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Courts Uphold Closure of California Medical Marijuana Dispensaries

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❖ Introduction

In three separate matters, judges in both state and federal courts have recently upheld the rights of cities to prohibit medical marijuana dispensaries, on several legal theories. The most novel approach taken so far was the claim that a person with a disability had the "right" to use marijuana for medical purposes, if it was done under state law and with a doctor's recommendation.

The other cases focus on a city's right to control land use through its own zoning ordinances and in accordance with state law (Cal. Govt.Code 37100).

❖ ADA and Medical Marijuana

In the case of James v. City of Costa Mesa, #8:10-cv-00402 (C.D. Calif.), several plaintiffs sued the cities of Costa Mesa and Lake Forrest for the actions taken by the

cities to ban the distribution of marijuana for medical use in their communities. Four individuals who suffered from various illnesses, and who had recommendations from their doctors to use marijuana, filed a motion for a preliminary injunction to stop the cities from interfering with their accessing medical marijuana.

On April 30, 2010, Judge Andrew J. Guilford, of the U.S. District Court for the Central District of California, issued an order denying the plaintiffs' motion for a preliminary injunction. The Court noted that the "plaintiffs argue that the Americans with Disabilities Act (ADA) gives disabled citizens a federally protected right to use medical marijuana if such use is legal under state law and done with appropriate supervision.

"They then argue that they will suffer irreparable harm absent a preliminary injunction, and that the balance of equities and the public interest weigh in favor of a preliminary injunction."

Plaintiffs are members of marijuana "collectives" in Costa Mesa and Lake Forest. (In fact, the law does not refer to "collectives" or "cooperatives," as entities. It merely states that qualified patients can associate together collectively or cooperatively to cultivate medical marijuana. Those terms are used as adverbs, not nouns.)

The cities had prohibited the distribution of medical marijuana within their limits and Costa Mesa adopted an ordinance which zoned out all marijuana dispensaries.

Lake Forest, on the other hand, filed several lawsuits against dispensaries arguing that "marijuana collectives are a nuisance *per se*." In their lawsuit, the plaintiffs, claiming violations under the ADA, "seek a reasonable accommodation from Defendants' zoning laws and policies to obtain access to medical marijuana to treat their disabilities."

The City of Costa Mesa was represented by James Touchstone, a partner with the firm of Jones & Mayer, which serves as the city attorney for Costa Mesa. Touchstone argued, among other things, that although the plaintiffs have disabilities, they are not "qualified individuals" under the ADA.

Furthermore, an individual with a disability, who might be protected under the ADA, "does not include an individual who is currently engaging in the illegal use of drugs …." In the instant case, "plaintiffs seek as a reasonable accommodation access to the drug

marijuana to treat their disabilities, despite marijuana being a controlled substance under the [Federal] Controlled Substances Act."

Plaintiffs claim that because they had recommendations from doctors, pursuant to the Compassionate Use Act (CUA) of California, there is an exception within the ADA which allows "the use of a drug taken under supervision by a licensed health care professional," and which would permit them to use marijuana. Touchstone argued that since marijuana cannot be legally prescribed by a doctor under the CUA, the exception could not apply - the Court agreed.

The Court noted that although "some illegal drugs, such as opium, may be prescribed under the Controlled Substances Act, marijuana cannot be prescribed because it is a Schedule I drug." Finally, the Court held that "the exception applies only to authorized uses under the Controlled Substances Act or other Federal laws."

❖ Land Use and Medical Marijuana

Two other matters were heard in the Superior Court of California, in the County of Orange. In each of those cases, the issue presented was whether or not cities could ban medical marijuana dispensaries as part of their zoning codes and under other laws? Although the cases were heard separately, and involved two different cities, the issues were similar and the judge in both cases was the Honorable David Chaffee.

The first case was the *City of Lake Forest v. Mark G. Moen,* #30-2009-00298887 (Orange Co. Super.) which involved an application for a preliminary injunction against Lake Forest by the owner of a medical marijuana dispensary (Moen). Plaintiff's argument was, primarily, that the dispensaries were authorized under California's Compassionate Use Act (CUA) as a way to provide medical marijuana to qualified patients.

Lake Forest's Municipal Code, however, prohibited "any use of land, operation, or business that is in violation of State and/or Federal laws" from "all planning areas, districts, or zones with the City." The Court noted that distribution of marijuana, even for medical use, is a crime under federal law.

The Court also noted that California Government Code 37100 "provides that a city's 'legislative body may pass ordinances not in conflict with the Constitution and laws of the State or the United States.' Stated in the negative, Section 37100 serves as a bar to

local government's enacting ordinances that would serve to allow residents or businesses to violate state or federal law."

The Court held that "the Controlled Substances Act (CSA) classifies marijuana as a Schedule I 'controlled substance' and prohibits the use of this drug for any purpose. The United States Supreme Court has clearly stated that the use of marijuana is illegal; thereby affirming that there is no exception for medicinal use under California law." Furthermore, "our Supreme Court has recognized this principle in *Ross v. Ragingwire Telecommunications, Inc*. (2008) 42 Cal.4th 920 when it stated that despite the passage of California's Compassionate Use Act (CUA), marijuana was not a legal prescription drug …."

The Court held that "neither the CUA nor the Medical Marijuana Program Act … restricts a city's power to enact land use or zoning laws affecting medical marijuana dispensaries, nor do they limit a city's ability to enforce existing local laws against such businesses." Citing to the 2009 Court of Appeal decision in City of Claremont v. Kruse, #B210084, 177 Cal. App.4th 1153, 100 Cal. Rptr.3d 1, "nothing in the text or history of the CUA suggests it was intended to address local land use determinations or business licensing issues."

Since Lake Forest did not include dispensaries in their applicable zoning regulations, "like the dispensaries in … Kruse, the operation of these dispensaries must be enjoined."

❖ **False Statements on Applications**

The second case was *City of Westminster v. Saif Madhat*, #30-2010-00338140 (Orange Co. Super.) and was very similar to the Lake Forest case regarding land use. The City of Westminster, like the City of Costa Mesa, is also served by the firm of *Jones & Mayer* as its city attorney. Elena Gerli and Krista McNevin Jee represented the City in this matter and petitioned the court to issue a preliminary injunction against the defendants to prevent them from operating a dispensary within the City's limits.

In issuing the preliminary injunction the Court referenced, as it did in the Lake Forest case, a city's zoning authority, as well as Government Code section 37100. The Court stated that "the City of Westminster has not, and cannot promulgate code or zoning regulations allowing the use, sale or distribution of marijuana. Illegal activities under the state or federal law are necessarily precluded from inclusion in the City's Municipal

Code pursuant to WMC (Westminster Municipal Code) Sections 5.08.040(A) and 17.06.060, and Gov. Code Sec. 37100."

As with Lake Forest, Westminster did not include dispensaries as an identified permissible use or business. "Defendants urge that any direct or indirect Municipal Code proscription of medical marijuana dispensaries is preempted by state law." However, once again, the Court cited to appellate court decisions which held that the CUA was not "intended to address local land use determinations or business licensing issues."

What made this case even more interesting was the fact that the defendants had falsified their application for a business license. The application "merely stated that they were engaged in wholesale medical supply." But the Court notes that, based on evidence presented by the City, "the application was false as it appears that Defendants were using the premises solely for retail sales of medical marijuana."

In citing to an appellate court decision, the Court in the instant case held "that the failure to honestly get a business permit was sufficient grounds for voiding the license."

The Court concluded that the City established "that the Defendants misrepresented the nature of their business on the application for the business license; the license is void based on the misrepresentation. Additionally, the WMC only allows for uses specifically permitted. Medical marijuana dispensaries are not listed as permitted. Since Defendants never obtained a permit to conduct the business at issue, it is an unlicensed business operation; a nuisance per se. For nuisance per se 'no proof is required, beyond the actual fact of their existence, to establish the nuisance. No ill effects need be proved.'"

❖ **How This Affects California Agencies**

These three cases support the efforts to resist the proliferation of medical marijuana dispensaries by banning them based on current law. Individual cities have the right to establish zoning ordinances which exclude certain types of businesses, such as medical marijuana dispensaries.

Additionally, as the court noted in the Lake Forest and Westminster cases, California's Government Code section 37100 only allows municipalities to promulgate ordinances which are not in conflict with state OR federal laws. If a city generates a zoning ordinance which "permits" the sale or distribution of marijuana, for any purpose, that

ordinance is in conflict with federal law and, therefore, in violation of Government Code sec. 37100.

Additionally, it is important to note that novel and/or unique arguments can be presented in an effort to overcome resistance to the permitting of dispensaries in a community. The suit against Costa Mesa, claiming its prohibition was a violation of the ADA, is just such an example. It is up to each jurisdiction to decide whether or not to allow or resist the opening of such establishments but these cases certainly reinforce prior appellate court decisions which give cities the tools to resist, if they so wish.

The reality is that a serious conflict exists between state and federal law on this subject. It is up to each community to decide how to proceed. It is also of the utmost importance that legal advice and guidance is obtained from your agency's legal counsel. This is an area of the law fraught with difficulties and conflict. Ask before proceeding.

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