



County Counsels Mt. Shasta Retreat

Medical Marijuana 2013 Update

Presented by:

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State Law (CUA/MMP)

Preemption

- ***City of Riverside v. Inland Empire Patient's Health & Wellness Center, Inc. (2013) 56 Cal. 4th 729.***
- Total permanent ban does not conflict with CUA/MMPA.
- MMP/CUA “limited & specific.”
- Broad statement of purpose not controlling.
- Exemption not= authorization.
- No broad right w/o hindrance/inconvenience.
- Exemption from 11570 no limit on local nuisance.
- Rejects *Qualified Patients*.



- ***Conejo Wellness Center v. City of Agoura Hills*** (2013) 214 Cal.App. 4th 1534.
- Gov. Code § 65853 inapplicable.
- Terms “medical marijuana dispensary” and “business” include plaintiff.
- Ordinances not preempted by CUA or MMP.
- Did not violate due process.
- Dispensary unlawful, no const. protections.
- No violation privacy/association.



County of Tulare v. Nunes **(2013) 215 Cal.App. 4th 1188**

- No MMC in ag zone.
- Limited to commercial/mfctg. zones.
- Zoning reasonable exercise of police power (Cal. Const., art. XI, § 7).
- No conflict with 11362.5, 11362.775.
- Can apply zoning to MMC's without storefronts or retail outlets.



County of Tulare v. Nunes **(2013) 215 Cal.App. 4th 1188 (cont.)**

- No equal protection violation.
- MMC's/individual growers not similarly situated.
- Different treatment rationally related.
- Pot=controlled substance; not crop.
- County not required to define as ag.



Browne v. County of Tehama (2013) **213 Cal.App. 4th 704**

- Cultivation ordinance.
- Not improper amendment of CUA per art. II, § 10, subd. (c).
- Proper analysis preemption per art. XI, § 7.



Browne v. County of Tehama (2013) **213 Cal.App. 4th 704 (cont.)**

- No conflict with CUA or MMP.
- Neither authorizes unregulated cultivation.
- No conflict with §§ 11362.765, 11362.775.
- Does not declare nuisance solely on cultivating.
- Because no express MMP authority to cultivate w/o restriction, no statutory authorization defense.



People ex rel. Trutanich v. Joseph **(2012) 204 Cal.App. 4th 1512**

- Injunction against dispensary.
- 11362.765, 11362.775 do not immunize/authorize distribution.
- Activities violated 11570 as nuisance.
- 11362.765 and 11362.775 do not immunize activities from nuisance abatement action per 11570.



People ex rel. Trutanich v. Joseph **(2012) 204 Cal.App. 4th 1512 (cont.)**

- 11362.775 protects group activity to cultivate for medical purposes, not dispensing or selling.
- Storefront dispensary not protected.
- 11362.765 allows reasonable compensation for services provided to qualified patient, but only to primary caregiver.



“Grant & Hold” Cases

- *City of Lake Forest v. Evergreen Holistic Collective* (2012) 203 Cal.App.4th 1413 (ban on dispensaries conflicted with MMPA), rev. granted, 140 Cal.Rptr.3d 795.
- *People v. G3 Holistic, Inc.* (2011) Case No. E051663, 2011 WL 5416335 (Cal. App. Ct. Nov. 9, 2011) (unpub. opn.) (ban on dispensaries did not conflict with MMPA), rev. granted Case No. S198395.
- *County of Los Angeles v. Alternative Medicinal Cannabis Collective* (July 2, 2012) 207 Cal.App.4th 601 (ban on dispensaries preempted by MMPA), rev. granted.
- *420 Caregivers LLC v. City of Los Angeles* (July 3, 2012) 207 Cal.App.4th 703 (dispensary regulations not preempted by MMPA, do not violate equal protection, due process or privacy), rev. granted.



“Grant & Hold” Cases (cont.)

- Grant and hold cases are held until the Court decides the lead case.
- Once lead case opinion becomes final (30 days), Court can then (1) transfer held cases to court of appeal for consideration in light of new decision or (2) dismiss review.
- Riverside opinion final June 5.



Federal Law (CSA) Preemption

- ***Pack v. Superior Court (2011) 199 Cal.App. 4th 1070.***
- Ordinance regulating medical marijuana collectives preempted by Controlled Substances Act, rev. granted, dismissed.
- League Medical Marijuana Committee: *Pack* concerns still exist; use caution with regulatory ordinances.





Federal Law (CSA) Preemption (cont.)

- ***Conejo Wellness Center v. City of Agoura Hills* (2013) 214 Cal.App. 4th 1534, fn. 5:**
 - “We note that if either the MMPA or the CUA affirmatively authorized cultivation, possession, or distribution of medical marijuana, by individuals or collectives, it would raise serious questions of federal preemption by the Controlled Substances Act The Controlled Substances Act defines marijuana as a schedule I drug, and prohibits any possession or use of marijuana except in the course of federally approved research projects. ... A local statute that authorizes conduct prohibited by federal law is an “obstacle” to accomplishing federal objectives and is therefore preempted.”



Constitutional Issues

- ***Conejo Wellness Center v. City of Agoura Hills (2013) 214 Cal.App. 4th 1534.***
 - Permit requirements did not violate substantive or procedural due process.
 - Because dispensary always unlawful, not entitled to constitutional protections.
 - No privacy/association violation.



Constitutional Issues (cont.)

- ***County of Tulare v. Nunes* (2013) 215 Cal.App. 4th 1188.**
 - No equal protection violation.
 - MMC's & individual growers not similarly situated.
 - Different treatment of MMC's rationally related to preventing potential difficulties.
 - Because marijuana controlled substance and not merely crop, zoning not required to define growing marijuana as ag use.



Constitutional Issues (cont.)

- ***Staffin v. County of Shasta* (2013)
2013 U.S. Dist. LEXIS 64625.**
 - Claimed harassment to impose de facto ban.
 - No impairment of contract w/o valid contract.
 - No due process b/c no protected right.
 - No *Monell* 1983 b/c no const. violation.



Constitutional Issues (cont.)

- ***420 Caregivers LLC v. City of Los Angeles* (July 3, 2012) 207 Cal.App. 4th 703 (“Grant & Hold”).**
 - No equal protection, due process or privacy violation.



Cultivation

- ***Browne v. County of Tehama* (2013) 213 Cal.App. 4th 704.**

- Location limits, i.e. school, church, park.
- Numeric limits based on lot size.
- Registration
- Screening, setback requirements
- No MMP “unfettered” right
- No MMP/CUA preemption





Cultivation (cont.)

- ***County of Tulare v. Nunes (2013)***
215 Cal.App. 4th 1188.
 - MMCs only in comm'l/mfctg zones.
 - Limited numbers of plants.
 - No CUA.MMP preemption.
 - No right to cultivate w/o hindrance/regulation.
 - No equal protection violation.
 - MMCs not ag use.



Cultivation (cont.)

- ***Maral v. City of Live Oak, 3d Dist.***
 - Total cultivation ban.
 - Claimed violations:
 - CUA/MMP.
 - Equal protection and due process.
 - City's demurrer sustained.
 - Case briefed.



Delivery/Mobile Services

Post Riverside Strategy/Business Plan:

Subject: Supreme Court Ruling

From: "James DeAguilera" <deaguileralaw3@gmail.com>

Date: Mon, May 6, 2013 11:29 am

To: "James DeAguilera" <deaguileralaw3@gmail.com>

"The California Supreme Court issued its ruling on City bans of medical marijuana dispensaries this morning. This does not affect the status of medical marijuana collectives. They remain legal under state law. This only affects the ability of the Cities to use their zoning regulations to prohibit the dispensing of the medication at a stationary storefront. We will be advising our medical marijuana collective clients to use a different model for dispensing the medication. The location of the dispensary will become the offices of the medical marijuana collective.

This will be the location where patients bring their recommendations, their recommendations are verified and they join the collective. Donations can be received at the collective office. At the collective office a voucher will be given to the member (patient) for the medication and the medication will be dispensed from a mobile source either on or off the premises but not from within the collective office. My clients are to contact my office immediately. We are going to start submitting business license applications for the collective office and separately for the mobile dispensing operation. If the City Clerk refuses to issue these separate business licenses we will immediately ask the court to require that the City Clerk issue these business licenses. We do not believe that it is illegal for the collective to have an office. The City Clerk should issue that business license. California's medical marijuana laws continue to allow for patients (members of the collective) to obtain medications. We do not believe there is any zoning limitation on a mobile source of dispensing, even after this Supreme Court decision.

Law Office of James DeAguilera"



Delivery (cont.): Arguments?

- ***Barajas v. City of Anaheim* (1993) 15 Cal.App.4th 1808, citing Vehicle Code § 22547.**
- ***People v. Colvin* (2012) 203 Cal.App.4th 1029.**
- **§ 11362.775 defense for dispensary w/bus. license in process of complying with applicable ordinances.**
- **§ 11362.775 not limited to cooperatives involving united action or participation among all members.**
- **§ 11362.775 does not require members to engage in united action or participation.**
- **Cf. *People v. Nahouraii*, 2010 Cal. App. Unpub. LEXIS 1900:**
- **CUA/MMPA allow qualified patients/cardholders/ primary caregivers to obtain, possess, cultivate and transport medical marijuana.**
- **Prevents them from obtaining/transporting "collectively or cooperatively" through agency of single person.**



Arguments (cont.):

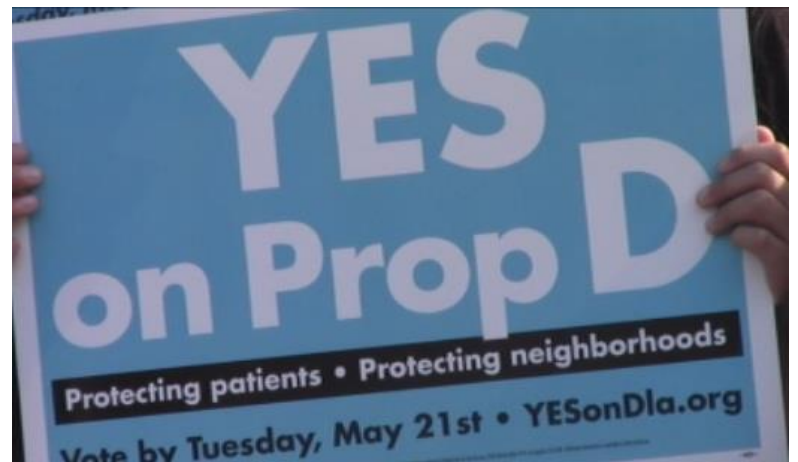
- **Health & Safety Code § 11362.768 (e):**
 - “This section shall apply only to a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider that is authorized by law to possess, cultivate, or distribute medical marijuana and that has a storefront or mobile retail outlet which ordinarily requires a local business license.”



Initiatives

Successful:

- **City of Los Angeles—Prop D:**
- **City supported. Restricts #; requires tax.**
- **Litigation?**





Initiatives (cont.)

Unsuccessful (November 2012):

- Dunsmuir (Siskiyou) Measure S
- Palo Alto (Santa Clara) Measure C
- Del Mar (San Diego) Measure H
- Lemon Grove (San Diego) Measures Q, T
- Imperial Beach (San Diego) Measure S
- Solana Beach (San Diego) Measure W



Initiatives (cont.)

- **Upcoming:**
 - **Amiano Initiative?**
 - **Santa Clara?**



Legislation: State

- AB 473: Medical Marijuana Regulation and Control Act (Aminano): Defeated in Assembly. Would:
 - Create Division of Medical Marijuana Regulation and Enforcement (MMRE) within ABC.
 - MMRE to establish standards for cultivation/mfctg/testing/transportation/ distribution/sales.
 - Require uniform policies for taxing marijuana businesses.
 - Establish mandatory commercial registration program.
 - Authorize penalties for violations.
 - Establish fees to administer program.
 - Require MMRE to enforce rules and regulations.



Legislation: State (cont.)

- SB 439 (Steinberg & Leno): Approved by Senate.
- Bill passed out of Assembly Public Safety Committee on June 18.
- Likely in Assembly Health Committee August 13.
- Amendments pending: anti-preemption, CA Medical Board guidelines for recommending MM to patients, delete nuisance abatement language.
- Usual proponents/opponents.



Legislation: Federal

- **HR 1523 (Rohrabacher, R-CA-48 [Orange County]):**
 - “Respect State Marijuana Laws Act.”
 - Amends CSA.
 - Exempts dispensaries complying with state marijuana laws.
 - Referred to committee.



CEQA

■ Challenges:

- **San Bernardino County**
- **Kern County**
- **City of Los Angeles**

■ Practice Tip:

- **Address in staff report and ordinance.**
- **Adopt and timely post NOE**

CEQA



Anti-SLAPP

City of Costa Mesa v. D'Alessio Investments LLC (2013) 214 Cal. App. 4th 358, rev. den.

- City must face property owner's slander claims after obtaining injunction against alleged prostitution and dispensaries.



Nuisance Abatement Under Local Ordinances

***City of Monterey v. Carrnshimba* (2013) 215 Cal.App. 4th 1068.**

- **Perm. injunction prohibiting dispensary per moratorium.**
- **Business license application d/n disclose dispensary use.**
- **City denied application upon discovering truth.**
- **Court of Appeal affirmed.**
- **Nuisance b/c not allowed commercial use b/f moratorium.**
- **Dispensary not = personal services or retail sales.**
- **Also not in pharmacy category: not licensed/no Rx.**
- **B/c never lawfully operated, moratorium not retroactively applied to existing lawful business.**





Proof of Compliance With MMP

- ***People ex rel. City of Dana Point v. Holistic Health* (2013) 213 Cal.App.4th 1016.**
 - **Summary judgment reversed.**
 - **Disputed factual issue whether collective made profit.**



Proof of Compliance With MMP (cont.)

- ***People v. Solis* (2013) 217 Cal.App. 4th 51.**
 - No MMP defense if operation not "collective or cooperative" and marijuana sold for profit.
 - All excess income treated as personal "salary."
 - No accountability/disclosure to membership.
 - Collective not registered as nonprofit.
 - Marijuana purchased from non-members.
 - No evidence to raise reasonable doubt whether collective operated for profit or lawful.



Proof of Compliance With MMP (cont.)

- ***People ex rel. Trutanich v. Joseph* (2012) 204 Cal.App. 4th 1512.**
 - 11362.765 allows reasonable compensation for services to patient, but only to primary caregiver.
 - Defendant not primary caregiver.
 - Patrons never designated Def as primary caregiver.
 - Def d/n consistently assume responsibility for their housing, health or safety.
 - Dispensary not licensed as clinic, health care facility, residential care facility, or hospice.
 - Persons who purchased marijuana d/n reside in same city or county as Def.
 - Of 1,772 patients in customer records, only 601 had address in same area.



Proof of Compliance With MMP (cont.)

- ***People v. Jackson* (2012) 210 Cal.App. 4th 525.**
 - Defendant charged with sale and possession for sale.
 - Motion granted to prohibit MMP defense.
 - Court of Appeal reversed.
 - Defendant only required to produce evidence which would create a reasonable doubt as to MMP defense.
 - If dispensary not for profit, and all members qualified patients, large membership did not prevent MMP defense.
 - Cf. *People v. Solis*, *People v. Joseph*.



- **Questions?**