Case Summary
Pack v. Superior Court (City of Long Beach)

Opinion Available at: http://www.courtinfo.ca.gov/opinions/documents/B228781.DOC

Background and Courtôs Decision:

Long Beach adopted a medical marijuana collectives ordinance that required collectives to have a permit to operate, set buffer zones between collectives and sensitive uses, and required collectives to be at least 1,000 feet apart. A lottery system was created for applicants whose collectives would be within 1,000 feet of one another to determine which of them would operate. Applicants were required to submit an application fee in excess of $14,000, which was nonrefundable, and permit holders thereafter paid an annual fee of $10,000 or more. Collectives were also required to have an independent laboratory analyze samples of their medical marijuana to ensure that it contains no pesticides or contaminants. Any collective operating at the time the ordinance was adopted that did not subsequently obtain a permit under the ordinance was required to close.

Plaintiffs challenged the ordinance, alleging the cityôs ordinance is preempted by both state and federal law. The superior court upheld the ordinance, and plaintiffs appealed. The Second District Court of Appeal reversed, concluding that to the extent the ordinance permits and regulates medical marijuana collectives rather than merely decriminalizing specific acts, it is preempted by federal law.

In the opinion, the court makes a distinction between ordinances that affirmatively ñauthorizeò or ñpermitò conduct illegal under federal law (i.e., marijuana distribution, cultivation or possession) and those that merely ñimpose further limitations on medical marijuana collectives beyond those imposed under the MMPA, and do not, in any way, permit or authorize activity prohibited by the federal CSA.ò In other words, ordinances framed in terms of restrictions on the location or manner of operation of dispensaries (or cultivation sites, etc.), which merely tolerate by negative implication those activities that are not prohibited, are federally permissible.

Practical Considerations and Outstanding Issues

- The decision is not yet final. The City of Long Beach plans to seek California Supreme Court review, which is likely to garner heavy amicus support from all sides of the issue.

- The distinction between ñpermittingò rather than merely ñdecriminalizingò specific acts related to medical marijuana will be a difficult one for local

governments to decipher. Both ñpermittingò and ñdecriminalizingò these activities, however phrased, have precisely the same functional resultð no prosecution under the local agencyôs own enforcement powers. In trying to comply with the opinion, counties may want to avoid issuing anything denominated a ñpermit,ò or any language suggesting affirmative approval of the activity by the local agency. That said, the court also left open the possibility of a quasi-ministerial permit issued as a matter of right to those activities meeting all local requirements. Such a permit would merely serve as a method for identifying compliant activities rather than signifying a discretionary local decision to allow a specific federally prohibited operation. If the Supreme Court does not review this opinion, it will probably take some time and further litigation for counties to understand precisely what can be affirmatively ñpermittedò without running afoul of federal preemption.

- The decision clearly does not affect dispensary bans, but it does appear that bans are not mandated by the opinion either. Toleration remains permissible. Zoning and setback restrictions (phrased in terms of where marijuana activities are and aren't prohibited, rather than where they are affirmatively permitted), should still be acceptable. Restrictions on the manner and intensity with which such activities are conducted also appear largely permissible. With careful drafting, many local regulatory goals can likely still be achieved. However, provisions that allow a county to make discretionary determinations regarding which specific operations will be permitted/tolerated are problematic, as are provisions that limit the number of permitted/tolerated operations (which necessarily require some method of selecting between competing operations).

- The *Pack* opinion only addresses federal preemption. The court was careful to note that even if an ordinance is permissible under federal law, it may still face a state preemption challenge. Several cases addressing state law preemption are currently pending in state appellate courts, though recent legislative efforts (AB 2650 and AB 1300) appear to reduce concerns about state law preempting local police power regulation.