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FEATURE ARTICLE

WEED, WATERS AND WILDLIFE: ENVIRONMENTAL PERMITTING OF CANNABIS CULTIVATION IN CALIFORNIA—PART 1: FISH AND GAME PERMITTING

By Clark Morrison, Esq.

This article is the first of a two-part series describing California's environmental regulatory structure for cannabis cultivation as implemented by the California Department of Fish and Wildlife (Department) and the State Water Resources Control Board (SWRCB).

In part 1, the author provides a brief introduction to Proposition 64's environmental requirements as subsequently codified by the California Legislature through the passage of Senate Bill 94. Following this introduction, the author describes the Department's regulations under §§ 1602 and 1617 of the Fish and Game Code (lake and streambed alterations), which code provisions were amended or adopted by SB 94 specifically to address cannabis cultivation.

In the second part of this article, to follow in a subsequent issue, the author will discuss the cannabis policy and permitting requirements adopted by the SWRCB to implement the directives of Proposition 64 and SB 94.

Introduction

Last year, the California Department of Fish and Wildlife published a report entitled, *A Review of the Potential Impacts of Cannabis Cultivation on Fish and Wildlife Resources* (July 2018). The Department's report identified a variety of environmental challenges related to the production of cannabis, including the direct and indirect impacts of pesticides and rodenticides on wildlife; water diversion impacts on flow regimes (including dewatering) and water quality; the impacts of dams and stream crossings; the delivery of pollutants; terrestrial impacts associated with site development, use and maintenance (including road use, noise and artificial lighting); and health hazards to wildlife from the ingestion of crops.

The Department's findings were neither new nor surprising. California's regulatory agencies had long known that unregulated grows were affecting water quality, and fish and wildlife habitat, in areas of the state where cultivation was most concentrated. Accordingly, when Proposition 64 was crafted for consideration by California voters in 2016, significant funding was included for three conservation priorities: the restoration of watersheds and habitat damaged by cultivation; improved management of state parks and wildlife areas to minimize future degradation; and the enforcement of environmental laws that had hitherto been largely unenforced. According to the Conservation Strategy Group, Proposition 64 initially was expected to generate up to $200 million year for these purposes.

In 2017, Proposition 64 was codified through the passage SB 94. The law includes a number of provisions calling upon the state's environmental agencies, particularly the Department and the SWRCB to develop programs for the regulation of cannabis cultivation. In particular, the law requires the California Department of Food and Agriculture (CDFA) to include in any license for cultivation conditions requested by the Department or the SWRCB to:

- Ensure that the effects of diversion and discharge associated with cultivation do not affect the instream flows needed for fish spawning, migration and rearing, and the flows needed to maintain natural flow variability;

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- Ensure that cultivation does not negatively impact springs, riparian habitat, wetlands or aquatic habitat; and

- Otherwise protect fish, wildlife, fish and wildlife habitat, and water quality.

The law further directs CDFA, in consultation with the SWRCB and the Department, to implement a program for the issuance of unique identifiers to be attached to the base of marijuana plants grown under a state license. In implementing the program, CDFA is required to consider issues such as water use and environmental impacts, including 1) flows needed for fish spawning, migration and rearing, and the flows needed to maintain natural flow variability and 2) impacts on springs, riparian wetlands and aquatic habitats. If a watershed cannot support additional cultivation, no new plant identifiers may be issued for that watershed.

With respect to the SWRCB and the Regional Water Quality Control Boards (RWQCBs) specifically, the law amended § 13276 of the Water Code to authorize the SWRCB and direct the RWQCBs to address discharges of waste from cultivation, including by adopting a general permit, establishing waste discharge requirements or taking action under Water Code § 13269. In so doing, the RWQCBs must include conditions addressing a dozen different considerations including, for example, riparian and wetland protection, water storage and use, fertilizers, pesticides and herbicides, petroleum and other chemicals, cultivation-related waste and refuse and human waste. The SWRCB's programs to implement these requirements, and SB 94's requirements relating to water rights, will be addressed in Part II of this article.

With respect to the Department, the law amended certain provisions of the Fish and Game Code governing the diversion of water from, and certain alterations and discharges to, rivers, streams and lakes in California. These provisions, and the Department's implementation of them, are further described below.

Finally, the law directs the Department and the SWRCB to prioritize the enforcement of environmental laws governing cannabis cultivation, and establishes steep penalties (including imprisonment) on those whose activities violate various provisions of, among other statutes, the Water Code (§ 1052 regarding diversions or §§ 13260, 13264, 13272, or 13387 regarding waste discharges) or the Fish and Game Code (§§ 5650 or 5652 regarding discharges of waste or, § 1602 regarding streambed alterations, § 2080 regarding listed species and § 3513 regarding migratory birds).

The Department of Fish and Wildlife's Lake and Streambed Alteration Program

SB 94 supplemented the Department's existing authority under § 1602 of the Fish and Game Code to issue "Lake and Streambed Alteration Agreements" for certain activities affecting rivers, streams and lake (*i.e.*, water diversions, modifications to bed and bank, certain deposits of waste). The Department's lake and streambed alteration program is one of California's original environmental regulatory structures, hailing from the days of the gold rush.

Under the statute, an "entity" (*i.e.*, permittee) intending to engage in a potentially regulated activity provides a "notification" to the Department. Upon receipt, the Department evaluates whether the activity is covered by § 1602 and, if it is, recommends a set of reasonable measures to protect fish and wildlife resources. Those measures are set forth in a draft Lake and Streambed Alteration Agreement (LSAA) delivered to the permittee, who then has the opportunity to objection to one or more of those measures and negotiate a final agreement with the Department. If the Department and permittee cannot resolve their differences, the matter is submitted to binding arbitration.

The LSAA process is generally fairly quick. The Department has 30 days to determine if a notification is complete and, if it is, 60 days to issue a draft agreement. In many cases the Department will simply decline to act within the 60-day period, in which case the proposed activity becomes authorized as a matter of law. LSAAs can be authorized for individual projects or in the form of long-term, programmatic agreements that might cover a complex or multiphase project.

SB 94 Requirements Regarding LSAAs

Under SB 94, any cultivation license must contain a condition that it not become effective until the licensee has demonstrated compliance with § 1602 or receives written verification from the Department

that an LSAA is not required. Given the potential deluge of LSAA applications expected to swamp the Department as a result, even the efficiencies associated with the 1600 process were not expected to be sufficient to implement this requirement. Accordingly, the law amended to Fish and Game Code to further streamline the process.

First, it amended § 1602 to exempt any permittee from the need to secure an LSAA if, following notification and the payment of fees, the Department determines that conditions contained in the license in accordance with the Department's recommendations as described above (and codified at § 26060.1 of the Business and Professions Code) "will adequately protect existing fish and wildlife resources that may be substantially adversely affected by the cultivation without the need for additional measures" that would ordinarily be included in an LSAA. This process is described by the Department as "self-certification." Where this occurs, any failure to comply with the CDFA's license conditions will constitute a violation of the Fish and Game Code.

Second, SB 94 added a new § 1617 to the Fish and Game Code, allowing the Department to adopt a "general" LSAA (referred to as the "General Agreement") authorizing certain cannabis cultivation activities on an essentially automatic basis. As more fully described below, a permittee secures this coverage by submitting to the Department information to the Department demonstrating that the proposed project qualifies for coverage, and the Department issues its authorization on a perfunctory, non-discretionary basis. There is no need for a specific LSAA for the activities proposed. Under the General Agreement, however, there is no opportunity for a permittee to object to the required fish and wildlife protections or to arbitrate any disagreement with the Department.

The General Agreement

On January 2, 2018, the Department, acting on an emergency basis (as authorized by SB 94), added § 722 to the Department's existing regulations in Title 14 of the California Code of Regulations. Section 722 constitutes the the General Agreement authorized by the Legislature.

Although coverage under the General Agreement is more or less automatic, compliance is anything but simple. Anyone wishing to pursue authorization under the General Agreement must certify that he or she will comply with an exhaustive and detailed list of environmental protections. These are described below. Notably, neither § 1617 nor § 722 include any requirement for compensatory mitigation in the form of conservation easements or other tools typically required under § 1600, the California Endangered Species Act (CESA) and other state regulatory programs.

The General Agreement covers certain construction projects as well as certain water diversions associated with cannabis cultivation, including the planting, growing, harvesting, drying, curing, grading or trimming of cannabis. In particular, the General Agreement covers: 1) the construction, reconstruction, maintenance or repair of a bridge, culvert or rock ford in or over a stream or river, including all fill material within the crossing "prism"; and 2) water diversions on *nonfish* rivers, streams, and lakes where such diversions are used or will be used for the purpose of cannabis cultivation. Covered diversions include diversions of either surface flow or hydrologically connected subsurface flow for use or storage, including all infrastructure used to divert or store the flow (*e.g.*, rock dams, excavation pools in fast-moving water, and wells).

For an activity to be eligible for coverage, the permittee must certify to the Department that the proposed activity: 1) will meet certain design criteria and other requirements described in § 722, 2) will not occur on or in a "finfish" (*i.e.*, inhabited by any species of bony fish) stream or lake, and 3) is not already the subject of a complaint by the Department or other law enforcement agency or any resulting court order; provided, however, that the General Agreement process may be used on an after-the-fact basis to permit prior unauthorized work.

The permittee must also certify that the activity will not result in the "take" of a species that is listed under the CESA, the Native Plant Protect Act (NPPA) or the Fish and Game Code's provisions establishing statutory, "fully protected" status for certain species.

Section 722(e) establishes the Department's required design criteria for bridges, culverts, rock fords and water diversions, respectively.

Bridges, for example, must be single span with abutments located outside of top of bank and the tops of any abutment footings located below the scour line; allow 100-year peak flows with one foot of

freeboard; and allow free passage of fish upstream and downstream. Culverts must be comprised of a single pipe constructed in a particular manner and sufficient to, among other things, convey or withstand a 100-year peak storm flow. Rock fords must be located in a stable stream reach with a coarse gravel and cobble streambed, oriented particular to the flow, designed and constructed to withstand multiple flow velocities, and must not impede fish passage.

The design criteria for water diversions are more complicated. Among other things, diversions may not exceed ten gallons per minute and must allow a minimum 50 percent of the flow to bypass the diversion. Water diverted to storage must not exceed five acre-feet per year, with storage facilities located off-stream and outside the 100-year floodplain.

In addition to these design criteria, any authorized structure must be constructed in a manner consistent with a number of general and specific measures to protect fish and wildlife resources, which are described more fully below.

Applying for Coverage

To apply for coverage, a permittee must—in addition to paying certain fees and making the certifications described above—submit certain information to the Department (through the Department's website at https://wildlife.ca.gov/Conservation/LSA) describing the identity of the permittee and the nature and location of the project. Following the submittal of that information, the Department notifies the permittee of the issuance of coverage.

Among the required information is a certification that the permittee has in his or her possession and will retain at the project site: 1) a detailed design plan prepared by a licensed engineer, geologist, land surveyor, professional forester or professional hydrologist, 2) a detailed a property diagram; and 3) a detailed biological resources assessment prepared by a qualified biologist. This information, as well certain other information such as any cannabis cultivation license issued by CDFA, must be presented upon request to CDFW employees upon request. CDFW employees are permitted access to any project site for inspection purposes—without notice—between 8 am or 5 pm or at other reasonable times as may be mutually agreed between the Department and the permittee.

Biological Resource Assessment and Impact Avoidance

The biological resource assessment must identify the presence or potential presence of "Species of Greatest Conservation Need" (as listed in the state's *Wildlife Action Plan*), rare or endangered species (as defined in § 15380 of the California Environmental Quality Act (CEQA) Guidelines), any finfish or their habitat, and any invasive species. In so doing, the biologist must rely on certain classification systems promulgated by the U.S. Department of Agriculture (USDA), the Department, the U.S. Geological Service (USGS), the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), respectively. Notably, the species covered by the biological resource assessment are somewhat different from those whose take is expressly prohibited under the terms of the General Permit.

Because the primary purpose of the Department's LSAA program is to protect fish and wildlife resources, the General Permit establishes a long list of detailed measures to avoid and minimize impacts to those resources. These include the following:

- Seasonal restrictions on work within the bed, bank or channel (*i.e.*, June 15 to October 15 only) and dry-weather-only work requirements;

- Any wildlife encountered must not be disturbed or harmed;

- Disturbances to aquatic and riparian habitat must be minimized;

- Daily morning inspections of the project site for wildlife;

- Installation of overnight escape ramps in open trenches;

- Seasonal (*i.e.*, February 1 through August 31) focused surveys for nests and dens of birds and mammals, and the establishment of work buffers if any are found;

- Vegetation removal must be minimized and buffers established for any plant designated as a Species of Greatest Conservation Need;

•Implementation of measures to protect water flow and minimize turbidity, siltation and pollution.

•Prohibitions on the use of chemical herbicides and pesticides that are deleterious to fish, plants, birds or mammals where they may "pass into" any "waters of the State" as defined in Section 89.1 of the Fish and Game Code);

•Implementation of a variety or erosion control measures throughout all work phases
Measures related to the storage or migration of toxic materials and hazardous substances
Invasive species controls, including prohibitions on the stocking of fish;

•A variety of additional design requirements for all stream crossings, and also specifically for bridges, culverts, and water diversions.

Not surprisingly, the regulation includes significant reporting requirements, including a project completion report, water diversion and use reports, and reports on any observations of Species of Greatest Conservation Need (to be submitted to the Department's Natural Diversity Database, *i.e.* CNDDB). If a permittee fails to comply fully with the General Agreement, or if any activity undertaken by a person does not actually qualify for the General Agreement, the Department may take action, including suspension or revocation of the permittee's authorization or the pursuit of formal enforcement.

Conclusion and Implications

The Department's cannabis program website: (https://www.wildlife.ca.gov/Conservation/Cannabis#53534664-resources)

includes a number of helpful tools for the prospective permittee, including best management practices for watershed management and pesticide use, a compliance handbook issued by the Department's North Coast region, frequently asked questions, and other materials. A review of the Department's page for LSAAs is also helpful. It is cited above.

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CANNABIS NEWS

CALIFORNIA'S CANNABIS TAX REVENUE MISSES THE MARK, DESPITE AN UPWARD TREND

California posted revenue-from-cannabis numbers recently. The numbers were below projections by the state causing California regulators to decrease revenue targets moving forward.

Background: Cannabis Related Revenue

California only pulled in $74.2 million in cannabis excise tax for the second quarter of 2019. This number is far short of the projections previously set. In January, the forecast for excise tax revenues was $335 million for 2019 and $514 million for 2020. This caused the state, in May, to decrease its target by $223 million through June 2020. Still, the $74 million pulled in between April and June was a 21 percent increase from the $63 million pulled in the first quarter, January through March.

Additionally, California pulled in $22.6 million in cultivation tax and $47.4 million in state sales tax during the second quarter, according to the California Department of Tax and Fee Administration (CDTFA). This brings the total tax revenue reported to $144.2 million for the second quarter. The reported revenue for the first quarter was revised to $120.8 million, which included $63.1 million from excise tax, $17.1 million from cultivation tax, and $40.6 million in sales tax.

Projections by the Legislative Analyst's Office

The excise and the cultivation tax were a result of California voters approving Proposition 64, *the Control, Regulate, and Tax Adult Use of Marijuana Act*, in November 2016. The taxes went into effect on January 1, 2019. In its analysis of Proposition 64, the California Legislative Analyst's Office (LOA) projected that California would bring in $1 billion in revenue annually. However, LOA emphasized in its official analysis that it the $1 billion annual projection would likely not happen right away and anticipated that revenues were likely to be significantly lower in the first several years following the passage of the measure.

What Explains the Over Projected Revenue?

There are multiple problems contributing to California collecting tax revenue far under projections. A shortage of licensed cannabis retailers and a confusing number of levies on the cannabis industry are a major source of blame. Many cities and local areas have refused to allow retailers to open and, in addition to the 15 percent excise tax, the $9.25 per dry-weight ounce cultivation tax, and 9 percent to 11 percent retail tax on products, city and county governments are free to impose their own taxes on cannabis products. The city and county governments' imposed tax rates vary widely. With such high taxes on recreational products and the new requirements for medical marijuana recommendations, the illegal market is benefitting from an influx of cannabis users.

As a result, most legal companies are just breaking even. Many businesses have been forced to freeze hiring or downsize. Not only is taxation to blame, but also certain regulations for the packaging of cannabis products. For example, on July 1, childproof packaging became a requirement for edibles and concentrates. It is estimated that unit prices have shot up from 7 cents per unit to 55 cents per unit as a result of the new packaging requirement. The owner of a business in Sacramento told local new stations that he was down about 60-75 percent "of what we would normally have [of product]—but every day, it's increasing." Owners feel that this has taken away individuality from their products, which has resulted in customer backlash.

Testing costs are also putting added financial pressure on manufacturers and growers, which can run into the tens of thousands of dollars monthly. Products must be tested before being delivered to distributors.

Conclusion and Implications

It is expected—at least according to Governor Gavin Newsom—that it will take five to seven years for the legal cannabis market to reach its potential. Industry advisors, Arcview Market Research and BDS

Analytics, project that legal spending will climb to $7.2 billion by 2024 with the illegal market dropping to $6.2 billion. However, the analysts believe that five years from now, the illegal market will still make up 53 percent of cannabis sales in California, while states with more supportive regulatory regimes are expecting illicit sales to make up less than 30 percent of sales.

Overall, it is projected that the industry will smooth out, as permanent industry regulations will be in place by the end of 2018. Further, the supply chain is expected to become more stable as more growers and product makers obtain licenses and production is increased, which will in turn likely cause more cities and counties to issue business permits.
(Brittany Ortiz, Nedda Mahrou)

CANNABIS, ILLINOIS AND SOCIAL EQUITY—THE THIRD PILLAR OF LEGALIZATION OR POLITICAL EXPEDIENCE?

Traditionally cannabis licensing depended primarily on the applicant's ability to demonstrate capital and trustworthiness. By having capital, the applicant demonstrated business acumen and financial wherewithal to withstand the high costs of opening the cannabis venture without the use of traditional financing that other industries enjoy. The economic and political realities of medical cannabis producers in Illinois meted out burn rates that ate into the capital of the select few awarded licenses to peddle the flower to a very restricted list of patients before being granted a temporary monopoly by the Illinois Cannabis Regulation & Tax Act, 401 ILCS 705/1-1 *et seq*, passed on May 31, 2019.

Background

Cash outflows soared as an anti-cannabis administration took the helm of the state in 2015 after the effective date of its medical law. It then dragged its feet in opening the businesses, and made patients wait for months to get access to their licenses to purchase medicine. Next year, those cannabis businesses still operating will occupy the entire adult use market in the Illinois for at least a year before new entrants can compete with them. Each and every of those newcomers need social equity to get their license, including the existing players that want to acquire the maximum number of new licenses. A total of ten dispensary licenses can be held by any entity, which includes any medical dispensary licenses, and also its second location granted to existing medical license holders.

Of course, the newcomers also need the second pillar of the industry, trustworthiness. You have to ensure that no diversion of supply or cash (until the SAFE Banking Act passes) proceeds will be lost to the untaxed black or grey markets. The security and record keeping requirements of Illinois are as strict as can be found in any other state. The new entrants have to compile a litany of standard operating procedures (SOPs) and company policies on security, operations, community outreach and diversity in order to rack up as many points as they can in their quest to get the highest scoring application in a very competitive field. This competition includes new application requirements in social equity.

A full 20 percent of the points come from a new "social equity applicant" status that is not found anywhere else. Look for this to be replicated in other states, or municipalities, that must legalize legislatively, which has to be done regardless of "marihuana" (the federal legal term of art) being de-scheduled from the Controlled Substances Act because the majority of states still prohibit the regulated sale of the plant's flower.

Illinois Rehabilitation and Rectification for Past and Present Offenses

Illinois adopted rehabilitation and rectification methods to repair the damage caused by the war on cannabis that enabled millions of arrests and even greater burdens on the poorest neighborhoods. To fix those issues, Illinois evidently will make millionaires from a select few people that are either residing in a very impoverished part of town, or have been arrested for cannabis offenses.

The 'Social Equity Applicant'

These two things comprise two-thirds of the new legal term of art in Illinois—the "Social Equity Applicant." 401 ILCS 705/1-10.

"Social Equity Applicant" means an applicant that is an Illinois resident that meets one of the following criteria:

•(1) an applicant with at least 51 percent ownership and control by one or more individuals who have resided for at least five of the preceding ten years in a Disproportionately Impacted Area;

•(2) an applicant with at least 51percent ownership and control by one or more individuals who:
(i) have been arrested for, convicted of, or adjudicated delinquent for any offense that is eligible for expungement under this Act; or
(ii) is a member of an impacted family;

•(3) for applicants with a minimum of ten full-time employees, an applicant with at least 51 percent of current employees who:
(i) currently reside in a Disproportionately Impacted Area [DIA]; **or**
(ii) have been arrested for, convicted of, or adjudicated delinquent for any offense that is eligible for expungement under this Act or member of an impacted family.

Logistics

The definition section of the new law provides for the terms, DIA, Ownership and control, and Member of impacted family, but not for an offense eligible for expungement. Such offenses can be found in the lengthy amendments section to the new law at § 900-12. 401 ILCS 705/900-12. The final social equity bucket that an applicant can fall into calls for a business with at least ten full-time employees, 51 percent of which are from either of the first two categories. This third option represents a validation of the necessity for capital in the industry. A well-capitalized business can hire itself into social equity status, while those first two prongs of the social equity applicant prove hard to achieve.

If you live in a DIA or have been arrested for an expungable offense, then you qualify as a social equity applicant only if you maintain 51 percent ownership and control of the new cannabis business. Ownership and control is defined under the act as control of the day-to-day operations and majority of the capital and profits in the business. A dispensary or craft grow in Illinois will be more than expensive enough to price practically all people that have resided in a DIA for at least five out of the last ten years out of such an opportunity. If instead you got arrested for an offense eligible for expungement under the new Cannabis Regulation and Tax Act, the same 51 percent of ownership and control applies.

Moreover, the two elements appear to have no overlap in that 51 percent number. For example, a company of three people: a capital contributor, someone living in a DIA, and someone with an offense eligible for expungement whose governing documents calls for a two-thirds majority vote in is decisions is not a social equity applicant. The only time that the DIA resident or the offense eligible for expungement coincides in the disjunctive is when they must cede control and merely be an employee.

Licenses Will Be Limited

The limited number of licenses and the lucrative nature of Illinois' highly regulated supply of legal cannabis will create numbers that may rival Pasadena, California's uber-competitive ratio of 200 applications for only six licenses. People from multiple states, countries, and neighborhoods all want the Illinois license because they know they can recapture their initial investment and make substantially more than that over time. And publicly traded companies have fiduciary duties to employ tactics to acquire social equity talent in a good faith effort to obtain more licenses and maximize profits.

Empowerment

That being said, the noble idea of rectifying the war on drugs by empowering employment and ownership in the population most severely injured by the past 82 years of federal cannabis prohibition need not completely be swept into the capital pillar of the cannabis industry. Enough money to start a craft grow or dispensary can easily be raised by a handful of people that put trust in a social equity applicant, and may condition that trust with a buyout option in five years—as that is as long as the very limited restrictions on the sale of social equity applicant cannabis licenses place. That buyout need not go to a Multi-State Operator. It could be an employee stock ownership plan (ESOP). It could also be a growth strategy to become a social equity cannabis business because

you have grown into one, which is substantially easier for craft grows than for retail.

Conclusion and Implications

How will the State of Illinois score its applications? Will it provide the full 20 percent of the points on social equity for companies with the person lucky enough to now become a millionaire because they got arrested for cannabis, or for living in a bad part of town? Or will it provide the maximum amount of points for companies that put together a business plan that takes into account an exit strategy that creates jobs and ownership in the new licensee to maximize the benefit to the largest amount of people most injured by the previous law? We will find out next summer. Barring delays, dispensary licenses should be announced in May, and craft grows in July of 2020. (Thomas Howard)

HEMP AND THE DE-FACTO DECRIMINALIZATION OF CANNABIS?

Two states, which have not formally decriminalized cannabis possession have made the decision to either forego arrest and prosecution of "minor" possession and use crimes or initiate a citation system of enforcement, due to the lag in technology allowing law enforcement to test in the field, and for state and local labs to test for THC levels. And hemp is to blame.

Background

It's all about Hemp. The United States 2018 Farm Bill included provisions to legalize hemp and the products derived from hemp—mainly, CBD and related byproducts of hemp. President Trump signed into law the federal 2018 Farm Bill—Senate Bill 2667 and the accompanying House resolution, HR 5485—on December 20, 2018. (*See*, https://www.votehemp.com/wp-content/uploads/2018/12/FarmBill-CRPT-115hrpt1072.pdf)

With the Farm Bill becoming law, its provisions related the legalization of hemp and it's by product, CBD, become the law of the nation. However, legalization of cannabis was not addressed leaving cannabis sales and possession illegal and still a Schedule I drug right up there with heroin. The Farm Bill legalized products of very low concentrates of THC which, in turn opened up to farmers access to water rights and federal agricultural grants—and theoretically, make the national banking system accessible to farmers—although this aspect remains vague as banking hasn't really yet come on board.

Prosecution Issues in States that Have Not Legalized Cannabis

The legalization of hemp and hemp products may have seen, to supporters of cannabis use and sales, the hope of a gateway to full decriminalization at the federal level, the Farm Bill, also produced an unforeseen challenge to local law enforcement. In states that still prosecute cannabis possession, *i.e.*, states that have *not* legalized recreational cannabis use and sales, local law enforcement were presented with the challenge of discerning hemp from cannabis to enable arrest and prosecution. Recently, in the States of Florida and Texas, faced with this challenge, state and local law enforcement have recently announced a sort of moratorium on arrest of small-scale cannabis prosecution—but only until the science of detection of and differentiation catches up.

Florida Moritorium

In the State of Florida, on May 13, 2019, the State Legislature passed Senate Bill 1020 legalizing hemp. Governor DeSantis signed Senate Bill 1020 and on July 1, 2019, the bill became law. But what about law enforcement? Recently, State Attorney Jack Campbell, on July 30, 2019 penned a letter to law enforcement within the state (*see*: https://www.bodifordlaw.com/wp-content/uploads/2019/08/Campbell-Letter.pdf} addressing the difficulty the state currently is experiencing in testing to differentiate legal hemp and hemp products from illegal cannabis. The problem is that currently, the state doesn't yet have reliable presumptive testing protocol:

> The current posture is that no private or public lab in Florida can do this dispositive testing. . . and while some private labs that may want to get into this business, they are not online as of now. . . . Hemp products look and smell exactly like marijuana. . . .

The State Attorney goes on to advise Florida law enforcement that while the office still intends to prosecute illegal cannabis to the letter of the law:

> . . .this office will no longer be charging people with possession of cannabis, absent a confession to what the substance is. . . .We also will not be approving seach warrants or other legal process based on traditional predicates where officers or their dogs and presumptive tests, feel a substance is cannabis.

The letter to law enforcement concludes that:

> I know this is a significant change in the law and would caution you in making arrests when these issues are present. . . . [and]. . .I am confident we can work through these challenges as we have in the past.

Texas Faces the Same Challenges

Texas approved House Bill 1325 which legalized hemp and hemp byproducts in the state. That, coupled with the fallout from the federal Farm Bill, created a nearly identical challenge to law enforcement as in Florida. Use of traditional sight and smell factors in the determination to arrest suspects of illegal cannabis possession are no longer dispositive of probable cause to perform arrests. And testing methodology has not yet caught up to assist in the process.

In July 2019, the Texas Department of Public Safety issued a Memorandum addressing this problem. (*See:* https://static.texastribune.org/media/files/6bb887232ae43ab238d88d50d18b196f/DPS-citerelease2019.pdf?_ga=2.186429481.1054261715.1565214640-709732705.1564612372)

The Memorandum states that:

> Because marijuana and hemp come from the same plant, it is difficult to definitively distinguish the two without a laboratory analysis. Currently, our crime labs do not have the capacity to to measure the THC concentration level.

The Memorandum concludes:

> . . .effective immediately, personnel will cite and release for any misdemeanor amount of marijuana as authorized by Article 14.06 of the Texas Code of Criminal Procedure.

Conclusion and Implications

With removal of hemp from the federal schedule of illicit drugs, and with many states adopting their own laws legalizing hemp and CBD—but remaining steadfast on *not* legalizing cannabis—law enforcement is in a holding pattern, waiting for technology to catch up in order for it to arrest for cannabis possession and use. In Florida this takes the form of a de-facto moratorium regarding small quantities. In Texas, this takes the form of a citation lowering the consequences significantly from pre-hemp legalization days. Whether all of this prompts these states and more to consider full legalization of cannabis or not is left to be seen. Most likely, however, when a reliable field detection device is manufactured and when state and local laboratories become ready to test for levels of THC, these states can once again give the green light to law enforcement to resume arrests and prosecution. (Robert Schuster)

LEGISLATIVE DEVELOPMENTS

RECENT OREGON LEGISLATION ADDRESS CHANGES IN PENALTIES FOR OREGON LIQUOR CONTROL COMMISSION RULE VIOLATIONS FOR THE CANNABIS INDUSTRY

Recently, House Bill 2098, passed during the 2019 legislative session, which made a lot of changes to Oregon's cannabis industry. Among those changes are increased authority for the Oregon Liquor Control Commission (OLCC) to take action against unapproved financial interests, sanctions for failure to pay recreational marijuana taxes applicable to OLCC retailers, and an increase in the maximum civil penalty for a single violation from $5,000 to $10,000. This article will delve into these changes and how they may impact licensees.

Enforcement Changes

Anyone who has been following the OLCC commission meetings has undoubtedly noticed a change in the tone of the stipulated settlement ratification discussions. The commissioners, particularly Chairman Paul Rosenbaum, have repeatedly questioned settlement terms and pushed for more aggressive treatment of licensees who incur violations. Chairman Rosenbaum has occasionally voted against ratifying settlements and opined that he expects other commissioners to vote no with him more often as time passes.

Representatives of the OLCC and commissioners alike have said that the leniency shown to licensees during the first few years of the recreational marijuana program should be curtailed now that the laws and rules have been in place for some time. At the same time, the OLCC, the legislature, and Oregonians have begun to hone their enforcement priorities. These law changes reflect those priorities.

Unapproved Financial Interests and Diversion

The foremost enforcement priorities for the OLCC and the legislature are curtailing unapproved financial interests in OLCC licensed businesses and preventing diversion of marijuana products out of the legal system. Thus, ORS 475B.186 is amended such that the OLCC has the authority to restrict, suspend or refuse to renew a license if the agency has probable cause that there is an unapproved financial interest on the license. ORS 475B.186 is further amended to permit the OLCC to seize marijuana items from a licensee if the agency has probable cause that there is an unapproved financial interest on the license or that the licensee has engaged, or is engaging, in the unlawful diversion of marijuana items.

Retailer Tax

OLCC licensed retailers have complained that other retailers who do not pay the recreational marijuana retail taxes required under ORS 475B.710 have an unfair competitive advantage over those that are properly submitting the taxes they collect from customers to the Department of Revenue. Likewise, Oregonians expect that the tax revenues due to the state will be paid and put to use for the benefit of the state and its residents. Previously, the OLCC lacked clear authority to consider delinquent tax payments when making licensing decisions. House Bill 2098 fixed that.

ORS 475B.256 is amended to direct the OLCC to revoke an OLCC recreational marijuana retailer license if, either:

- the licensee has failed to pay the retailer tax for any two of any four consecutive quarters and the Department of Revenue has issued to the licensee a distraint warrant for the nonpayment of tax; or

- the licensee has failed to file the retailer tax return twice in any four consecutive quarters and the department has issued to the licensee a notice of determination and assessment for failure to file a return.

Increase in Civil Penalty

Prior to the passage of House Bill 2098, the highest civil penalty the OLCC could impose for a single violation was $5,000. House Bill 2098 amends ORS 475B.416 to increase the maximum civil penalty to

$10,000 for each violation. This change has angered many licensees and creates the potential for insurmountable penalties resulting from seemingly minor rule violations. However, it may also provide additional tools for settlement negotiation. For example, when the OLCC would otherwise impose a 60-day suspension or cancel a license for a violation that it considers too serious for a $5,000 civil penalty, it might now consider accepting a $10,000 civil penalty, allowing the licensee to avoid interruption of business.

Conclusion and Implications

The law changes created by House Bill 2098 that affect penalties are harsher to OLCC licensees. They were deliberately crafted to move the Oregon cannabis market in the direction of a healthy, mature industry. Time will tell whether the OLCC's new powers succeed in cutting the bad actors from the industry and boosting the good players. Either way, licensees and their attorneys need to be aware of the new laws and the rules that will follow, to avoid becoming guinea pigs for these new penalties.
(Mia Getlin)

UTAH TO ABANDON PLANS FOR CONTROVERSIAL STATE-RUN MEDICAL CANNABIS SYSTEM WITH SPECIAL LEGISLATION

Recent events in Utah have cast further uncertainty on the future of cannabis in a notoriously traditional state that is seeing an increasing demand for medical cannabis. Last year, Utah voters approved Proposition 2, a ballot initiative that legalized medical marijuana in the state. However, after the initiative was approved, the Utah State Legislature stepped in to alter the version passed by voters. The Church of Jesus Christ of Latter-day Saints (LDS Church) also got involved in negotiations with the bill's sponsor and the Legislature over the substitute bill.

Background

On December 3, 2018, the Legislature passed, and the Governor signed, House Bill 3001, the Utah Medical Cannabis Act. The revised legislation created a state-run system where cannabis would be grown by a limited number of licensees and would be distributed through private dispensaries and county health departments. The law would allow the state to grant up to ten licenses for companies to grow medical marijuana for the state's program.

After signing the bill replacing Proposition 2, Governor Gary Herbert issued a statement proclaiming that:

> This is a historic day. With the passage of the Utah Medical Cannabis Act, Utah now has the best-designed medical cannabis program in the country. Working with trained medical professionals, qualified patients in Utah will be able to receive quality-controlled cannabis products from a licensed pharmacist in medical dosage form. And this will be done in a way that prevents diversion of product into a black market.

Lawsuits Follow

However, almost immediately, two lawsuits were filed concerning the Legislature's move to replace Proposition 2 with HB 3001. One of the lawsuits takes issue with the LDS Church's involvement in negotiating the altered cannabis bill and also claims that the legislature's immediate alteration of the ballot measure was unconstitutional.

81 Applications, Eight Growing Licenses Granted—Appeals Follow

The Utah Department of Agriculture and Food received 81 applications for medical cannabis grower licenses under the new program. On July 19, 2019, the Department of Agriculture and the Utah Division of Purchasing selected eight companies to participate in Utah's Medical Cannabis Cultivation Program. The agency was authorized to award up to ten licenses under the Utah Medical Cannabis Act, but chose to hand out only eight to avoid an overabundance of cannabis. Andrew Rigby, Director of Medical Cannabis and Industrial Hemp Programs, Utah Department of Agriculture and Food, said in a statement that:

> The decision to only award eight licenses was made to avoid an oversupply of product, while

still maintaining a healthy diversity of cultivators for purposes of competition of product quality and patient pricing.

The decision to grant fewer licenses than the amount allowed by law sparked controversy and was met with swift opposition. At least six of the marijuana companies whose applications were rejected filed administrative appeals and/or lawsuits, alleging that the state awarded licenses to unqualified cultivators and that the licensing process in general was unfair. Others protested on the grounds that the limited number of licenses would result in a cannabis shortage that will be detrimental to patients who need the drug. Medical marijuana advocates are among those who are concerned that the supply won't keep up with the rising demand.

Legislation to Scrap State-Run Dispensary System for Private Dispensaries

It was just last month when the state chose the eight companies to legally grow medical marijuana under new regulations that created a state-run distribution system. Now, lawmakers plan to introduce a bill for a special session of the Utah State Legislature to scrap the planned state-run medical marijuana dispensary system. The decision came after county attorneys throughout the state expressed concerns that the law could put public employees at risk of federal prosecution, since cannabis is still illegal under federal law. In fact, various district and county attorneys advised their local health departments not to dispense marijuana under the law.

Conclusion and Implications

The second version of the revised plan would allow medical cannabis to be distributed through up to 12 private companies. There is still growing concern among marijuana advocates that 12 licenses will not be enough to provide enough supply for all of the state's patients. The revised law could be considered at a special session in September and the Governor has indicated plans to get the regulations in place in time to start distributing in March 2020. Only time will tell how Utah will eventually end up distributing medical marijuana, which Utah's residents have voted to legalize.
(Nedda Mahrou)

WASHINGTON STATE LEGISLATURE TAKES ANOTHER CRACK AT PERMITTING 'DO IT YOURSELF' CANNABIS IN THE WAKE OF SEVERAL FAILED PREVIOUS ATTEMPTS

While cannabis is legal in Washington, it is not evenly distributed. For those living in remote regions or in communities that have prohibited the sale of cannabis, growing a few plants might be the easiest option. Small, illicit growing operations have been a fixture of cannabis culture for decades. As legalization of both recreational and medicinal marijuana has spread through the U.S., so too have the opportunities for legal "homegrows." Growing cannabis in a private residence has been an available path for medical marijuana patients in many states since the beginning of legalization. Washington State remains an outlier in that despite a robust, legal recreational cannabis market, it is the only state that entirely bans adult-use homegrows. Currently, Washington State only allows homegrows for medical patients. This year, there have been renewed efforts by both the Washington State House and Senate to address and sanction small, homegrows.

A History of Failed Attempts at Legalization

Senate Bill 6083

Despite the strong public support for legal cannabis, attempts to legalize homegrows have consistently failed in Washington. The first meaningful push began in 2015. Senate Bill 6083 included provisions that would have allowed adults to grow up to six plants for personal use. The argument for legalization was relatively simple and has generally remained unchanged; regulated homegrow would shrink the black market while simplifying the current system of medical licensing. The complex protocols in place around medical grows could be clarified and "casual users of marijuana" would be more readily equated with home beer brewers or wine makers, argued SB 6083. The bill did not pass.

House Bill 1212

In 2017, House Bill 1212 left the Commerce and Gaming committee with a unanimous "do pass." HB 1212 would have similarly allowed for the cultivation of up to six plants for personal use. After being diverted from the floor into the Finance Committee, HB 1212 eventually died.

2019 Bills

This year, two bills were introduced to address homegrows. House Bill 1131 and Senate Bill 5155 were introduced and the bills have bi-partisan support and similar aims as previous homegrow bills in Washington. Under these proposals, adults over 21 years old would be allowed to legally produce or possess up to six cannabis plants on the premises of their housing unit with a limit of fifteen plants in a single housing unit.

Opposition from the Washington State Liquor and Cannabis Board

The Washington State Liquor and Cannabis Board (LCB) has traditionally opposed the legalization of homegrowing. In response to 2015's SB 6083, the LCB authored a letter that implored lawmakers to vote against the bill. The LCB made a case for homegrows undercutting the regulated market, increasing illicit sales, and increasing youth access to cannabis. Citing the United States Department of Justice's now-rescinded "Cole Memo," the LCB raised concerns that the eight priorities of prevention outlined in that memo could be increased, which could turn Federal attention on Washington. Finally, citing general regulatory schema, the LCB analogized cannabis to tobacco, not beer or wine. The home production of tobacco is not legal.

In 2017, the state legislature paid the LCB to study the issue of homegrowing and provide recommendations. Of the two recommendations that allowed for homegrowing, both required permitting and limited individual possession to four plants. These "Home Grow Regulatory Options" are still present on the LCB's webpage.

Earlier this year, the LCB's Chris Thompson told the House Commerce Committee that the LCB still has concerns about homegrows providing cover for illegal grows. This echoes earlier concerns from the LCB related to the difficulty of regulating and enforcing homegrows, especially if they become widespread.

Conclusion and Implications

We can't determine the fate of House Bill 1131 and Senate Bill 5155 at this time. Both bills have been referred to committees and may die there, sharing the fate of 2017's HB 1212. However, circumstances have changed and legislators and regulators both have had the opportunity to learn from other states' mistakes and successes.

John Kingsbury, an advocate with Homegrow Washington, told TheStranger.Com (https://www.thestranger.com/slog/2019/01/14/37971819/bipartisan-group-of-legislators-introduce-bill-to-legalize-cannabis-home-grows-in-washington-state) "I am absolutely convinced that if we get this to the floor we can get it passed." Additionally, he states:

> I have gone to dozens and dozens of legislators asking for their support and the thing I kept hearing was 'I don't want to sign my name on it but I will vote on it if it comes to the floor.'

This may be in line with the recent shift in legislative attitude towards cannabis regulation and enforcement. Senate Bill 5318, signed into law earlier this year, prioritizes bringing cannabis producers, processors, and retailers into regulatory compliance via education and corrective notices over fees and license revocation. Some have viewed SB 5318 as a sign of legislative displeasure with the LCB and both the new bills disregard the LCB's suggestions for homegrow legalization.
(Cassidy Patnoe, Mia Getlin)

JUDICIAL DEVELOPMENTS

U.S. SUPREME COURT DELIVERS MAJOR REGULATORY 'TAKINGS' DECISION WITH IMPLICATIONS FOR ALL LAND USE CONCERNS, INCLUDING THE CANNABIS INDUSTRY

Knick v. Township of Scott, Pennsylvania, ___U.S.___, 139 S.Ct. 2162 (U.S. June 21, 2019).

On June 21, 2019, the United States Supreme Court delivered a major property rights victory by giving property owners a direct path to federal court that had been closed since 1985. In a 5-4 decision in *Knick v. Township of Scott, Pennsylvania*, the Supreme Court held that a property owner has an actionable federal claim under the Takings Clause of the Fifth Amendment, "when the government takes his property without paying for it" and may "bring his claim in federal court under [42 U.S.C] § 1983 at that time."

This decision overrules *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, (1985) (*Williamson County*) where the Supreme Court held that a property owner had not suffered a Fifth Amendment violation unless his claim for just compensation was first denied by a state court under state law. The decision also eliminates its 2005 decision in *San Remo Hotel, L. P. v. City and County of San Francisco*, 545 U.S. 323 (2005) (*San Remo*), which caused the most difficulties in takings jurisprudence.

The majority opinion and the minority opinion both paint different pictures of the impact of this decision. The majority minimizes the impact of its holding, stating that it:

> . . .will not expose governments to new liability [and] will simply allow into federal court takings claims that otherwise would have been brought as inverse condemnation suits in state court.

While the dissent states:

> Today's decision sends a flood of complex state-law issues to federal courts. It makes federal courts a principal player in local and state land-use disputes.

Both are, in part, correct.

Background

In *Knick v. Township*, Scott Township in Pennsylvania (Township) passed an ordinance in 2012 requiring all cemeteries to be kept open and accessible to the public during daylight hours. In 2013, a Township officer notified Rose Mary Knick (Knick) that "several grave markers" were on her property and that she was violating the Township's ordinance by failing to open her land to the public during the day. Knick sought declaratory and injunctive relief in state court claiming a "taking." The state court did not rule on Knick's request because "she could not demonstrate the irreparable harm necessary for equitable relief" as a result of the Township's withdrawal of its violation notice pending the court proceedings.

Knick then filed an action in the U.S. District Court for the Middle District of Pennsylvania under 42 U.S.C. § 1983. Knick alleged that the ordinance violated the Fifth Amendment's Takings Clause. The District Court, following *Williamson County*, dismissed Knick's claim and the Third Circuit Court of Appeals affirmed (also following *Williamson County*). The U.S. Supreme Court granted review to:

> . . .reconsider the holding of *Williamson County* that property owners must seek just compensation under state law in state court before bringing a federal takings claim under Section 1983.

The Supreme Court's Decision

The Majority Identifies a 'Catch-22' and Overrules *Williamson County*

The majority's decision to overrule *Williamson County* was based in part on the widely accepted premise that takings plaintiffs were faced with a

"Catch-22" as a result of *Williamson County* and the Supreme Court›s 2005 decision in *San Remo*. In *San Remo*, the Supreme Court held that "a state court's resolution of a claim for just compensation under state law generally has preclusive effect in any subsequent federal suit." Thus, a takings plaintiff:

> . . .cannot go to federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court.

The majority and dissent also had opposing interpretations on the text of the Takings Clause: "nor shall private property be taken for public use, without just compensation." Specifically, they disagreed on what action gives rise to a federal claim. According to the majority, it is the taking itself that gives rise to a federal claim. The dissent, however, opined that a Fifth Amendment violation only occurs if: 1) there is a taking *and* 2) there is a failure to provide just compensation, with the second condition only satisfied "when the property owner comes away from the government's compensatory procedure empty-handed." The disagreement between the majority and dissent is highlighted by the following exchange.

The majority decision stated:

> . . .[the Takings Clause] does not say: 'Nor shall private property be taken for public use, without available procedure that will result in compensation.'

Meanwhile, the minority position was as follows:

> [H]ere's another thing the [Takings Clause] does not say: 'Nor shall private property be taken for public use, without advance or contemporaneous payment of just compensation, notwithstanding ordinary procedures'

The majority ultimately opined that *Williamson County* was wrong and that its "reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence." As a result, the majority held that *Williamson County's*:

> . . .state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled.

The majority clarified that a government need not provide compensation in advance in order to protect its activities from injunctive relief as "long as the property owner has some way to obtain compensation after the fact." But even with such a procedure in place, "the property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation" and may file his claim in federal court at that time.

Conclusion and Implications

What about the potential impacts of the decision in California? Only time will tell how California plaintiffs and California federal courts will apply inverse condemnation claims. For example, will plaintiffs first seek to adjudicate ancillary claims for invalidation of land use regulations before seeking federal court relief? How will the federal courts apply the California courts' requirements that to avoid the chilling effect of inverse condemnation claims on planning, plaintiffs must first seek to invalidate challenged land use regulations? While invalidation of the challenged land use regulations is not a prerequisite to an inverse condemnation claim in federal courts, it is possible that lack of an attempt at invalidation might have an impact on the claim.

Plaintiffs suing in state court first, will have to reserve their federal claims to have a "second bite" at the apple if they lose in California. Thus, due to the many state court claims a plaintiff can bring, will federal courts stay the federal claims and remand the state law claims to state court? There are a number of procedural issues that now have to be addressed.

Furthermore, the removal of the *Williamson County* procedural hurdle may not be a panacea for all takings claims. For example, California court precedent under rent control laws as to what is meant by a constitutional "fair return" may significantly impact whether there is a taking of property rights. As another example, California court precedent under the Coastal Act may limit whether mistaken assertion of Coastal Commission jurisdiction under the Coastal Act constitutes a taking. The substantive aspects of each particular inverse condemnation claim should be considered before filing in federal court.
(Boyd Hill, Nedda Mahrou)

CALIFORNIA SUPREME COURT HOLDS LOCAL ORDINANCE REGULATING CANNABIS ACTIVITY MAY BE SUBJECT TO CEQA REVIEW

Union of Medical Marijuana Patients, Inc. v. City of San Diego,
___Cal.5th___, Case No. S238563 (Cal. Aug. 19, 2019).

On August 19, 2019, the California Supreme Court issued a unanimous 38-page opinion, authored by Chief Justice Cantil-Sakauye, in *Union of Medical Marijuana Patients, Inc. v. City of San Diego*, holding that while zoning amendments are not, as a matter of law, always a project under the California Environmental Quality Act (CEQA) the City of San Diego's ordinance regulating the siting and operations of certain cannabis-related activity was potentially subject to CEQA review under *Muzzy Ranch Co. v. Solano County Airport Land Use Commission* (*Muzzy Ranch*). Concluding the Fourth District Court of Appeal misapplied the *Muzzy Ranch* test for determining whether a proposed activity has the potential to cause an environmental change as described in Public Resources Code § 21065, the Supreme Court remanded the case for further consideration.

The San Diego Ordinance Regulating Cannabis Dispensaries

In 2014, the City of San Diego (City) enacted Ordinance No. O-20356 (Ordinance) authorizing medical cannabis dispensaries to be established within the City. Pursuant to the authority granted to local jurisdictions under Health and Safety Code § 11362.83—a provision of the California Uniform Controlled Substances Act's Medical Marijuana Program—the City imposed certain restrictions on the siting and operation of the dispensaries by amending the City's zoning ordinances.

Under the Ordinance, dispensaries were restricted to two of six types of commercial zones, two of four types of industrial zones, and certain planned districts. Dispensaries were prohibited in residential and agricultural zones, within 1,000 feet of parks and schools, and within 100 feet of residential zones. Furthermore, the City limited the number of dispensaries to four in each of the City's nine districts. The zoning restrictions had the effect of limiting two districts to a maximum of three dispensaries and foreclosed one district from having any dispensaries. In addition to these locational limits, the Ordinance imposed restrictions on signage and hours of operation.

The Patient Advocacy Group's Appeal for CEQA Review

Prior to the adoption of the Ordinance, patients' rights group, Union of Medical Marijuana Patients (UMMP), submitted two comment letters to the City requesting a CEQA review of the then-proposed Ordinance because of its potential impacts on the environment. UMMP's letters alleged potential impacts on the environment including: 1) increased emissions from medical cannabis users having to travel further due to the siting restrictions, 2) an increase in the "inherently agricultural practice" of medical cannabis users growing their own cannabis as a result of the siting restrictions, and 3) the "unique development impacts" and intensification of impacts because of the limited permissible dispensary locations.

The City adopted the Ordinance with the finding that the Ordinance was not a "project" under CEQA and that:

> . . .adoption of the ordinance does not have the potential for resulting in either a direct physical change in the environment, or reasonably foreseeable indirect physical change in the environment.

UMMP then challenged the adoption of the Ordinance under CEQA.

The Supreme Court's Decision

Zoning Amendments Are Not Necessarily CEQA Projects as a Matter of Law

CEQA review is required for "projects" contemplated by a public agency. "Project" is defined in Public Resources Code § 21065 as an activity that is undertaken by, funded by, or requiring the approval of a public agency that:

> . . .may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.

UMMP argued that in addition to this definition, zoning amendments are "projects" per se because they are one of the types of "discretionary projects" enumerated in Public Resources Code § 21080. The Supreme Court rejected this theory that zoning amendments and other types of activities listed in Public Resources Code § 21080 are subject to CEQA as a matter of law. To support this conclusion, the Court looked to the CEQA Guidelines' interpretation of what constitutes a "project" for purposes of CEQA. CEQA Guidelines § 15378 interprets a "project" to be made up of two distinct elements: 1) an activity undertaken by a public agency, that 2) has an actual or potential to cause a change to the environment.

The Supreme Court found that interpreting Public Resources Code § 21065 to mean that all activity listed thereunder to always be a project as a matter of law ignored the two-step analysis of whether an activity is a "project" under Public Resources Code § 21080. Based on this, the Court determined that not all activities listed in Public Resources Code § 21065, including zoning amendments, always require CEQA analysis.

The Supreme Court Affirmed the *Muzzy Ranch* Test as Proper Means to Determine Whether a Project Has a Potential to Cause a Change in the Environment

Under the *Muzzy Ranch* decision [*Muzzy Ranch Co. v. Solano County Airport Land Use Commission*, 41 Cal.4th 372 (2007)], when determining whether an activity is a project under CEQA, the public agency must consider the potential environmental effects of the activity without considering whether the activity will actually have that environmental effect. The Court restated this test as follows:

> A proposed activity is a CEQA project if, by its general nature, the activity is capable of causing a direct or reasonably foreseeable indirect physical change in the environment. This determination is made without considering whether, under the specific circumstances in which the proposed activity will be carried out, these potential effects will actually occur.

The Supreme Court found that this abstracted analysis of the potential for impacts was consistent with the preliminary nature of a public agency determining whether an activity was a project as a first step in determining whether CEQA's analysis is warranted. The Court also noted that the specific type of activity contemplated by the public agency is irrelevant to the analysis of the potential for a significant environmental effect, so long as one of the triggering conditions listed in Public Resources Code § 21065(a)-(c) was met.

In applying the *Muzzy Ranch* test, the Supreme Court considered hypothetical impacts that *could* result from the adoption of the ordinance. The Court hypothesized that because the Ordinance would permit a new type of business in the City where previously there were no legally permitted dispensaries, the Ordinance could:

> . . .result in new retail construction to accommodate the businesses. . . .[and could]. . .cause a citywide change in patterns of vehicle traffic from the businesses' customers, employees, and suppliers.

The Court agreed with UMMP's argument that these potential impacts were:

> . . .sufficiently plausible to conclude that the Ordinance's adoption may cause a reasonably foreseeable indirect physical change in the environment.

Therefore, the Court concluded that the City erred in adopting the Ordinance without evaluating its environmental impacts.

Conclusion and Implications

The Court's conclusions in this case are significant for several reasons. First, the Court's determination that zoning amendments are not necessarily CEQA projects as a matter of law reaffirms a long-followed practice by land use agencies of determining whether a particular zoning amendment is subject to CEQA on a case-by-case basis based on the considerations laid out in Public Resources Code § 21065.

Second, the Court's holding that the City's ordinance regulating dispensaries necessitated CEQA review has the potential to broaden the scope of activities that may be subject to CEQA's environmental analysis. The generic hypothetical impacts laid out by the Court as sufficiently plausible to raise potential significant effects caused by the Ordinance leave open the door for project opponents to raise the potential of such impacts where a public agency is considering taking an action without CEQA review. To minimize the risk of this, public agencies and project proponents should ensure that any determination by the public agency that an activity is not a project under CEQA and therefore not subject to environmental review is based only on clear findings supported by the specific facts surrounding the decision. The Supreme Court's decision is available online at: http://www.courts.ca.gov/opinions/documents/S238563.PDF
(Andreas L. Booher)

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