

ORDINANCES

Regulating Medicinal Marijuana

by Brad Bailey

Colorado, as well as 13 other states and the District of Columbia,[1] has adopted legislation to legalize the use of marijuana for medicinal purposes. Colorado is unique, as the legislation to legalize the use of marijuana for medical purposes is in the State Constitution. While the legislation grants, to state governments, the licensing of medical marijuana dispensaries, caregivers, and growers, the location of these various uses in the distribution chain falls squarely upon municipal and county governments. The operation of medical marijuana dispensaries has become a big business. Although one real estate agent has suggested that the dispensaries are no different than liquor stores, his analogy is only partially correct: the dispensaries are likely no different than pharmacies.[2]

To use marijuana medically, a patient must obtain a certification from a physician that he possesses a medical condition for which the consumption of THC will provide therapeutic relief.[3] (Smoking or ingesting makes no difference.) The patient is then placed upon a list with the state health department and allowed to: grow marijuana for his own use, cultivate plants for another, or purchase marijuana from a licensed caregiver at a licensed dispensary. A grower may contract with dispensaries to provide medical marijuana for any number of patients so long as the grower is appropriately licensed by the state. The business model is similar to the relationship between the pharmaceutical companies, druggists, and patients: a licensed physician issues a prescription to a patient for a drug; the patient takes the prescription to the pharmacy; and a licensed pharmacist fills the doctor's order through compounding the drug or dispensing the appropriate pill, tablet, or elixir, shipped to the pharmacy by the drug company.

Local governments have responded to this new "pharmaceutical" business in different ways. The reasons are as practical as political. Many local governments require business licenses to be issued before any business is allowed to operate within their jurisdiction. The business license itself may be an "occupation license," so that professionals and retail establishments must both be licensed, or a license may be one for the collection of taxes upon retail sales only.[4] Many of these ordinances contain a provision that the license may be revoked for the violation of any federal, state or local statute, regulation or ordinance. Because the sale of marijuana is a violation of federal law,[5] a local government may refuse to issue the appropriate license to a dispensary and avoid the problem altogether.

This brings us to the next step in the analysis: the regulation of dispensaries and growers as a land use. The use and sale of medical marijuana doesn't appear to implicate a fundamental right. Other than religious use, there is no fundamental right to the receipt of any controlled substance. A municipality could restrict, through zoning, all medical marijuana dispensaries to an industrial district (along with any sewage plants, airports, tattoo parlors, or strip clubs). If dispensaries have no greater impact than any other retail establishment, then, perhaps, it makes better land use sense to locate them in the same zone district as a pharmacy or other medical use.

While law enforcement and neighboring citizens may be concerned about potential criminal activity around these dispensaries, there haven't been any land-use studies that demonstrate any negative secondary effects. However, there have been burglaries of at least two dispensaries in Colorado in the last year, and there were 108 burglaries of drug stores or doctors' offices in 2008.[6]

The approaches in regulating medical marijuana dispensaries are as varied as municipalities themselves. Municipalities are employing specialty licensing procedures similar to those used to regulate adult businesses; are zoning dispensaries to a defined district (such as commercial or industrial area); requiring dispensaries to be located a certain distance from schools or other locations; and managing operational concerns (i.e., the hours of operation, odor mitigation, security requirements and growing on premises). Additional regulations include requiring a background investigation and requiring dispensaries to keep a confidential patient ledger.

Charter provisions, business licensing procedures, zoning, nuisance codes, and federal law may allow municipalities to prohibit medical marijuana dispensaries from operating in their communities. Provisions of charters, business licensing procedures, zoning, or nuisance codes that require all businesses to comply with federal law are being used to prohibit medical marijuana dispensaries from opening.

The Colorado Municipal League has collected a number of ordinances from cities and towns in Colorado that may be used as guides in drafting regulations to police the operation of medical marijuana dispensaries.[7]

Notes

1. The other states are Alaska, California, Hawaii, Maine, Maryland, Michigan, Montana, Nevada, New Mexico, Oregon, Rhode Island, Vermont and Washington. The

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Pandemic

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3. For more information, see The Centers for Disease Control and Prevention (CDC), *CDC Guidance for Businesses and Employers To Plan and Respond to the 2009–2010 Influenza Season* (Oct. 21, 2009); OSHA, *Worker Guidance: Precautions For All Workers during the 2009-2010 Flu Season* (Nov. 05, 2009), and OSHA, *Guidance on Preparing Workplaces for an Influenza Pandemic*, OSHA 3327-02N 2007 (Feb. 01, 2007) at http://www.osha.gov/Publications/influenza_pandemic.html.
4. *CDC Guidance for Businesses and Employers To Plan and Respond to the 2009–2010 Influenza Season* (Oct. 21, 2009).
5. 29 C.F.R. § 541.602 (2004).
6. For additional information, see *Pay and Absence Concerns for Exempt Employees*, by the Boardman Law Firm.
7. CDC, *People at High Risk of Developing Flu-Related Complications* (Nov. 10, 2009).
8. *See, e.g.*, the Americans With Disabilities Act, 42 U.S.C.§ 12111(3) (West 2009).
9. For example, a major exception to many states' at-will employment doctrines is "discharge against public policy."
10. The CDC suggests, for example, that employers develop flexible leave policies to allow workers to stay home, and not require a doctor's note for workers who are ill with influenza-like illness to validate their illness or to return to work, since doctors' offices and medical facilities may be extremely busy and not be able to provide such documentation in a timely way. CDC Guidance, *supra* note 4.
11. Freeman v. Chertoff, 604 F. Supp.2d 726 (D. N.J. 2009).
12. Robinson v. Bodman, 333 Fed. Appx. 205 (9th Cir. 2009).
13. "[O]ver the course of the 477 hours that Robinson worked from home, the only work she produced was one half-page report." *Id.* at 208.
14. No. 2:2009cv00289 (E.D. Wis., filed Mar. 15, 2009). *See also*, Abdelkhaleq v. Precision Door of Akron, No. 5:07 CV 3585, 2009 WL 2762356 (N.D. Ohio Aug. 28, 2009) (employee on "pager duty" sued under FLSA claiming time spent on-call constituted time spent working). ML

Merger of Adjoining Parcels

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29 Cal.4th 990 (Cal. 2003) (holding that lots shown on an 1865 map but never individually deeded were not entitled to grandfather status, absent any law then authorizing divisions of land by map).
4. *See, e.g.*, San Diego, Calif. Code § 125.0760 (2000).
5. Cal. Gov't Code § 66451.10, *et seq.* (West 2009). For a thorough account of California's merger law, see *Merger and Local Governments* (1986), available from the California Governor's Office of Planning and Research.
6. *See* Stell v. Jay Hales Dev. Co., 11 Cal. App. 4th 1214 (Cal. Ct. App. 1992); *see also*, Citizens for Covenant Compliance v. Anderson, 12 Cal. 4th 345 (Cal. 1995) (disapproving a ruling in *Stell* regarding enforceability of restrictive covenants).
7. 11 Cal. App. 4th at 1223-24.
8. Cal. Gov't Code § 66451.10, *et seq.* (West 2009).
9. Cal. Gov't Code §§ 66451.12 to 66451.17 (West 2009).
10. 11 Cal. App. 4th at 1224-25.
11. Cottone v. Zoning Hearing Bd. of Polk Twp., 954 A.2d 1271 (Pa. Commw. Ct. 2008).
12. *Id.* at 1276.
13. *Id.* at 1279.
14. *Id.*
15. 151 Cal. App.4th 827 (Cal. Ct. App. 2007).
16. *Id.* at 834. ML

Economic Incentives

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23. Rachel Weber, *Do Better Contracts Make Better Economic Development Incentives*, 68 J. Am. Plan. Ass'n 43 (2002).
24. Greg LeRoy, *Nine Concrete Ways to Curtail the Economic War Among the States, in Reining in the Competition for Capital*, Ann Markusen, ed. (Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 2007).
25. Scott J. Ziance, *Making Economic Development Incentives More Efficient*, 30 Urb. Law. 33 (1998).
26. Timothy J. Bartik, *Solving the Problems of Economic Development Incentives*, 36 Growth & Change 139, 143 (2005). ML

Supreme Court

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process right of the plaintiffs." By the time the case reached the oral argument stage before the Supreme Court, all of the underlying property disputes had been resolved, either because the property had been returned or because the plaintiff had relinquished a claim to the property. The Supreme Court, in an opinion authored by Justice Breyer, vacated and remanded on the basis that, in such circumstances, the case no longer presented an Article III "case or controversy." An actual controversy had to exist at all stages of review, not just when the complaint was filed, and the complaint before the Court sought only declaratory and injunctive relief, not damages (a damages claim was launched only after the Seventh Circuit issued its ruling). Because the "case more closely resemble[d] mootness through 'happenstance' [rather] than through 'settlement,'" the exception to vacating the judgment set out in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U. S. 18, 21 (1994), did not apply (namely, that, by virtue of a settlement, a party had "voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari"). The Court concluded that "we should follow our ordinary practice, thereby 'clear[ing] the path for future re-litigation of the issues.'" The upshot? Local governments will need to wait for this future re-litigation to clarify how long law enforcement officers may retain seized property without providing for administrative review and without offending due process. ML

Ordinances

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District of Columbia voters adopted an initiated ordinance in 1998, which has not been adopted by Congress.
2. Joel Warner, *Medical marijuana has become a growth industry in Colorado*, Westword, Feb. 5, 2009.
3. Colorado Constitution, Article XVIII, §14(1)(a).
4. Littleton calls their sales tax license a business license, although a lawyer who

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sells nothing at retail is not required to have such a license. *See* Littleton City Code, sec. 3-9-2-1.
5. 21 U.S.C.A. § 801 *et seq.* (West 2009).
6. Crime in Colorado 2008, Colorado Bureau of Investigation, at http://cbi.state.co.us/dr/cic2k8/incident%20based%20reports/Property%20Crimes/burglary.html.
7. *See* http://www.cml.org/new.aspx. ML

Inside Canada

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of that water to the cows. "These two difficulties suggest an unexplained reason, unrelated to the chemicals in the buried waste, for the cows' unwillingness to drink the Berendsens' well water." Secondly, on foreseeability, "despite the voluminous amount of expert evidence called by the Berendsens, not one of their many experts testified about the known or likely harmful effects of buried waste material in the 1960s…No evidence was led that in the 1960s soil geologists understood chemicals in buried waste material could migrate to well water 60 feet away." Absent such evidence, the finding that Ontario breached the standard of care was an error of law. Lastly, and flowing from the previous finding, there was no duty to remediate. Ontario made a "deliberate decision" not to exercise its power to remove the contaminants, and it "did so for a legitimate reason: the water met existing standards." ML

Cases

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and agreed to call her drug dealer, Smith. As she arranged for a purchase at her residence, police recorded the call. When Smith arrived, he was arrested and his cell phone was seized. The arresting officer put the cell phone (one with phone, text messaging, and camera capabilities) in his pocket and placed Smith in a cruiser, then searched the scene for evidence. Police later confirmed that Smith's phone had been the one used to arrange for the drug purchase, but the officers did not have either a warrant or Smith's consent to search the phone data. Smith filed a pretrial motion to suppress evidence, objecting in part to the warrantless search of his cell phone. The trial court ruled that it would permit testimony regarding the cell phone's call records and phone numbers, but not the use of photographs that had been discovered in the phone. Smith appealed.

Pointing out that neither the United States Supreme Court nor any state supreme court had ruled on the warrantless cell phone search, the Supreme Court of Ohio began by contrasting the two approaches to characterizing a cell phone for Fourth Amendment search purposes. A phone could be treated as akin to a closed container found on an arrestee's person, which may be searched; or, alternatively, as an object more like a laptop computer, in which arrestees had a significant privacy interest and which required consent or a warrant. The court adopted the second approach, finding that objects "falling under the banner of 'closed container' [had] traditionally been physical objects capable of holding other physical objects." A cell phone was "wholly unlike any physical object found within a closed container," and its ability to store large amounts of private data gave its user "a reasonable and justifiable expectation of a higher level of privacy in the information" it contained. Once the cell phone was in police custody, the police were required to obtain a warrant before intruding into the phone's contents. In this case, a search of the cell phone's contents was not necessary to ensure officer safety, and the state failed to present any evidence that the call records and phone numbers were subject to imminent destruction. "We therefore hold that because a cell phone is not a closed container, and because an individual has a privacy interest in the contents of a cell phone that goes beyond the privacy interest in an address book or pager, an officer may not conduct a search of a cell phone's contents incident to a lawful arrest without first obtaining a warrant." *State v. Smith*, No. 2008-1781, 2009 WL 4826991 (Ohio Dec. 15, 2009). ML

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