CSAC MEDICAL MARIJUANA WORKING GROUP
Wednesday, October 26, 2011 • 1:00 – 3:00 p.m.
CSAC Conference Center
1020 11th Street, 2nd Floor, Sacramento, California 95814

UPDATE ON STATUTORY AND CASE LAW

Recent Legislation

- **AB 2650 (2010) Effective January 2011**

  This bill would provide that no medical marijuana cooperative, collective, dispensary, operator, establishment, or provider authorized by law to possess, cultivate, or distribute medical marijuana that has a storefront or mobile retail outlet which ordinarily requires a local business license shall be located within a 600-foot radius of any public or private school providing instruction in kindergarten or grades 1 to 12, inclusive, except as specified. The bill also would provide that local ordinances, adopted prior to January 1, 2011, that regulate the location or establishment of these medical marijuana establishments would not be preempted by its provisions; and that nothing in the bill shall prohibit a city, county, or city and county from adopting ordinances that further restrict the location or establishment of these medical marijuana establishments.

- **AB 1300 (Blumfield) Chaptered**

  Section 11362.83 has been amended to read:

  ñNothing in this article shall prevent a city or other local governing body from adopting and enforcing any of the following:

  (a) Adopting local ordinances that regulate the location, operation, or establishment of a medical marijuana cooperative or collective.
  (b) The civil and criminal enforcement of local ordinances described in subdivision (a).
  (c) Enacting other laws consistent with this article.ò

- **SB 847 (Correa) Vetoed**

  This bill, had it not been vetoed, would have prohibited medical marijuana establishments from locating within a 600-fool radius of a residential zone or a residential use. Governor Brown's veto message was: "I have already signed AB 1300 that gave cities and counties authority to regulate medical marijuana dispensaries -- an authority I believe they already had. This bill goes in the opposite direction by preempting local control and prescribing the precise locations where dispensaries may not he located. Decisions of this kind are best made in cities and counties, not the State Capitol."

- **AB 1017 (Ammiano) 06/02/2011 Ordered to inactive file at the request of Assembly Member Ammiano**

  SECTION 1. Section 11358 of the Health and Safety Code is amended to read:

  > 11358. Every person who plants, cultivates, harvests, dries, or processes any marijuana or any part thereof, except as otherwise provided by law, shall be punished by imprisonment in *a county jail for a period of not more than one year or by imprisonment in* the state prison.

  SECTION 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

- **SB 129 (Leno) 06/02/11: Ordered to inactive file on request of Senator Leno.**

  An act to amend Section 11362.785 of, and to add Section 11362.787 to, the Health and Safety Code, relating to medical marijuana.

  This bill, notwithstanding existing law, would declare it unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment or otherwise penalize a person, if the discrimination is based upon the person's status as a qualified patient or a positive drug test for marijuana, except as specified. The bill would authorize a person who has suffered discrimination in violation of the bill to institute and prosecute a civil action for damages, injunctive relief, reasonable attorney's fees and costs, any other appropriate equitable relief, as specified, and any other relief the court may deem proper. The bill would not prohibit an employer from terminating the employment of, or taking other corrective action against, an employee who is impaired on the property or premises of the place of employment, or during the hours of employment, because of the medical use of marijuana.

<u>Recent Case Rulings (Published Decisions)</u>

Pack v. Superior Court of Los Angeles (City of Long Beach)
(Court of Appeal, Second District, Division Three) (Decision October 4th, 2011)

The Court ruled that an ordinance regulating medical marijuana collectives adopted by the City of Long Beach in 2010 was preempted by federal law. The ordinance in question subjected dispensaries to numerous restrictions and includes a non-refundable application fee in the amount of $14,742. Once the

application is submitted along with the fee, the qualified applicants are then required to participate in a lottery for a limited number of permits. Once a permit has been issued, an ñAnnual Regulatory Permit Feeòis also required based on the size of the collective. That fee is $10,000 for a collective that has up to 500 members and increases with the size of the collective. The ordinance also provides that no person is allowed to be a member of more than one fully permitted collective. The Court held that the ordinance is preempted by federal law as it permits collectives to operate rather than merely decriminalizing the activity. The Court concluded that, through the permitting scheme in its ordinance, the City ñauthorizedòthe collective cultivation and distribution of a federally prohibited controlled substance. The Court acknowledged that those ordinances which merely regulated the activity in the form of location and operational restrictions as opposed to ñpermittingòthe activity were not in conflict with federal law.

The City intends to appeal, and a de-publication request has been filed. The City has also instructed its City Attorney to prepare a repeal of the ordinance and a new ordinance prohibiting dispensing collectives altogether. The City is also refunding the $700,000 it had received from permit applicants.

***Traudt v. City of Dana Point* (2011)199 Cal.App.4th 886**
(Court of Appeal, Fourth District, Division Three)

Malinda Traudt is a medical marijuana patient who suffers from cerebral palsy, epilepsy, and acute cognitive delays. She is also blind. She obtains her medical marijuana from dispensaries in Los Angeles County and from the Beach Cities Collective in Dana Point near her home in San Clemente. Ms. Traudt filed a declaratory judgment complaint subsequent to the Cityós action to shut down the Beach Cities Collective. The City of Dana Point, in its zoning regulations, has an implied ban on medical marijuana dispensaries. The Court, in upholding the Cityôs demurrer to her complaint, ruled that Ms. Traudt lacked the requisite standing necessary to challenge the application of Dana Pointôs zoning code. The Court found that she did not own or lease at the locations where Beach Cities Collective sought to operate, nor is she a dispensary. The Court specifically stated ñan individual medical marijuana patient is not the proper party to challenge generally applicable zoning provisions because whatever the contours of the right to engage in cooperative or collective medical marijuana activity (see, e.g. Section 11362.775), the Legislature invested this right in cooperative and collective groups and entities, not in individuals.ò

***County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861**
(Court of Appeal, Second District, Division One)

In *COLA v Hill*, the Second District Court of Appeal affirmed the superior court's order granting the County a PI, and ruled the County's ordinance regulating MMDs was valid. The Court held that the County's CUP and business license requirements were reasonable and not preempted by California's medical marijuana laws.

In this case, the County brought a nuisance action against the AMCC collective and its owner, Martin Hill, who failed to apply for, or receive, the necessary permit. The MMD was also operating within 1,000 of a public library.

The dispensary argued: The ordinance was 1) preempted by state law; 2) was inconsistent with state law both on its face and as applied to AMCC; and 3) was unconstitutional because it violated the Equal Protection Clause.

As to its first two arguments, the dispensary faced an uphill battle because of prior case law, *Claremont v Kruse*, which held that the Medical Marijuana Program Act did not preempt local government from regulating medical marijuana dispensaries, and the recent enactment of AB 2650 (Health & Safety Code 11362.768), which specifically recognizes and partially regulates MMDs having a storefront or mobile retail outlet, and which ordinarily requires a local business license. In their analysis, the Court considered section 11362.768(f) which states in pertinent part that "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." Moreover, 11362.768(g) provides, "Nothing in this section shall preempt local ordinances, adopted prior to January 1, 2011, that regulate the location or establishment medical marijuana cooperative, collective, dispensary, operator, establishment or provider."

The Court found that the evidence refuted the dispensary's claim that MMDs were zoned so as to relegate them to remote and commercially infeasible locations. So, under *Kruse* and the new Health & Safety Code provision, section 11362.768, the Court held that the County's constitutional authority to regulate the particular manner and location in which a business may operate was unaffected by Health & Safety Code section 11362.775. The limited statutory immunity from prosecution under the "drug den" abatement law provided by section 11362.775 did not prevent the County from applying its nuisance laws to MMDs that did not comply with its valid ordinances. The Court also found that the dispensary's equal protection argument had no merit. "The statute does not confer on qualified patients and their caregivers the unfettered right to cultivate or dispense marijuana anywhere they choose." The dispensary compared itself to a pharmacy but the Court found that the County had a rational basis for finding that dispensaries posed different risks from pharmacies and, therefore, should be treated differently.

***Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734**

Qualified Patients Association, an association of medical marijuana patients, challenged an ordinance adopted by the City of Anaheim which prohibits "any person or entity to own, manage, conduct, or operate any Medical Marijuana Dispensary or to participate as an employee, contractor, agent or volunteer, or in any other manner or capacity, in any Medical Marijuana Dispensary in the City of Anaheim.ò The ordinance defined Dispensary as ñany facility or location where medical marijuana is made available to and/or distributed by or to three or more

of the following: a qualified patient, a person with an identification card, or a primary caregiver.ò

The ordinance provides for misdemeanor punishment for ñany person who violates any provision of this ordinance....ò

Plaintiffs' sought a declaratory judgment that the state's medical marijuana laws preempted the city's ordinance. The Court held that the trial court erred as a matter of law in concluding federal regulation of marijuana in the Controlled Substances Act preempted California's decision in the CUA and the MMPA to decriminalize specific medical marijuana activities under state law. It reversed the trial courtôs judgment of dismissal and remanded the matter to allow plaintiffs to pursue their declaratory judgment cause of action.

Trial was held in this matter on May 16, 2011. On August 15, 2011, the trial court ruled that Anaheimôs ordinance is a valid exercise of powers allocated to the City by the California Constitution once the criminal portion of the ordinance was removed from the ordinance.

***County of Sonoma v. Marvin's Gardens* (2010) 190 Cal.App.4th 1312**

Marvin Gardens Cooperative filed an action against the County of Sonoma challenging the County's dispensary regulations on grounds of equal protection and other statutory provisions. The Cooperative sought to have the Court resolve the question as to whether a requirement that state-sanctioned medical cannabis cooperatives must have a special use permit violates the equal protection clause of the California Constitution. The Cooperative was essentially comparing itself to a drug store. The County raised numerous procedural errors in the filing of the case. Subsequent to an unfavorable ruling from the Superior Court, the County filed a Petition for Writ of Mandate with the First District Court of Appeal. The Court held that the Cooperative's claims were based on a facial challenge to the Ordinance and the case should have been filed within 90 days of the effective date of the Ordinance. Since the 90-day period expired long before the Cooperative filed its action, the action was time-barred.

Unpublished Decision

City of Gilroy v. Kuburovich, Case No. H035876, Unpublished Decision issued 10/25/11

This unpublished opinion was issued yesterday (and CSAC may wish to consider seeking publication). The Sixth District upheld a permanent injunction against a dispensary opened in violation of Gilroy's zoning ordinances (which did not list dispensaries as a permitted use). The Court rejected challenges that the zoning ordinance was preempted, that dispensaries were, in fact, a permitted use, and that the ordinance violated equal protection.

Pending Cases

Americans for Safe Access v. City of LA
(Pending in the Second Appellate District, Division Eight)

The Los Angeles Superior Court upheld "the bulk" of LA's "Interim Control Ordinance" for dispensaries, concluding that municipalities have general authority to regulate in this area. However, the Court nonetheless enjoined the City from implementing the following key provisions of the Ordinance: (1) the grandfathering provision, as facially violating equal protection; (2) the section providing for criminal enforcement, and the sunset clause, both as preempted by state law; (3) the section requiring maintenance of records with the name, address, and telephone number of patient members to whom the collective provides medical marijuana, as violating the right of privacy; and (4) the provisions shutting down existing dispensaries, as depriving collectives of vested rights without a neutral hearing.

The City has appealed. During the pendency of the appeal, LA revised their ordinance to address the features that concerned the Superior Court - which was promptly challenged by numerous dispensaries and advocates. On October 15th, Judge Mohr issued a decision upholding the revised ordinance in its entirety. An appeal is expected.

People v. Cooperative Patient Services
(Pending in the Fourth Appellate District, Division Two) (Filed April 12, 2011)

This is an appeal from the trial courtôs issuance of a preliminary injunction prohibiting CPSôs operation of a dispensary as a public nuisance in violation of the zoning code. Again, the argument made on behalf of the dispensary operators is whether the Cityôs zoning ordinance, which does not allow for dispensaries, is preempted by state law.

COLA v AMCC
(Pending in the Second Appellate District, Division One)

AMCC is challenging the County's ban; same defendants as *COLA v Hill*.

City of Riverside v. Inland Empire Patient's Health and Wellness Center, Inc. (Pending in the Fourth Appellate District, Division Two)

A tentative published opinion holds City of Riverside's ban is not preempted by state law; oral argument is scheduled for November 2, 2011.

The People of the State of California v. G3 Holistic, Inc.
(Pending in the Fourth Appellate District, Division Two)

An unpublished tentative opinion holds City of Upland's ban is not preempted by state law; oral argument is also scheduled for November 2nd.

Mendocino County

Hill v. Mendocino County

This case was a facial challenge to Ordinance 9.31 on grounds of preemption. The Court held the ordinance is facially valid. No appeal has been filed.

Tehama County

Browne v. County of Tehama
(Pending in the Third Appellate District, Division Two)

Tehama Countyôs litigation concerns an ordinance regulating the location and intensity of marijuana cultivation (through per-parcel plant limits, location restrictions, registration requirements, etc.) The County was challenged by NORML, who claim that the County is violating patientsôfundamental right to grow.ò A demurrer was sustained without leave to amend, and a writ petition to the Court of Appeal was summarily denied. The matter has been appealed, but briefing has not yet begun.

Tulare County

COT v. Jeffrey Nunes dba Foothill Growers Association, Inc.; and Manual Souza (property owner)

Nunes was leasing the property for the purpose of operating a medical marijuana collective. The property was located in an AE-20 zone. Tulare County zoning ordinance requires that medical marijuana cooperatives and collectives locate in C-1, C-2, C-3, M-1 or M-2 zones. The County initiated a complaint for preliminary and permanent injunction for violations of the County's zoning ordinance and public nuisance. The County's preliminary injunction was denied after Defendants argued that, over the years, there had been multiple previous uses of the property that were allowed under the zoning ordinance and, as such, any non-conforming use was now a grandfathered use. The Court denied a preliminary injunction. The County filed a motion for summary judgment arguing that, once a previous use is terminated, the next use must comply with the zoning ordinance. At the hearing, the Defendants argued that marijuana was an agricultural product. The Court found that marijuana had never been classified as a crop or horticultural product. Marijuana is a controlled substance. The County prevailed and an order was entered permanently enjoining Defendants from operating at that location and declaring said use a public nuisance. Plaintiff Nunes has appealed. Following the judgment, the Court granted the County's motion for attorney fees and costs in the amount of $16,079.60.

County of Tulare v. Richard Daleman; and Dolieslager Land & Livestock (property owner)

Defendant Daleman leases property located in a Rural Residential zone which consists of several acres. Daleman claims that he does not operate a collective or cooperative. He utilizes a portion of the property for marijuana cultivation. He

declares that he rents, for profit, plots of land to qualified patients or caregivers so that they can grow medical marijuana. In addition, he also states that he provides gardening, watering, and fertilizing services for a fee. He states that he does not have any interest in the marijuana; however, he does grow, in a separate location, medical marijuana for himself and his wife. There are thousands of plants on the property. The County issued a cease and desist letter. Daleman responded by filing an application for a restraining order which the Court granted after finding irreparable harm to the patients, one of which appeared at the hearing. The County filed its complaint for violation of zoning ordinance and public nuisance. The Court has since dissolved the TRO. A hearing on the preliminary injunction is set for November 7. The property owner has not appeared in the action but is seeking to evict Daleman through an unlawful detainer action.

Fresno County

In September 2010, Fresno County passed an ordinance banning outdoor marijuana cultivation. The Superior Court initially granted a restraining order prohibiting enforcement of the ordinance. The Court subsequently lifted that order and upheld the ordinance, but delayed the ruling until the end of the 2010 growing season to allow growers to harvest marijuana planted prior to passage of the ordinance.

Kern County

Earlier this month, the Kern County Superior Court upheld Kern County's ordinance limiting marijuana cultivation to 12 plants per parcel. However, the judge expressed concern over the alleged practice of the Sheriff's department of summarily abating marijuana in excess of that limit without providing any notice and hearing.