January 8, 2015

An open letter to Boards of Supervisors, City Councils, County Counsels and City Attorneys in California

As you may be aware, Rep. Woods has issued an open letter to City and County officials in California regarding the "drafting error" that has lead many local jurisdictions to impose restrictive laws against medical marijuana before March 1 (see http://www.canorml.org/woodsletter.pdf). Now, Reps. Woods, Cooley, Jones-Sawyer, Lackey and Bonta have introduced an urgency measure, AB 21, which repeals the March 1 deadline for local action in MMRSA, the 2015 state law that regulates medical marijuana. The repeal is supported by the League of Cities, CSAC, and the RCRC. It is heading to its third reading in the Senate on track to be signed by the Governor within the month.

Even if the repeal does not pass, it is California NORML's opinion that local action is not required in order to retain local control over medical marijuana activities.

Question Presented: Does Health & Safety Code Section 11362.777 Cause Local Governments to Permanently Lose Their Authority to Regulate Medical Cannabis Cultivation if They Fail to Affirmatively Act by March 1, 2016?

I. Introduction

In enacting the Medical Marijuana Regulation & Safety Act (hereinafter, "MMRSA"), the California Legislature added Section 11362.777 to the Health & Safety Code (hereinafter, "Section 11362.777"). Subsection (c)(4) of Section 11362.777 provides in full that:

> If a city, county, or city and county does not have land use regulations or ordinances regulating or prohibiting the cultivation of marijuana, either expressly or otherwise under principles of permissive zoning, or chooses not to administer a conditional permit program pursuant to this section, then commencing March 1, 2016, the division shall be the sole licensing authority for medical marijuana cultivation applicants in that city, county, or city and county.

Thus, Section 11362.777 clearly requires the California Department of Food & Agriculture (hereinafter, "CDFA") to act as the "sole licensing authority" for applicants seeking to conduct medical cannabis cultivation under MMRSA if a local government fails to affirmatively regulate or prohibit medical cannabis cultivation by March 1, 2016. *See* Bus. & Profs. Code § 19300.5(w) ("'Licensing authority' means the state agency responsible for the issuance, renewal, or reinstatement of the license, or the state agency authorized to take disciplinary action against the license."). In other words, rather than requiring medical cannabis cultivators to possess both a state license and local permit, Section 11362.777 allows medical cannabis cultivators under MMRSA to only possess a state license if a local government fails to affirmatively regulate or prohibit medical cannabis cultivation by March 1, 2016. However, the plain language of Section 11362.777 is unclear whether local governments permanently lose their authority to regulate medical cannabis cultivation if they fail to act by March 1, 2016.

II. Analysis

There are those who believe Section 11362.777 causes local governments to permanently lose their authority to regulate medical cannabis cultivation if they fail to affirmatively regulate or prohibit medical cannabis cultivation by March 1, 2016. Essentially, they interpret Subsection (c)(4) of Section 11362.777 as stating:

> If a local government does not have land use regulations or ordinances affirmatively regulating or prohibiting medical cannabis cultivation, then commencing March 1, 2016, CDFA shall be—***forever and always***—the sole licensing authority for medical marijuana cultivation applicants in that city, county, or city and county.

However, Subsection (c)(4) of Section 11362.777 could just as easily be interpreted as stating:

> If a local government does not have land use regulations or ordinances affirmatively regulating or prohibiting medical cannabis cultivation, then commencing March 1, 2016, CDFA shall be—***for the time being***—the sole licensing authority for medical marijuana cultivation applicants in that city, county, or city and county.

Thus, the plain language of Section 11362.777 is ambiguous on whether local governments permanently lose their authority to regulate medical cannabis cultivation if they fail to affirmatively regulate or prohibit medical cannabis cultivation by March 1, 2016.

III. Conclusion

Being ambiguous as a matter of plain language, Section 11362.777 should be evaluated in light of how a California court would likely interpret the provision. It is well established that California courts consider a local government's authority to affirmatively regulate or prohibit medical cannabis cultivation as within its "traditional land use and police powers . . . ." *See City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 56 Cal. 4th 729, 762 (2013); *Maral v. City of Live Oak*, 221 Cal. App. 4th 975, 978 (2013) ("Accordingly, we conclude the CUA and MMP do not preempt a city's police power to prohibit the cultivation of all marijuana within that city."). "Consistent with this principle, when local government regulates in an area over which it traditionally has exercised control, such as the location of particular land uses, California courts will presume, absent a ***clear indication*** of preemptive intent from the Legislature, that such regulation is not preempted by state statute." *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 56 Cal. 4th 729, 743 (2013) (emphasis added) (internal quotation marks omitted). "[A]mbiguous provisions fail to provide that ***clear indication***." *Kirby v. Cnty. of Fresno*, F070056, at *2−3 (Cal. Ct. App. 5th Dist. Dec. 12, 2015) (emphasis added). Because of the ambiguous plain language, a California court will likely decide that Section 11362.777 ***does not*** cause local governments to permanently lose their authority to regulate medical cannabis cultivation if they fail to affirmatively regulate or prohibit medical cannabis cultivation by March 1, 2016.

Banning medical marijuana cultivation and distribution will only impact the neediest patients, and drive the market towards underground, unregulated players, without allowing locals to recoup tax revenues (something that is specifically allowed under a MMRSA "clean up" bill that has also been introduced, AB 1575, which states "*The fees established by licensing authorities pursuant to this chapter shall be in addition to, and shall not limit, any fees or taxes imposed by a city, county, or city and county in which the licensee operates.")*

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