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CANNABIS NEWS

CO-FOUNDER OF MARIJUANA PROHIBITIONIST GROUP MOUNTS CAMPAIGN TO HAVE PRESIDENT-ELECT BIDEN APPOINT HIM TO LEAD THE FEDERAL DRUG POLICY AGENCY

On November 19, 2020, Former Rep. Patrick Kennedy (D-RI), cofounder of the marijuana prohibitionist group Smart Approaches To Marijuana (SAM), penned an open letter to the Biden-Harris transition team stating that he is the best person to lead the White House Office of National Drug Control Policy (ONDCP). The ONDCP coordinate drug policies ranging from law enforcement to treatment programs.

Efforts to Run the ONDCP

In the letter, Kennedy pointed out the "dangers of today's higher potency consumption options and a rapidly evolving for-profit industry." However, Kennedy apparently agrees with President-elect Biden's position supporting marijuana decriminalization. "Like him I support expanded research and expungement as priorities," Kennedy said in the letter.

Kennedy stated:

> ONDCP has had varying levels of influence and success since then. Though at times a cabinet-level position (*e.g.* Clinton's second term, George W. Bush) and at times not, the Director of ONDCP is vested with unique statutory responsibilities. The Director certifies the drug portions of about two dozen departmental and agency budgets, leads the government's anti-drug strategy, and acts as a bully pulpit on all areas of drug addiction. A key responsibility, too, is to liaise and work with Congress to fund drug-related programming and secure bipartisan support for the nation's drug control strategy. Hence, the Director should be someone who has earned respect across party lines and among a wide swath of Americans.

Kennedy also pointed out the shortcomings of the Trump administration with respect to ONDCP. "During the Trump years, ONDCP has severely suffered," Kennedy stated. He went on to state that:

> It wasn't until 2019 that President Trump selected his drug czar: a lawyer with no drug expertise. During a time when overdoses were on a steady climb, ONDCP was reduced in size, scope, and influence – and there were only minimal efforts from within the West Wing. With an annual death toll over 110,000 due to addiction, overdose, and suicide, ONDCP needs a significant refresh and focused approach.

Trump's drug czar is Jim Carroll, a former White House deputy chief of staff and counsel to Ford Motor Co. ONDCP faced budget cuts under the Trump Administration, but Congress refused to pass the proposals. The agency was also downgraded during the Obama Administration from its former Cabinet-level status.

Kennedy has had his own public struggle with mental health and addiction. "I have no shame in saying it: I believe I could do better than anyone else," Kennedy told *STAT News*. He further shared that he believes the coronavirus pandemic is a "historic turning point for mental health and addiction." He went on to state that "there's a major distinction between commercialization of a new big tobacco industry and decriminalizing marijuana and ensuring that people aren't incarcerated because of it," according to the *STAT*.

NORML'S Position

NORML, on the other hand, is advocating for the abolition of the drug czar role entirely. At a minimum, NORML is asking Biden not to select Kennedy.

"There is no place in the Biden administration for policy leaders who cling to these outdated viewpoints," NORML said. It went on to state that:

> It's time to do as you promised and to move away from the failed drug war policies of the past. You promised to do so and we expect you to follow through on your pledge.

Traction on the Kennedy Proposal

Kennedy has gathered recommendation letters from several notable individuals, including Dr. Arthur C. Evans, Jr., CEO of the American Psychological Association, Bethany Hall-Long, the lieutenant governor of Delaware, Thomas Insel, director of the National Institute of Mental Health during the Bush and Obama Administration, and former ONDCP head Michael Botticelli.

Other prospects for the role include H. Westley Clark, the former director of the Center for Substance Abuse Treatment at the Substance Abuse and Mental Health Services Administration, and Kelly Clark, past president of the American Society of Addiction Medicine (ASAM).

Conclusion and Implications

ASAM has resisted marijuana reform efforts in the past, but recently adopted a new policy position in favor of protecting people who use cannabis in compliance with state laws from being punished by the federal government.

The Biden transition team has not commented on whether it is seriously considering Kennedy as a potential ONDCP director nominee. Any nominated director will require Senate confirmation.
(Brittany Ortiz)

LEGISLATIVE DEVELOPMENTS

THE U.S. HOUSE OF REPRESENTATIVES SENDS A SHOT ACROSS THE SENATE'S BOW WITH PASSAGE OF THE MARIJUANA OPPORTUNITY REINVESTMENT AND EXPUNGEMENT ACT

Every year, more states are changing the legal status of cannabis. As this slow wave of status sweeps across the county, more questions arise about when and how the federal government will address the current disparity between state and federal regulations.

The House of Representatives earlier in December 2020 passed sweeping legislation that would decriminalize cannabis and expunge nonviolent cannabis-related convictions. The bill is part of an ongoing effort by Democrats to roll back and compensate victims of decades of drug policies that have disproportionately affected low-income communities of color.

Background

The bill passed by a vote of 228-164, a bipartisan result that was the first time either chamber of Congress had ever endorsed a form of cannabis legalization. The legislation would remove the drug from the Controlled Substances Act and authorize a 5 percent tax on cannabis that would fund community and small business grant programs to help those most impacted by the criminalization of cannabis.

The legislation is almost certain to fail in the GOP-controlled Senate, where Republican leaders have derided it as a distraction from the work of passing coronavirus relief during last minute negotiations to get a spending bill passed through Congress' higher chamber.

Overview of the Legal Status of Cannabis under Federal Law

Cannabis is a genus of plant that has three species: *Cannabis sativa*, *Cannabis indica*, and *Cannabis ruderalis*. Tetrahydrocannabinol (THC) is the compound found in all species of the cannabis plant that has the psychotropic—or mind-altering—effects typically associated with cannabis use. The amount of THC is the distinguishing factor for a cannabis plant's legal status. Federal law considers any of the above-listed species containing greater than 0.3 percent THC as cannabis, and those containing less than 0.3 percent THC are considered hemp. Industrial hemp is commonly plants from the species of *Cannabis sativa* that contain less than 0.3 percent of THC.

Cannabis, as well as hemp, was classified as a controlled substance for purposes of federal law under the Controlled Substances Act of 1970 based on how cannabis was defined in the Agricultural Marketing Act of 1946. These definitions remained unchanged for decades until Congress, with the Agricultural Improvement Act of 2014, allowed pilot programs to study the cultivation of hemp on an industrial scale for various uses, including as a source of biomass. The Agricultural Improvement Act of 2018 (2018 Farm Bill) expanded the legal status of hemp under federal law by amending the definition of hemp in the Agricultural Marketing Act of 1946 and specifically excluding it from the definition of "marihuana" in the Controlled Substances Act at 21 U.S.C. § 802(16).

All the while, the federal government has not changed its stance on the classification of cannabis as a controlled substance until this year.

Public Policy Considerations in the MORE Act

On December 4, 2020, the U.S. House of Representatives passed the Marijuana Opportunity Reinvestment and Expungement Act of 2019 (MORE Act) introduced by Representative Jerome Nadler of New York. The MORE Act found bipartisan support with a vote of 228-164.

The policy finding underlying the MORE Act are broad.

The House acknowledged that 36 states and various territories have legalized access to cannabis in some fashion and 47 states have modified their laws related to the criminalization of cannabis. The House also made a nod to the social justice aspects of cannabis criminalization. It cited the statistic that Black men receive sentences for cannabis related offenses

that are 13.1 percent longer than those imposed on White men and latinos are 6.5 times more likely to be charged Federally for cannabis possession than non-hispanic caucasins. The House also noted that only 20 percent of cannabis businesses owners identify as belonging to a minority.

Democrats acknowledged that the harms of cannabis prohibition have not been evenly felt across society. "The effects of marijuana prohibition have been particularly felt by communities of color because it has meant that people from the communities couldn't get jobs," Representative Nadler, Chairman of the House Judiciary Committee stated. Nadler co-sponsored the legislation with Vice President-elect Kamala Harris, also described the consequences of a conviction for possession as creating "an often-permanent second-class status for millions of Americans."

Financial grounds for de-scheduling cannabis were also cited by the MORE Act's authors. For example, the MORE Act cites an ACLU study that found enforcement of cannabis prohibitions costs $3.6 billion annually, and that legal cannabis business face steep costs in getting operational, at times up to $700,000.

Studies indicate that 40 percent of drug arrests made in 2018 were for cannabis offenses – and just over 90 percent of those arrests were for possessing the drug, according to a report from the nonpartisan Pew Research Center. A separate report released by the American Civil Liberties Union showed that Black people are more than three times as likely as white people to be arrested for cannabis possession despite comparable usage rates across racial lines.

"Marijuana is either socially acceptable behavior or its criminal conduct," said Representative Hakeem Jeffries. "But it can't be socially acceptable behavior in some neighborhoods and criminal conduct in other neighborhoods when the dividing line is race."

Changes in Federal Law Made by the MORE Act

The legislation intends to give states power and incentives to enact their own reforms, and its passage came as states around the country, including some traditionally conservative states, have become increasingly open to decriminalizing cannabis amid a growing societal consensus that the war on drugs has been an unmitigated failure. Fifteen states have legalized recreational cannabis, and voters in five states last month voted on legalization issues, bringing the number of states where medical marijuana is legal to 35.

The most basic mechanics of the MORE Act are relatively simple: it delists cannabis from Schedule I of the Controlled Substances Act. Beyond that, the MORE Act also requires the Bureau of Labor Statistics to begin compiling detailed figures regarding cannabis businesses. The MORE Act also requires the Secretary of the Treasury to undertake a study every five years of the impacts of cannabis legalization and to advise Congress on improving industry regulations, including taxes.

Separately, the MORE Act establishes a Cannabis Justice Office to oversee a grant program directed at benefiting those affected by the "war on drugs." More specifically, these programs are supposed to promote the following goals:

- Job training;
- Reentry services;
- Legal aid for civil and criminal cases, including expungement of cannabis convictions;
- Literacy programs;
- Youth recreation or mentoring programs; and
- Health education programs

The law would also require federal courts to release those serving sentences for nonviolent cannabis-related offenses, and set up grant programs focused on providing job training, legal aid and substance use treatment, as well as grants for small businesses in the cannabis industry lead by low-income and minority business owners. Physicians with the Department of Veterans Affairs would also be allowed to recommend medical marijuana to their patients.

As stated above, the MORE Act imposes a 5 percent tax on cannabis products for a period of two years, with a 1 percent annual increase thereafter for three years.

Conclusion and Implications

Now that the MORE Act passed the House, the Senate will consider the bill. While some House Republicans supported the MORE Act, at this time it

is unlikely that enough support will be found among Senate Republicans to bring this bill far enough for White House consideration. Five Republicans broke from their party to support the bill, as did Libertarian Representative Justin Amash. Some Republicans, including Representative Matt Gaetz, decried the bill's focus on reparations, though for Democrats, that was one of the bill's key selling points. However, the Senate is a very different chamber than that of the House of Representatives.

Nevertheless, the MORE Act marks a turning point in federal cannabis regulation because it marks the most successful effort to decriminalize cannabis at the federal level since its classification in the Controlled Substances Act of 1970. With a Democrat-controlled House and presidency, and a still unknown Senate majority, it is unclear where cannabis legalization efforts will go in the next four years but more is surely to follow the MORE Act.

The American reckoning over the war on drugs and its effects on communities of color continues to trickle up the corridors of policymaking. The House's passage of a decriminalization bill is a massive step forward in the fight for federal legalization and a systemic review of how the justice system has discriminated against communities of color in setting cannabis policies and penalties for decades. The bill's history and full text is available online at: https://www.congress.gov/bill/116th-congress/house-bill/3884 (Andreas Booher, Jordan Ferguson)

REGULATORY DEVELOPMENTS

U.S. JUSTICE DEPARTMENT ISSUES FEDERAL AGENCY A GRANT TO HELP DEVELOP METHODOLOGY TO DISTINGUISH HEMP FROM CANNABIS

In light of the difficulty of federal and local law enforcement to be able to make arrests for illegal cannabis production and sales the National Institute of Justice has sought out proposals for tools to aid in the process. Hemp is no longer illegal in the eyes of the federal government and in many states and municipalities. The same cannot be said of cannabis which remains a federally scheduled harsh drug and illegal in many states.

Background

In a March 2020 solicitation, the National Institute of Justice (NIJ), a program under the U.S. Department of Justice (DOJ), requested proposals for "basic or applied research and development projects." The solicitation stated:

> Projects should address the challenges and needs of the forensic science community, including, but not limited to, the operational needs discussed at NIJ's FY 2020 Forensic Science Research and Development Technology Working Group meeting, which may be found on NIJ.ojp.gov.
>
> Some of the operational needs listed were:
>
> research to establish validated methods for THC quantity in plant materials, edibles, extracts, etc... [and] need for field test for discrimination of hemp versus marijuana that is validated to industry standards.

The NIJ was offering a total of 36 awards for a total amount awarded of $16,896,429.

The DOJ Funds the NIST

As a result of this solicitation, on December 10, 2020, the DOJ awarded $350,000 to the National Institute of Standards and Technology (NIST)—which is part of the Commerce Department—to support research to determine whether cannabis seized by law enforcement contains THC in excess of 0.3 percent. NIST has already taken steps to launch innovative testing cannabis testing programs before the DOJ awarded it this grant. For example, NIST announced in July that it would launch the Cannabis Quality Assurance Program (CannaQAP), which is intended to help ensure that products people purchase from retailers are accurately labeled. The program is intended to:

> . . .help laboratories accurately measure key chemical compounds in marijuana, hemp and other cannabis products, including oils, edibles, tinctures and balms.

The program is expected to be expanded to testing of the marijuana flower.

Hemp was federally legalized under the 2018 Farm Bill. Since then, laboratories have been faced with the difficult task of determining whether cannabis contains more than .03 percent THC, which is classified as illegal marijuana under the law. Since then, prosecutors on state levels have dismissed hundreds of low-level cannabis cases since the legalization of hemp. In Texas, marijuana possession arrests fell almost 30 percent from 2018 to 2019 following state-level legalization of hemp. In February, officials announce that labs would refrain from performing testing in misdemeanor cases, since Department of Public Safety said, it "will not have the capacity to accept those."

The Drug Enforcement Agency (DEA) has faced continual pressure from lawmakers to approve applications for additional manufacturers of research-grade marijuana. Last year, the DEA announced that it is actively looking for a device that it can use to determine whether a certain cannabis plant is federally legal hemp. The DEA published a notice requesting "vendors in the marketplace" that have developed

such field kits. The grant to NIST is a reasonable stride toward funding the tools needed to take these steps.

The award is intended to:

> . . .provide forensic laboratories with the necessary analytical tools to confidently make these measurements through simple, robust, and cost-effective analytical methods.

The DOJ's National Institute of Justice pointed out in the grant notice:

> . . .forensic laboratories are now required to quantify the level of total THC in seized evidence to distinguish as either hemp or marijuana. . .[but]. . .most forensic laboratories are currently lacking reliable extraction protocols and analytical methods for this purpose.

The DOJ's stated that the NIST will be collaborating with local law enforcement agencies in order to transfer the technology to local levels. The grant notice stated:

> After method completion, this proposal includes a technology transfer focus from NIST to the federal, state, and local forensic laboratories through standard operating procedures, training modules, webinars, and scientific publications. To help facilitate the transfer, NIST has formed a collaboration with Montgomery County Police Department (MCPD) and Maryland State Police (MSP) crime labs. The collaboration with MCPD has permitted the transfer of 125 adjudicated seized Cannabis samples for method validation. NIST will use the collaboration with MSP to allow for a critical evaluation of the new analytical methods to ensure their applicability to meet forensic laboratory needs.

Conclusion and Implications

The differentiation of cannabis from hemp/CBD has proven very problematic to law enforcement, especially in states that retain heavy criminal penalties for cannabis. This year several state law enforcement agencies have placed moratoria on arrests due to their inability to test for the difference. They have lacked the tools to enforce their laws and they have placed considerable pressure on the federal government—which as we know, treat cannabis as a Schedule I drug—to aid them with the tools and technology they lack. Efforts are now underway by the DOJ to come to their aid. All of this may become moot when President-Elect Biden is sworn in in January. (Brittany Ortiz)

LAWSUITS FILED OR PENDING

LANDLORD FILES LAWSUIT IN COLORADO STATE COURT ALLEGING TENANT POLLUTED SOIL AND GROUNDWATER RELATED TO HEMP/CBD PRODUCTION

In November 2020 a lawsuit was filed by the owner of commercial real property against a former tenant alleging that the tenants polluted soil and groundwater and caused discharges of pollution into the City of Colorado Springs' water system. The tenant leased the premises to facilitate the production of "Industrial Hemp and Hemp extraction" which is legal under Colorado State law. [*McKeefe Ventures, LLC v. Folium Biosciences LLC*, *filed* Nov. 10, 2020 (D. El Paso County, Colorado).]

Background

Over the course of some time, a former meat processing facility occupied some of the premises later leased to Folium Biosciences LLC. Colorado Blue Ribbon Foods processed meat products for several national food chains, but in August 2016 the premised became available when Blue Ribbon vacated for greener pastures, which prompted McKeefe to start looking for a new tenant. This led to a lease of some of the premises to Folium. Later in time Folium expanded their lease to include all of the premises in issue. Not long thereafter the landlord became aware of Folium creating and using areas outside of the structures for evaporation ponds and general dumping of chemicals. The landlord also became aware of a leaking roof that should have been the tenant's responsibility to repair but despite claiming to the contrary, said repairs were never made. This made the floor surfaces wet, unsanitary and potentially dangerous with byproducts and chemicals. Finally, the landlord became concerned that the tenant was disposing of byproducts and chemicals directly into toilets at the premises. This prompted an action for eviction and unlawful detainer. The tenant has denied many of the claims made against it.

The Lawsuit

The state court lawsuit alleges, among other things, that the tenant had agreed to use water as part of its production of hemp and hemp extracts but not use "ethanal." The lease was a fairly standard and comprehensive commercial lease. The lawsuit further alleges that the tenant illegally maintained a large evaporation pond to produce its products what allowed for the leaching of chemicals into the groundwater table beneath the leased premises. It is also alleged that the tenant was responsible for and claimed to have made repairs to the roof at the leased premises—but its failure to actually make said repairs caused the pooling of hemp waste and related chemicals at the premises.

The property owner also alleged the premises outside the leased buildings were generally used as a site for dumping waste. It is also alleged that the tenant illegally dumped ethanal down toilets at the facility.

The lawsuit also alleges a litany of other violations—both general lease violations and other allegations related specifically to the production of hemp and hemp byproducts.

The landlord seeks damages, attorney's fees and costs of suit. This action has not yet gone to trial.

Conclusion and Implication

As any owner of commercial property will tell you, it is always a risk that a tenant will trash the premises during the lease period, or worse, cause the premises to become polluted and contaminated. In this case the allegations are all over the spectrum of problems possible, but include the added facts of the intentional dumping of hazardous waste. These allegations include pollution of soil, groundwater and water system pollution related to the production of hemp. So, while this action bears the hallmark of a very bad landlord/tenant dispute, the subject matter of hemp production makes it somewhat unique and hence its inclusion in the reporter. Cannabis tenants already find suitable space to lease difficult in an environment of mistrust due to the subject matter. Hemp production, the less stigmatized product also faces some mistrust in the community. So, this lawsuit, if fol-

lowed by commercial property owners and their legal counsel may indeed make the stigma worse and have a chilling effect on commercial properties that will be available to those in the hemp and cannabis production businesses.

For more information about this lawsuit, *see*: https://cannabislaw.report/wp-content/uploads/2020/11/Folium-Complaint_and_Jury_Demand_11-10-20.pdf
(Robert Schuster)

JUDICIAL DEVELOPMENTS

CALIFORNIA COURT OF APPEAL UPHOLDS DEVELOPMENT AGREEMENT, WHICH GRANTED AN EXCLUSIVE LICENSE TO TRANSPORT CANNABIS

Cereceres v. City of Baldwin Park, Case No. BC697871, *Unpub.* (2nd Dist. Oct. 21, 2020).

In *Cereceres v. City of Baldwin Park*, an *unpublished* opinion out of the Second District Court of Appeal, respondent City of Baldwin Park (City) adopted an agreement granting Rukli, Inc. (Rukli) an exclusive license to transport cannabis in the City, promising that the City would require all other cannabis licensees to use Rukli for transportation within the City. Appellants, residents and parties with stakes in the legal cannabis business, contested this approval. They claimed that the exclusivity provisions constitute an expressly prohibitive monopoly and anticompetitive practices. The California Court of Appeal affirmed the trial court's denial of appellants' petition and held that the City's decision did not exceed its zoning powers, did not violate the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA), and did not violate development agreement laws, or create impermissible "spot zoning."

Factual and Procedural Background

In 2016, California voted to approve Proposition 64, which led to the enacting of MAUCRSA. MAUCRSA established a comprehensive system for the control and regulation of a medicinal and recreational cannabis industry in the state. On August 16, 2017, the City adopted Ordinance No. 1400, which added Chapter 127 of Title XI to the City's Municipal Code and permitted cannabis operations in the City. The ordinance contained multiple safeguards ensuring cannabis operations are conducted safely.

Real party in interest, Rukli, Inc. (Rukli), applied for a cannabis transportation permit in September 2017. Rukli's application included various commitments to safety in its operations and a lengthy discussion of its safety measures. On December 18, 2017, the City granted Rukli the exclusive right to transport cannabis in the City (the Rukli Agreement). The next day, Rukli's CEO and its primary operations consultant donated a total of $8,800 to the 2018 state senate campaign of Monica Garcia, a councilmember who voted in favor of granting Rukli the exclusive license.

On March 15, 2018, appellants filed a petition for writ of mandate against the City. They challenged the approval of the agreement on procedural and substantive grounds. Following appellants' suit, the City approved another agreement with Rukli, correcting its initial procedural errors by acting in accordance with the proper procedures for approving development agreements. In July 2018, the City enacted Ordinance 1412, approving the Rukli Agreement, which again named Rukli as the exclusive distributor and transporter for cultivation and manufacturing permit holders within the City.

On October 26, 2018, appellants filed a first amended petition for writ of mandate against the City for creating a monopoly of cannabis distribution by approving the Rukli Agreement. Appellants sought injunctive and declaratory relief, as well as a writ of mandate ordering the City to set aside approval of the exclusivity provisions of the agreement and a writ of mandate or order overturning the City's approval of the Rukli Agreement, unless and until the exclusivity provisions were removed. In response, the City filed an answer and appellants filed a reply.

In January 2019, the Superior Court heard the petition, took it under submission after oral argument, and denied it two weeks later. In March 2019, the court entered judgment and appellants timely appealed the decision.

The Court of Appeal's Decision

City's Zoning Powers to Adopt an Agreement Granting a Monopoly

Appellants argued that the City's adoption of the exclusivity provisions violated the City's zoning

powers because: 1) the primary purpose of the provisions was to grant Rukli a monopoly for cannabis distribution and 2) the City's evidence was insufficient to support a conclusion that the purpose of the ordinance was to protect public safety. The court disagreed with both arguments.

First, the court stated that cities are permitted to regulate economic activity as long as the primary purpose is not the impermissible *private* anticompetitive goal of protecting or disadvantaging a particular favored or disfavored business or individual, but instead is the advancement of a legitimate *public* purpose. The ordinance must also reasonably relate to the general welfare of the municipality and constitutes a legitimate exercise of the municipality's police power.

Here, the court determined that appellants failed to prove the City's primary purpose was not a valid public purpose. Appellants contended that Rukli's contribution of $8,800 to the state senate campaign of a councilmember who voted in favor of both agreements reflected a *quid pro quo* arrangement. They argued this arrangement showed that the primary purpose of the exclusivity provisions was to grant a monopoly—an invalid private purpose. However, the trial court previously determined that this amount was insufficient to establish a *quid pro quo* situation. It also noted that the councilmember had made prior statements in support of having only one distributor for safety purposes. The Court of Appeal found this to be a reasonable conclusion, as the contributions rationally could have been made as an independent decision, demonstrating Rukli's appreciation of the councilmember's vote. Therefore, appellants had not shown sufficient evidence to support a claim that the City did not act with a primarily public purpose.

Second, the court determined that the City's need to present evidence of its valid public purpose was obviated by appellants' failure to satisfy their burden of proof. Although unnecessary, the City still provided evidence demonstrating its public safety purpose. This evidence included the Staff Report on the Rukli Agreement discussing Rukli's plans for safety, the councilmember's statement that she felt one distributor was safer, Rukli's permit application containing assurances of security and safety, and MAUCRSA's own additional safety requirements for cannabis distributors. The court determined that this evidence was minimal, yet adequate to support a finding that the City's decision was based on public safety.

Appellants attempted to counter this finding by claiming: 1) the exclusivity provisions do not further the purpose of a development agreement; and 2) public safety could not have been the reason for the approval of the exclusivity provisions because the City already adopted mandatory safety regulations by adding Chapter 127 to its municipal code. In response, the court stated that public purpose does not need to be related to the type of agreement in question for an ordinance regulating economic activity with anticompetitive effects to be valid. Additionally, enacting the mandatory safety regulations in Chapter 127 does not necessarily mean that the City did not have other public safety concerns, such as those related to accountability if there were multiple transportation companies. Thus, the court concluded that, based on substantial evidence, the City's approval of the exclusivity provisions was for a legitimate public purpose.

MAUCRSA

Appellants also contended that the exclusivity provisions conflicted with MAUCRSA's express intent to reduce barriers to entry into the legal cannabis market and prohibit monopolies and anti-competitive conduct. The court determined that §§ 26051 and 26052 of MAUCRSA only prohibit anticompetitive actions by "persons" and licensees," not "cities." The court reasoned that it must generally assume the Legislature meant what it said and cannot supply its own words where there is an omission. Further, the court stated that the Legislature knew how to restrict municipal action when it intended to because other sections of MAUCRSA do restrict municipal action, such as § 26080, subdivision (b), which prohibits local jurisdictions from preventing transportation of cannabis products on public roads by a licensee acting in compliance with MAUCRSA. The California Legislature thus did not intend to restrict cities from engaging in anti-competitive behavior. Therefore, MAUCRSA does not prohibit the City from approving the exclusivity provisions.

Development Agreement Laws

Appellants argued that cities are prohibited from including exclusivity provisions in development agreements because they have "no relationship" to the requirements for development agreements, which

are outlined in Government Code §§ 65864-65869.5. As a development agreement, the Rukli Agreement could therefore not contain the exclusivity provisions, according to appellants. The court disagreed and stated that the requirement of certain terms in development agreements does not mean that all other terms are prohibited. Further, the same provisions that appellants cited also state that development agreements "may include conditions, terms, restrictions, and requirements for subsequent discretionary actions . . . ." The court concluded that this statute regulating development agreements should be liberally construed, and thus the exclusivity provisions should fall under "conditions, terms, restrictions, and requirements" that are also permitted in development agreements. Therefore, appellants failed to demonstrate that the development agreement statute precludes the exclusivity provisions.

Spot Zoning

Finally, appellants claimed that the exclusivity provisions constitute "spot zoning" and are therefore invalid. "Spot zoning" occurs where a small parcel is restricted and given lesser rights than the surrounding property, which creates an "island" in the middle of a larger area devoted to other uses. This type of zoning is not always impermissible. It may be upheld where there is a "substantial public need" or "rational reason in the public benefit" for the zoning, even if a private owner will also benefit.

The court did not reach the issue of whether "spot zoning" existed in this case. Here, granting Rukli an exclusive license was in furtherance of public safety, with no support for a finding to the contrary. The court determined public safety is a sufficient "rational reason in the public benefit." Therefore, it held that whether spot zoning applied in this case is immaterial because it would not invalidate the exclusivity provisions.

Conclusion and Implications

The Court of Appeal affirmed the trial court's judgment. While *unpublished*, this case lends support to the idea that cities may grant exclusive licenses to transport cannabis for legitimate public purposes, such as public safety. The cannabis industry is relatively new and there may be more instances such as this one in the future. The court's decision is available online at: https://www.courts.ca.gov/opinions/nonpub/B296921.PDF
(Veronika Morrison, Christina Berglund)

CALIFORNIA COURT OF APPEAL FINDS APPELLANT FAILED TO TIMELY APPEAL FROM AN ORDER GRANTING ANTI-SLAPP MOTIONS IN CANNABIS RETAILER EVICTION SCENARIO

Reyes v. Kruger, 55 Cal.App.5th 58 (6th Dist. 2020).

A commercial cannabis retailer tenant brought a malicious prosecution action against a property owner and the property owner's attorney for what the tenant alleged was a wrongful eviction. The trial court granted the defendants' motions to dismiss under California's "anti-SLAPP" statute, and the tenant ultimately appealed. On appeal, the California Court found that the tenant had failed to timely appeal from the order granting the anti-SLAPP motions, and that a motion for new trial likewise had been untimely. The Court of Appeal then dismissed the appeal.

Factual and Procedural Background

Corinna Reyes operated a medical cannabis outlet on commercial premises leased by Kim Kruger and the Kim Kruger Trust. Kruger received complaints from neighbors about the operation and its customers, mostly related to parking issues, loitering, and littering. Kruger also stated that the city's code enforcement contacted her about violations on the premises and Reyes's noncompliance with requests for inspection. After an inspection confirmed the code violations and revealed other unpermitted alterations to the property, Kruger began eviction proceedings.

After that faltered, she filed an unlawful detainer action.

The case was tried in October 2013, at the conclusion of which the trial court granted judgment in favor of Kruger. After unsuccessful attempts to vacate the judgment and to petition for relief from the judgment as it declared forfeiture of the lease, Reyes filed an appeal in the appellate division of the superior court, which reversed the judgment. Reyes then sued Kruger in July 2015 in a breach of contract action for wrongful eviction. The trial court granted Kruger's special motion to strike the complaint under the anti-SLAPP statute and dismissed the case.

Reyes then filed a malicious prosecution action against Reyes and her attorney, alleging that Kruger had engaged in fraud and perjury by falsely testifying at trial in the unlawful detainer action that she had returned $2,800 in cash to Reyes by handing an envelope to an employee at the medical marijuana dispensary. Kruger and her attorney both filed demurrers and special motions to strike the complaint under California's "anti-SLAPP" statute (Code Civ. Proc., § 425.16). The anti-SLAPP motions established that the complaint's cause of action was based upon a protected activity and asserted that Reyes lacked the evidentiary showing required to demonstrate a probability of prevailing on the merits of the malicious prosecution case.

The trial court granted both anti-SLAPP motions, finding that Reyes had not established a probability of prevailing on the merits of each element of the malicious prosecution claim, and overruling the demurrers as moot based upon its ruling granting the special motions to strike. The trial court served a file-stamped copy of the order with proof of service in November 2016, and Kruger then served a notice of entry of judgment or order later that month. In January 2017, the trial court entered a judgment of dismissal and awarded reasonable attorneys' fees and costs. Kruger served a notice of entry of judgment or order later that same month.

In February 2017, Reyes filed a notice of intention to move for a new trial. In March, the trial court entered an order denying the motion for new trial and served a file-stamped copy with proof of service. Kruger served notice of entry of judgment or order denying a new trial in April 2017. Reyes then filed a notice of appeal later in April. The notice appealed from the judgment entered in favor of Kruger in January 2017 "and from all orders relating thereto, including and not limited to the" order denying the motion for new trial in March 2017.

The Court of Appeal's Decision

Challenge to Order Granting Anti-SLAPP Motions

The Court of Appeal first addressed Reyes' contention that the trial court erred in granting the anti-SLAPP motions on the grounds that the evidence in opposition to the motions was sufficient to establish a reasonable probability of prevailing on the malicious prosecution claim. The Court of Appeal found, however, that Reyes had failed to timely appeal from the order granting the anti-SLAPP motions, which itself was an appealable order under state law. Reyes had 60 days from the trial court's service of the file-stamped copy of the order (which was served on November 22, 2016), and therefore Reyes had until January 23, 2017, to file a notice of appeal. Because Reyes did not file a notice of appeal until April 2017, well after expiration of the appeal deadline, the Court of Appeal was jurisdictionally limited and constrained to dismiss the appeal.

Challenge to Order Denying Motion for New Trial

The Court of Appeal next addressed Reyes's claim that, even if the appeal as to the ruling on the anti-SLAPP motions was untimely, the Court of Appeal was not foreclosed from addressing the substantive issues raised in the motion for new trial. The Court of Appeal, however, found that the appeal from the January 2017 judgment did not enable review of the order denying a new trial because the motion for new trial itself had been untimely, and therefore the appeal likewise had been untimely. The Court of Appeal found that the November 2016 notice of entry of order (not the later judgment of dismissal in January 2017) had triggered the 15-day time limit to file a notice of the intent to move for a new trial. Reyes's filing and service of a notice of intention to move for new trial in February 2017 thus was untimely and could not serve to extend the time for the filing of an appeal under California Rule of Court 8.108, which generally extends the time to appeal where a party "serves and files a valid notice of intention to move for a new trial."

Conclusion and Implications

The case is significant because it contains a substantive discussion of issues pertaining to the appeal of orders regarding anti-SLAPP motions, as well as a discussion of jurisdictional issues relating to the filing of motions for new trial and appeals more broadly. The decision is available online at: https://www.courts.ca.gov/opinions/documents/H044661M.PDF (James Purvis)

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