using the drug, but I have not addressed those sections here.

122. *Id.* § 4-41a-406(1).

medical cannabis operations. To be clear, I hope this article has educated you on the practical zoning interactions and difficulties that medical cannabis establishments and pharmacies will likely face when the rubber hits the road and these businesses begin to seek appropriate locations in Utah's municipalities and counties.