

ORDINANCES

Medical Marijuana Dispensaries: A Tale of Two Cities

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In 1996, California enacted the Compassionate Use Act (Health & Saf. Code, § 11362.5), which authorized the use of marijuana for medical purposes. One of the provisions of the Code, § 11570 ("drug den" abatement law), stated that "Every building or place used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance ... is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance." The State subsequently enacted the Medical Marijuana Program Act (MMP), codified in Health and Safety Code sections 11362.7 through 11362.83, which authorized the access of patients and caregivers to medical marijuana through the operations of medical marijuana cooperatives, collectives, and dispensaries as "storefront outlets." The MMP provided that qualified patients and caregivers had limited immunity from prosecution for violation of various sections of the Code regulating marijuana, including the "drug den" abatement law. Section 11362.768(f) stated, "Nothing in this section shall prohibit a city, county, or city and county from adopting ordinances or policies that further restrict the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider;" and subdivision (g) stated, "Nothing in this section shall preempt local ordinances, adopted prior to January 1, 2011, that regulate the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider."

The Los Angeles County Board of Supervisors enacted an ordinance that banned medical marijuana dispensaries in all zones in unincorporated areas of County of Los Angeles, effective January 06, 2011. The operators of a dispensary challenged the ban on the basis that a *total* ban was preempted by the state law, being inconsistent with the MMP. The County contended its ban was a permissible land use regulation.

The Court of Appeal of California, Second Appellate District, ruled that the ban was preempted because the County's per se ban on medical marijuana dispensaries prohibited what the Legislature had authorized. By enacting the MMP, the Legislature expressly authorized collective, cooperative cultivation projects as lawful means of obtaining medical marijuana under California law, and expressly chose to place such projects beyond the reach of nuisance abatement under section 11570, if predicated solely on the basis of the project's medical marijuana activities. The ability to regulate or restrict the location of a business, construed in its usual and ordinary meaning, did not confer the ability, in this context, to ban, prohibit, or prevent all medical marijuana collectives and cooperatives from operating within the entire jurisdiction. "Had the Legislature intended to include an outright ban or prohibition among the local regulatory powers authorized in section 11362.768, subdivisions (f) and (g), it would have said so." Viewing the County's ban as a zoning law as opposed to a drug abatement law did not save it from preemption. *County of Los Angeles v. Alternative Medicinal Cannabis Collective*, No. B233419, 2012 Cal. App. LEXIS 772 (Cal. Ct. App. July 02, 2012).

However, a day after that ruling, a separate panel of the Second District Court of Appeal reversed a preliminary injunction granted against a City of Los Angeles ordinance, L.A. Mun. Code, §45.19.6 *et seq.*, regulating the number and geographic distribution of medical marijuana collectives within city limits (it capped the total number of allowable collectives at 70). The ordinance was passed due to the "explosive" increase in the number of dispensaries, numerous citizen complaints, law enforcement concerns about this proliferation, and evidence that not all of these establishments were operating according to state law. The challenged ordinance allowed only medical marijuana collectives that had registered under an earlier, interim ordinance in 2007 (and had met other requirements) to continue operation, and required all collectives not eligible to register to cease operation immediately. It did, however, allow these ineligible collectives to participate in a future lottery for the opportunity to register should the total number of operating collectives ever fall below 70. The ordinance had a "sunset" date after two years unless extended by the Los Angeles City Council and, if not extended, all collectives were required to cease operation.

The trial court granted a preliminary injunction against the enforcement of the ordinance on the basis of violations of federal equal protection and preemption. The appellate court reversed and remanded. Analyzing the ordinance under the rational basis test, the court found "grandfather provisions" had routinely withstood equal protection challenges, and an economic regulation creating classifications with some reasonable basis did not result in denial of equal protection simply because the application of the classifications resulted in some inequality. As for preemption by state law, the MMPA had been amended to expressly allow for "civil and criminal enforcement" of local ordinances "that regulate the location, operation, or establishment of a medical marijuana cooperative or collective" (§ 11362.83, subds. (b), (a)). This change to the MMPA, though it postdated both the ordinance and the trial court's enjoining of it, was seen as relevant by the appellate court. This clearly expressed the

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Occupy Movement *Cont'd from page 9*

lives/2011/12/27/gIQAwCtNRP_story.html (last accessed May 8, 2012).
31. Meghan Barr, *Occupy Wall Street: 6 Months Later, What Has Occupy Protest Movement Achieved?*, The Huffington Post, Mar. 16, 2012, at http://www.huffingtonpost.com/2012/03/16/occupy-wall-street-6-months-later_n_1352752.html (last accessed May 8, 2012).
32. Colin Moynihan, *Evicted From Park, Occupy Protestors Take to the Sidewalks*, The New York Times, Apr. 12, 2012, at http://www.nytimes.com/2012/04/13/nyregion/evicted-from-park-occupy-protesters-take-to-the-sidewalks.html (last accessed May 8, 2012).
33. Gene Policinski, *Government must be careful with tactics against Occupy camps*, First Amendment Center, Mar. 02, 2012, at http://www.firstamendmentcenter.org/government-must-be-careful-with-tactics-against-occupy-camps (last accessed May 13, 2012).
34. Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 650, (1981) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972)). ML

Public Employer *Cont'd from page 13*

against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit), Age Discrimination in Employment Act of 1967 (prohibits age discrimination against workers 40 or older and also makes it illegal to retaliate against a person because the person complained about age discrimination), Title VII of the Civil Rights Act of 1964 (discrimination on the basis of race, color, religion, national origin, or sex prohbited; the law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit), Genetic Information Nondiscrimination Act of 2008 (this makes it illegal to discriminate against employees or applicants because of genetic information).
8. Macy v. Holder, Appeal No. 0120120821, April 20, 2012 at http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt (transgender complainant's complaint of discrimination based on gender identity, change of sex, and/or transgender status held cognizable under Title VII).
9. As an example, the Civil Service Reform Act of 1978, prohibits federal employees who have authority to take, direct others to take, recommend or approve any personnel action from discriminating against applicants and employees on the bases of race, color, sex, religion, national origin, age, disability, marital status or political affiliation and from discriminating against an applicant or employee on the basis of conduct which does not adversely affect the performance of the applicant or employee. The Office of Personnel Management has interpreted the prohibition of discrimination based on "conduct" to include discrimination based on sexual orientation. *See* U.S. Office of Personnel Management, Addressing Sexual Orientation Discrimination In Federal Civilian Employment, A Guide to Employee's Rights, at http://www.opm.gov/er/address2/Guide01.asp (last visited July 22, 2012) and U.S. Equal Employment Opportunity Commission, Discrimination Based on Sexual Orientation, Status as a Parent, Marital Status and Political Affiliation, at http://www.eeoc.gov/federal/otherprotections.cfm (last visited July 22, 2012). ML

Supreme Court *Cont'd from page 23*

rantless "sniff test" violated his right against unreasonable searches under the Fourth Amendment.

The Florida court granted the motion to suppress. "Contrary to popular belief, a 'sniff test' conducted at a private residence is not necessarily a casual affair in which a canine officer and dog approach the front door and the dog then performs a subtle 'sniff test' and signals an 'alert' if drugs are detected." Instead, it was a "public spectacle," "a sophisticated undertaking that was the end result of a sustained and coordinated effort by various law enforcement departments." Accordingly, given the special status accorded a citizen's home under the Fourth Amendment, the "sniff test" was a "substantial government intrusion into the sanctity of the home" and constituted a search within the meaning of the Fourth Amendment. As such, the search had to be preceded by an evidentiary showing of probable cause. ML

Code Enforcement *Cont'd from page 31*

I do believe in making the penalties as stiff as possible. The penalty provision should also include attacking municipally-issued licenses, such as a tobacco dealer's license. This provision would allow pursuing businesses, such as gas stations and convenience stores selling these substances, which would be the likely places for teens and young adults to purchase the drugs.

Folks, the war on drugs just got bigger and more problematic. If the thinking on the previous version of the war on drugs is that it is unwinnable, what position are we in now as we deal with synthetic drugs, a moving target? We all need to work in concert to wage this war, as best we can. ML

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"Legislature's intent to allow not only local regulation of the geographic placement of collectives and the manner in which they conduct operations, but also local regulation of the creation of collectives. The local power to regulate creation, by definition, carries with it the power to regulate the number of collectives in existence." The trial court's order granting the preliminary injunction was therefore reversed. *420 Caregivers, LLC v. City of Los Angeles*, No. B230436, 2012 Cal. App. LEXIS 780 (Cal. Ct. App. July 03, 2012). The League of California Cities and California State Association of Counties participated as Amici Curiae on behalf of the City in this case. ML

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intended that the projectiles explode over the students' heads or against a wall, the officers' conduct resulted in Nelson being hit by a projectile that they intentionally fired towards a group of which he was a member. Their conduct was intentional, it was aimed towards Nelson and his group, and it resulted in the application of physical force to Nelson's person as well as the termination of his movement."

Regarding the reasonableness of the use of force, Nelson and his friends did not