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To:	RCRC Board of Directors
From:	Paul A. Smith, Senior Legislative Advocate Randall Echevarria, Legislative Analyst
Date:	January 8, 2013
Re:	Update on Litigation of Municipal Powers Involving Medical Marijuana

Summary

This memo provides an update on important court decisions regarding local municipality's regulatory authority over medical marijuana cultivation practices and the presence of dispensaries.

Background

In 1996, California voters approved Proposition 215 – the Compassionate Use Act (CUA) – which exempts patients and defined caregivers who possess or cultivate marijuana for medical treatment recommended by a physician from criminal laws which otherwise prohibit possession or cultivation of marijuana. In conjunction with Proposition 215, the Legislature approved Senate Bill 420, also known as the "Medical Marijuana Program Act (MMPA)," in 2003 to further implement the state's medical marijuana laws, guidelines and practices. Specifically, SB 420 extended the CUA's criminal defenses to include persons who "who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes," and expanded the criminal laws to which those defenses apply.

Under the federal Controlled Substances Act, it is a violation of federal law to possess, use, cultivate, and/or distribute marijuana. The Controlled Substances Act is enforced by federal law enforcement agents and prosecutions are made in federal courts by the U.S. Department of Justice (DOJ). In a departure from the Bush Administration's policy, in 2009 the DOJ (under the Obama Administration) issued a memorandum to U.S. Attorney's to focus federal resources upon those who are engaged in the cultivation, use and distribution of marijuana that are not "in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." However, the Justice Department has subsequently cautioned that the 2009 memo was never intended to shield large-scale "commercial" marijuana cultivation and distribution activities from federal enforcement action and prosecution, "even where those activities purport to comply with state law." Further, the four United States Attorneys' offices in California have each reiterated their commitment to combating marijuana distribution, and have contacted several cities and counties with liberal marijuana permitting schemes and expressed their view that these schemes violate federal law.

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In August of 2008, Attorney General Jerry Brown issued non-binding guidelines for law enforcement and medical marijuana patients to clarify the state's laws. Among other things, the Guidelines opined "that a properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful under California law . . ." Although this conclusion is not universally accepted among municipal lawyers, it appears to be gaining agreement among California's appellate courts.

In 2011, the Legislature enacted AB 1300 (Blumenfield) which provides local governments with the ability to enact ordinances regulating the location, operation, and/or establishment of medical marijuana collectives.

Issue

Despite California law and the California Attorney General guidance, it remains unclear what regulatory authority municipalities have over medical marijuana dispensaries and the perimeters of local cultivation restrictions. As stated above, many municipalities have adopted rules governing medical marijuana collectives and cooperatives to varying degrees – banning retail dispensaries, regulating the time, place, and manner of dispensaries, restricting the growing of marijuana, etc. As a result of strict prohibitions against medical marijuana dispensaries, patient rights advocates have filed numerous lawsuits. In essence, these suits center on what prevails – the interests of patients access to medical marijuana of the CUA and corresponding statutes versus the long-held power of cities and counties to make land-use decisions.

The following are references to important cases:

City of Claremont v. Kruse (2009)

The City of Claremont enacted a temporary urgency moratorium on marijuana dispensaries in 2006 - shortly *after* a dispensary opened up in the city without a business license. The Court of Appeal held that the moratorium was not preempted by the state medical marijuana laws and ordered the dispensary shut down. The decision suggests that the CUA and MMPA have no effect upon local government's land use powers; however, marijuana advocates argue that the decision involved a temporary moratorium, rather than a permanent dispensary ban, and that the dispensary's failure to successfully procure a business license arguably provided alternative grounds for the shutdown order. The Supreme Court denied review in *Kruse*, and this case is now final.

Qualified Patients Association v. City of Anaheim (2010)

The City of Anaheim enacted an ordinance in 2007 banning all marijuana distribution facilities consisting of three or more people who otherwise qualified as patients or caregivers under MMPA and CUA. The ban was challenged by a collective, and the City defended by arguing that (1) their permanent ban was not preempted by state law, and (2) even if it was, the state medical marijuana laws were preempted by federal law (at least to the extent that they forced local governments to tolerate dispensaries). The Court of Appeal concluded that the federal CSA did not preempt state law, and remanded the matter back to the Superior Court to consider whether the ordinance was valid under state law. The Orange County Superior Court has since upheld the ordinance under state law. An appeal from that decision is pending.

County of Los Angeles v. Hill (2011)
In 2006, Los Angeles County enacted an ordinance that required marijuana dispensaries to obtain a use permit and business license (and pay the associated fees), restricted dispensaries to commercial zones, and prohibited dispensaries from locating within 1,000 feet of schools, libraries, and various other sensitive land uses. When the County brought a nuisance abatement action against a non-compliant dispensary, the dispensary responded by claiming that the ordinance was preempted by the state medical marijuana laws and violated equal protection. The Court of Appeal upheld the ordinance, holding that municipalities retain the right to regulate the "manner and location" in which dispensaries are operated. The MMPA "does not confer on qualified patients and their caregivers the unfettered right to cultivate or dispense marijuana anywhere they choose. The County's constitutional authority to regulate the particular manner and location in which a business may operate is unaffected" by the MMPA. The court also rejected the argument that treating dispensaries differently from other land uses violated the constitutional guarantee of equal protection of law. The Supreme Court denied review in this case. Nevertheless, Los Angeles County has since replaced this ordinance with a complete dispensary ban, which is presently the subject of a separate challenge.

Pack v. Superior Court (2011)
Long Beach enacted a comprehensive permitting ordinance for marijuana dispensaries, under which a limited number of dispensaries, meeting stringent conditions, could obtain discretionary use permits upon payment of a substantial fee. This ordinance was challenged by a group of patients claiming that the *permitting* provisions were preempted by federal law (under which marijuana is absolutely prohibited). The Court of Appeal concluded that an ordinance "which permits and regulates medical marijuana collectives rather than merely decriminalizing specific acts" presents an "obstacle" to the federal CSA, and is therefore preempted. The Court drew a strong distinction between a state or local law that affirmatively *authorizes* marijuana-related conduct, and a law that merely imposes "further limitations" upon such conduct (such as location restrictions without a permitting feature), which would not be preempted. (This distinction has been challenged by many municipal lawyers as being purely semantic.) The California Supreme Court granted review of this case (thereby "depublishing" the Court of Appeal decision, but subsequently dismissed review as moot because Long Beach repealed the permitting ordinance (replacing it with a semi-complete ban). Many local agencies responded to the Court of Appeal decision by replacing their permit schemes with dispensary bans. The Court of Appeal decision is consequently no longer binding precedent, but these arguments continue to be raised by law enforcement groups and other marijuana dispensary opponents.

Supreme Court Dispensary Ban Cases (City of Riverside v. Inland Empire Patient's Health and Wellness Center, Inc., et al.)
The California Supreme Court is presently considering whether municipalities may completely ban marijuana dispensaries consistent with state law. The Court has granted review of a number of Court of Appeal decisions coming down both for (Riverside, Upland, City of Los Angeles) and against (Lake Forest, County of Los Angeles) municipalities' right to ban dispensaries. Municipal attorneys and organizations argue that the state medical marijuana laws address only the criminal process, and do not

restrict local land use powers. Marijuana advocates argue that while municipalities may enact reasonable regulations for dispensaries, absolute bans impermissibly thwart the legislative intention behind the MMPA. This case has been fully briefed and is awaiting oral argument in the Supreme Court. (The timing of oral argument and decision are entirely within the Court's discretion and cannot be predicted with any accuracy.)

Browne v. Tehama
Tehama County adopted a cultivation ordinance which: 1) declares it a public nuisance to grow marijuana anywhere within 1,000 feet of a school, school bus stop, church, park, or youth-oriented facility; 2) restricts gardens to no more than 12 mature or 24 total plants on parcels of 20 acres or less; 3) requires outdoor gardens to be surrounded by an opaque fence at least six feet high and located 100 feet or more from the property boundaries; and, 4) requires every patient garden to be registered with the county health services agency for a fee.

At the trial court in Tehama, Superior Court Judge Richard Schuler said the court "finds as a matter of law that the state medical marijuana law does not preempt the field of county zoning," and the county's marijuana ordinance is not pre-empted by any state law nor does it violate or conflict with any state law. Opponents of the Tehama ordinance – which has served as a model cultivation ordinance for many jurisdictions – have appealed to the 3rd District Court of Appeal where the court heard oral arguments in late 2012. A ruling is expected at any time, and it is likely further appeals will be sought to the State Supreme Court.

Mendocino County
In another twist of events, late last year the U.S. Attorney's Office subpoenaed the County of Mendocino seeking information regarding the county's cultivation ordinance. In 2011, the County enacted a very liberal set of restrictions on the growing of medical marijuana and derived a significant amount of revenue from the regulatory practice.

On a final note, last year the Legislature considered AB 2312 (Ammiano). AB 2312 proposed a comprehensive scheme of state regulatory oversight of the entire medical marijuana industry, and in many ways, proposed state regulation over dispensaries and cultivation – a power traditionally reserved for local land-use entities. While AB 2312 secured passage in the State Assembly, the measure failed to proceed in the State Senate. Assemblyman Ammiano (D-San Francisco) is expected to introduce a similar measure in the 2013 Legislative Session.

Staff Recommendation
RCRC staff will keep the RCRC Board of Directors updated on key medical marijuana dispensary court cases pending in the California Supreme Court.