Addressing the Issue of Medical

In recent years perhaps no other legal issue has affected California's cities as much as medical marijuana. Cities have experienced a proliferation of dispensaries and other types of storefront medical marijuana distribution operations. While some cities allow dispensaries to provide medical marijuana, other cities have enacted outright bans on their use.

Although the possession, use and cultivation of marijuana is illegal under both state and federal laws, California law allows an individual to use marijuana for certain medicinal purposes and creates a narrow affirmative defense to state criminal prosecution. In other words, when a person is arrested for marijuana possession, he can avoid being found guilty by asserting the defense that he is entitled to possess marijuana for medical purposes because he has complied with state law. In 1996, California voters approved Proposition 215, an initiative called the Compassionate Use Act (CUA) that allows people to use marijuana under certain circumstances for medical reasons. The CUA was intended to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and

The Legal Basis for Banning Medical Marijuana Dispensaries

by Sonia Carvalho and Jeff Dunn

Cities traditionally exercise nearly exclusive control over land use. They regularly invoke their land-use authority to limit or prohibit the location of various types of businesses and operations within their communities. They do so under their basic police powers, which permit them to adopt laws protecting health, safety and welfare. In instances where the state has not pre-empted local law-making authority, a city is free to regulate. Medical marijuana dispensaries are not expressly mentioned in either the Compassionate Use Act (CUA) or in the Medical Marijuana Program Act (MMP); and in the recent *City of Claremont v. Kruse* case the court's decision confirmed that these laws do not pre-empt a city's enactment or enforcement of land use, zoning or business license laws as they apply to medical marijuana dispensaries.

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Marijuana Dispensaries

has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine or any other illness for which marijuana provides relief."

To further implement the CUA, the Legislature passed the Medical Marijuana Program Act (MMP) in January 2004. The MMP created, among other things, a voluntary program for issuing government identification cards to qualified patients and their defined primary caregivers, and it created rules and regulations pertaining to the operation of cooperatives and collectives. One of the MMP's more interesting aspects is that it explicitly articulates that it does not pre-empt a city's local land-use authority; it is primarily this section of the MMP that has sparked the ongoing debate over how a city may regulate dispensaries.

The two articles presented here examine the legal standards and practices under which cities may enact local laws either to ban or regulate medical marijuana dispensaries.

About Legal Notes

This column is provided as general information and not as legal advice. The law is constantly evolving, and attorneys can and do disagree about what the law requires. Local agencies interested in determining how the law applies in a particular situation should consult their local agency attorneys.

The Legal Basis for Allowing Medical Marijuana Operations

by Michael Jenkins and Lauren Feldman

This article addresses how cities that support patients' access to medical marijuana can use an effectively drafted ordinance to permit properly run cooperatives or collectives, regulate them and keep them from proliferating.

California cities may adopt ordinances that do not conflict with state or federal laws. Marijuana is a controlled substance that may not be cultivated, possessed or used under federal law. The U.S. Supreme Court determined that strict compliance with California's medical marijuana program will not insulate a marijuana user or supplier from federal prosecution. Nonetheless, the current U.S. Justice Department has indicated that dispensaries operating in accord with California law will not be a priority for federal prosecution.

In California, marijuana can be used legally for personal medical use. Two panels of the California Court of Appeal found in recent years that California's medical marijuana program is not pre-empted by federal law; they concluded that the state's

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decriminalization of medical marijuana does not conflict with federal law because it does not purport to "legalize" marijuana or immunize marijuana possession or use from federal prosecution. Rather, California has decided not to punish certain marijuana offenses when used for medicinal purposes. Until a court determines otherwise California's program does not conflict with federal law, and a local ordinance sanctioning medical marijuana collectives meets the requirement to be consistent with federal law.

A local ordinance regulating cooperatives and collectives is also consistent with state law. The Legislature stated a clear intent to enhance medical marijuana access through collective and cooperative cultivation projects, indicating the law contemplates collective distribution. Nothing in state law prohibits collectives from maintaining a place of business, and each city must determine how to regulate this use to ensure collectives operate within the narrow parameters of state law. Consequently, an ordinance permitting a use that is contemplated under state law and implements a state policy by making medical marijuana more accessible to seriously ill patients should be considered a proper exercise of a city's legislative authority.

The California Court of Appeal has determined that the state's authorization of cooperatives and collectives is intended to facilitate the transfer of medical marijuana to qualified patients. The court also found that storefront dispensaries that qualify as "cooperatives" or "collectives" and otherwise comply with state law, as interpreted by the attorney general, may operate legally.

The attorney general published guidelines to clarify how a legitimate cooperative or collective is operated. The guidelines:

- Limit lawful distribution activities to true agricultural co-ops and collectives that provide crops to their members;
- Prohibit collectives and cooperatives from profiting from the sale of marijuana;
- Allow members to be reimbursed for certain services (including cultivation), provided that the reimbursement is limited to the amount to cover overhead costs and operating expenses;
- Allow members to reimburse the collective for marijuana that has been allocated to them. Marijuana may be provided free to members, provided in exchange for services, allocated based on fees for reimbursement only, or any combination of these; and
- Declare that distribution of medical marijuana is subject to sales tax and requires a seller's permit from the State Board of Equalization.

Unlike an agricultural cooperative, a "collective" is not defined under state law, but it similarly facilitates agricultural collaboration between members. A co-op, by definition, files articles of incorporation and must abide by certain rules for its organization, elections and distribution of earnings. A co-op's earnings must be used for the general welfare of its members or be distributed equally in the form of cash, property, services or credit. Both co-ops and collectives are formed for the benefit of their members and must require membership applications and verification of status as a caregiver or qualified patient; they must also refuse membership to those who divert marijuana for non-medical use. Collectives and co-ops should acquire marijuana from and allocate it to only constituent members.

Storefront dispensaries that deviate from these guidelines are likely outside the scope of state law and may not be permitted at the local level.

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The Legal Basis for Banning Medical Marijuana Dispensaries, continued from page 12

When a city's zoning code does not allow marijuana dispensaries or collectives, and it expressly states that any condition caused or permitted to exist in violation of its provisions constitutes a public nuisance, the city can ban the use. Accordingly, the city may enjoin the nuisance by filing a civil abatement action. Despite claims that the state's medical marijuana laws prevent cities from regulating marijuana dispensaries, the California Court of Appeal's thorough analysis of state pre-emption law in *Kruse* concluded that cities retain their police power to regulate and, if necessary, restrict the operation of dispensaries.

The courts have recognized that the CUA and the MMP create only narrow exceptions to criminal drug possession penalties. Numerous judicial decisions have confirmed that California voters approved limited defenses to possession of marijuana and did not intend to allow large-scale commercial operations. Most important to the theory that cities retain the right to ban dispensaries is the 2005 *People v. Urcizeanu* decision, in which the court of appeal noted that the CUA "creates a narrow defense to crimes, not a constitutional right to obtain marijuana."

Two Methods for Banning Marijuana Dispensaries

Some dispensary operators have obtained business permits under false pretenses, applying for city land-use and business permits under the guise of pharmacies or other permissible uses. In other cases operators outright refused to comply with city laws requiring business permits. Operators like these have been ordered by the courts to cease business based on the regulations that the cities had in place.

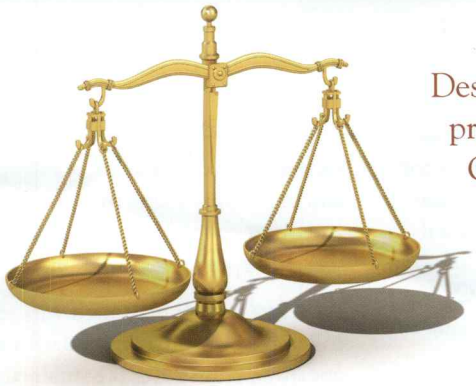
There are two primary methods cities use to ban dispensaries:

1. Adopt a business license provision that says licenses will be issued only to those operating in compliance with state and federal law; and
2. Prohibit dispensaries in all land-use zones.

Nearly 200 California cities have either banned pot collectives or have enforced moratoriums, according to Americans for Safe Access. The medical cannabis advocacy group reports on its website that 34 cities in California have specific ordinances that allow for medical marijuana cooperatives.

Pending Litigation

The City of Anaheim enacted an ordinance in 2007 banning all marijuana distribution facilities consisting of three or more people who otherwise qualified



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as patients or caregivers under California's MMP and CUA. The ban imposed a criminal penalty.

A collective called the Qualified Patients Association filed a lawsuit challenging the ban. The collective argued that local governments' ability to ban marijuana collectives is pre-empted by the California medical marijuana law. The collective argued that local governments may regulate but not ban marijuana distribution facilities.

The trial court disagreed, concluding there was no pre-emption and that Anaheim could use its police powers to ban marijuana distribution facilities and impose a criminal penalty for violating the ban. The collective has appealed and the matter is pending in the Fourth District Court of Appeal.

Unresolved Issues

While some cities have adopted ordinances permitting marijuana dispensaries under certain rules and regulations, the question of whether cities can authorize such uses by ordinance remains unclear. Government Code section 37100 states that a city's "legislative body may pass ordinances not in conflict with the Constitution and laws of the state or the United States." As all use of marijuana is illegal under federal law, cities may lack the authority to adopt enforceable ordinances permitting marijuana dispensaries under any rules or regulations. ■

Looking for Footnotes?

A fully footnoted version of this article is available online at www.westerncity.com/articles.

Regulating Medical Marijuana Collectives and Cooperatives

The most obvious methods for regulating the distribution of medical marijuana are through a zoning ordinance or regulatory business license ordinance — or a combination of both. Some cities require that collectives obtain a conditional use permit. West Hollywood recently rejected this approach. The city wanted a mechanism to examine an operator's criminal background and did not want the use to run indefinitely with the land. Consequently, the city's medical marijuana collectives are a permitted use in certain commercial zoning districts subject to distancing requirements from sensitive uses and other collectives, with a cap of four facilities operating at one time.

West Hollywood consulted with existing collective operators when drafting the operating requirements contained in its regulatory business license ordinance. The requirements include criminal background checks, compliance with the attorney general's standards for collectives (such as cash management practices), security requirements, limitations on operating hours, and a requirement that marijuana cannot be consumed onsite. Collectives may not occupy a space larger than 4,000 square feet, may not issue doctor recommendations onsite and are subject to limitations on the source of the collective's marijuana. The city holds bimonthly meetings with law enforcement and collective operators to address any negative impacts associated with the operations.

On the other hand, the cities of Arcata, Santa Cruz and Malibu effectively regulate collectives by requiring a use permit and imposing strict distancing requirements and operating standards. Arcata additionally subjects each collective to an annual performance review.

Most cities that permit collectives have determined that the distancing requirement and a cap on the number of facilities are the most effective ways to prevent an overconcentration of this use. The combination of the effective regulatory mechanism and the working relationship with collective operators has also proven to meet the goals of supporting access to medical marijuana while controlling negative impacts and the proliferation of collectives in a city. ■

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