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MEMORANDUM OF LAW

DATE: April 17, 2013

TO: Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Review of Current State of the Law – Medical Marijuana

BACKGOUND

In 1996, Proposition 215, the California Compassionate Use Act (CUA), was passed by the electorate. Proposition 215, codified at California Health and Safety Code section 11362.5, allows the use of marijuana for medical purposes when recommended by a physician and excludes from criminal prosecution the patient and the primary caregiver, as defined. In 2003, the State of California enacted Senate Bill 420, the Medical Marijuana Program Act (MMP), setting forth requirements for the issuance of voluntary identification (ID) cards; exempting cardholders, qualified patients, and designated primary caregivers who associate to collectively or cooperatively cultivate marijuana for medical purposes from certain crimes; requiring the Attorney General to issue guidelines for the security and nondiversion of medical marijuana; and allowing cities to adopt and enforce laws consistent with the MMP. Cultivating or distributing marijuana for profit is expressly disallowed; however, primary caregivers may recover reasonable compensation for services and out-of-pocket expenses. The MMP is codified at California Health and Safety Code sections 11362.7-11362.83.

The Attorney General issued "Guidelines for the Security and Non-Diversion for Marijuana Grown for Medical Use" in August of 2008 (Guidelines). The Attorney General has since acknowledged that the Guidelines do not solve the problems associated with the state's medical marijuana laws, and instead of updating the Guidelines, has urged the Legislature to amend state law. *See* December 21, 2011 letter from Attorney General Kamala D. Harris to Senate Pro Tem Darrell Steinberg and Assembly Speaker John Perez, "Re: Medical Marijuana Legislation."

The possession, cultivation, and distribution of marijuana remains a federal crime. 21 U.S.C. § 801, *et seq.* (2010). Although no case has ruled that the CUA and MMP are

preempted by federal law, the federal courts have held that there is no "medical necessity" defense to a prosecution under federal law, and that federal regulation of marijuana is within Congress commerce power. *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 491 (2001); *Gonzales v. Raich*, 545 U.S. 1 (2005). Compliance with state law does not provide a safe harbor from federal criminal prosecution. *Id.* at 29. However, doctors may recommend marijuana without risking revocation of their license on that basis. *Conant v. Walters,* 309 F.3d 629, 635-636 (9th Cir. 2002). ("A doctor's anticipation of patient conduct, however, does not translate into aiding and abetting, or conspiracy").

DISCUSSION

I. AUTHORITY TO REGULATE MEDICAL MARIJUANA COOPERATIVES

Pursuant to article XI, section 7 of the California Constitution, a "county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." This police power is broad. *Candid Enterprises, Inc. v. Grossmont Union High School Dist.*, 39 Cal. 3d 878, 885 (1985).

While municipal business regulations must be reasonable and nondiscriminatory, whether regulation is required is determined by the legislative body and generally not questioned by the courts. *See People v. Glaze*, 27 Cal. 3d 841, 845 (1980); *Harriman v. City of Beverly Hills*, 275 Cal. App. 2d 918, 923 (1969). "Judicial review of police power is limited to determining whether a regulation is reasonably related to promoting public health, safety, comfort and welfare and whether the means adopted are reasonably appropriate to the purpose." *Graf v. San Diego Unified Port Dist.*, 7 Cal. App. 4th 1224, 1232 (1992) (citing *Higgins v. City of Santa Monica*, 62 Cal. 2d 24, 30 (1964)). Moreover, the MMP specifically contemplates local regulation. Cal. Health & Safety Code §§ 11362.768, 11362.83 (allowing local government to adopt and enforce ordinances regulating the location, operation, or establishment of medical marijuana cooperatives).

As to medical marijuana, the CUA allows the possession and cultivation of marijuana for medical use by certain qualified persons, providing an affirmative defense to state criminal prosecution. The MMP expands those immunities against prosecution for additional marijuana offenses, including immunity for those who collectively or cooperatively cultivate marijuana for medical purposes. Cal. Health & Safety Code §§ 11362.765, 11362.775. However, case law has upheld the right of local government to regulate such activities, and the CUA and MMP do not create "a broad right to use marijuana without hindrance or inconvenience." *City of Claremont v. Kruse,* 177 Cal. App. 4th 1153, 1176 (2009) (quoting *Ross v. RagingWire Telecommunications, Inc.*, 42 Cal. 4th 920, 928 (2008)).

Further, the CUA and MMP likely do not require the City to establish local regulations for medical marijuana dispensaries.[1] *Id.* In *Kruse*, the court held that the areas of land use, zoning and business licensing were not preempted by the CUA or MMP and therefore it was permissible for the city to adopt a moratorium on issuing permits and licenses to dispensaries as well as enforce licensing and zoning regulations prohibiting operation of such dispensaries. *Id.* at 1175-76. Los Angeles County ordinances regulating the location of dispensaries and requiring a business license were upheld against a challenge that they were preempted by state law, inconsistent with state law, and treated dispensaries differently from pharmacies. *County of Los Angeles v. Hill*, 192 Cal. App. 4th 861 (2011). Therefore, under state law, the City may regulate such entities, but this Office expects the contours of local government regulations to continue to be the subject of litigation. *See* Section IIA of this report.

II. NEW DEVELOPMENTS IN THE AREA OF MEDICAL MARIJUANA

Since April 2011, when the Council adopted the medical marijuana ordinances, there have been developments in this area, including a pending decision from the California Supreme Court.

A. State law developments

The California Supreme Court accepted review in five cases, putting four of the cases on hold pending the outcome of the lead case. The five cases before the Supreme Court illustrate the conflicting development in the area of medical marijuana: *City of Riverside v. Inland Empire Patient's Health and Wellness Center, Inc.*, S198638, formerly at 200 Cal. App. 4th 885 (2011), review granted Jan. 18, 2012; *People v. G3 Holistic, Inc.*, 2011 WL 5416335 (2011); *City of Temecula v. Cooperative Patients' Services, Inc.*, Case No. E053310 (2012), all holding that state law does not preempt local bans on medical marijuana dispensaries; *420 Caregivers, LLC v. City of Los Angeles*, 207 Cal. App. 4th 703 (2012), holding that the city's medical marijuana ordinance was not preempted by state law, did not implicate due process, and did not violate the right to privacy; and *City of Lake Forest v. Evergreen Holistic Collective*, 203 Cal. App. 4th 1413 (2012), holding that local agencies are preempted from prohibiting medical marijuana dispensaries.

The Supreme Court heard oral argument in the lead case, *City of Riverside v. Inland Empire Patient's Health and Wellness Center, Inc.*, on February 5, 2013. *City of Riverside* involves Riverside's zoning code, which indicates that a medical marijuana dispensary is a prohibited use, and that any use violating state or federal law is also prohibited. A decision from the Court should occur within 90 days of oral argument. *See* Supreme Court's Internal Operating Practice and Procedures § X. A list of some of the decisions that have been published since April 2011, is attached as Attachment A.

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[1] The term "dispensary" is often used to describe a variety of operations relating to the collective cultivation and distribution of medical marijuana. The term did not appear in the CUA or MMP when enacted, however, the California Legislature recently used the term in adding California Health and Safety Code section 11362.768 to the MMP. That section prohibits a cooperative, collective, dispensary, operator, establishment, or provider from locating within 600 feet of a school, but does not separately define "dispensary."

The MMP was amended in 2011 to provide that nothing in the MMP prevents a local governing body from adopting and enforcing local ordinances regulating the location, operation, or establishment of a medical marijuana cooperative or collective, or from the civil or criminal enforcement of those ordinances. Cal. Health & Safety Code § 11362.83. This amendment arguably strengthens the ability of cities to regulate medical marijuana establishments; however, the interpretation of this section may be affected by the Supreme Court's decision in *City of Riverside*.

As noted previously, the California Attorney General has urged the state Legislature to amend state law. "[S]tate law itself needs to be reformed, simplified and improved to better explain to law enforcement and patients alike how, when and where individuals may cultivate and obtain physician-recommended marijuana." She specifically identifies areas requiring clarification: the meaning of California Health & Safety Code section 11362.775, which provides that patients, ID card holders, and primary caregivers "who associate . . . in order collectively or cooperatively to cultivate marijuana" are not subject to certain state criminal sanctions; rules around "dispensaries"; clarifying "non profit" operations; clarity around marijuana "edibles", such as cookies. *See* December 21, 2011 letter from Attorney General Kamala D. Harris to Senate Pro Tem Darrell Steinberg and Assembly Speaker John Perez "Re: Medical Marijuana Legislation."

Even with a California Supreme Court decision addressing local land use authority and whether or not such authority is limited by the CUA or MMP,[2] there are still many regulatory components that lack clarity, including those identified by the California Attorney General. *Id.* Further, although three appellate state court cases have opined that state law is not preempted by federal law, those cases are not binding on the federal government.[3] Thus, the conflict between federal and state law remains.

B. U.S. Attorneys' Enforcement Actions

Additionally, the United States Attorney General's Office has intensified its activity in this area.[4] In June of 2011, Deputy Attorney General James Cole issued a memorandum[5] to the

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[2] The California Supreme Court could rule on whether federal law preempts state law; however, during oral argument it appeared that the justices were not going to address that issue.

[3] In *County of San Diego v. San Diego NORML*, 165 Cal. App. 4th, 798, (2008), the court concluded that the voluntary identification card system contained in the MMP was not preempted by federal law. In *City of Garden Grove v. Superior Court*, 157 Cal. App. 4th 355 (2007), the court held that federal supremacy principles do not prohibit the return of medical marijuana, if possessed lawfully under state law. In *Qualified Patients Ass'n v. City of Anaheim*, 187 Cal App. 4th 734 (2010), the court held that cities may not ban medical marijuana collectives on the basis that the collectives violate federal law.

[4] The U.S. Attorney for the Eastern District, Benjamin B. Wagner, argues that federal law enforcement since the passage of Proposition 215 is less ambiguous than some perceive. 43 McGeorge 1. Rev. 109 (2012). Mr. Wagner does acknowledge that in the last three years, the status of medical marijuana has changed, in that businesses openly sell marijuana and advertise their services, and that the trend toward the open marketing and sale of marijuana to a large group of users has been accompanied by continued uncertainty in state law.

[5] James M. Cole, *Memorandum for United States Attorneys: Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use.* United States Department of Justice, Office of the Deputy Attorney General, June 29, 2011.

United States Attorneys, reaffirming the Department of Justice's position from a prior memo known as the Ogden Memo[6] (that prosecution of significant traffickers of illegal drugs, including marijuana, remains a core priority, but advised that it is likely not an efficient use of federal resources to focus enforcement efforts on sick individuals or their caregivers who use marijuana consistent with their state's applicable laws), but explaining that the Ogden Memo was never intended to shield persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, from federal enforcement action, even when those activities purport to comply with state law. Various U.S. Attorneys have written letters to state and local governments in their respective jurisdiction addressing medical marijuana, reaffirming the Cole Memorandum. In California, the U.S. Attorneys from all four districts held a joint press conference in October 2011, announcing that they were targeting the commercial marijuana industry, including medical marijuana operations that are a front for illegal activity.[7] Following that press conference, they sent letters to landlords threatening civil asset forfeiture for those who rent space to storefront dispensary operators.

Of particular concern is the U.S. Attorney's position that state and city employees who conduct activities mandated by a local ordinance are not immune from liability under federal law.[8] For example, the City of Del Mar recently voted on a ballot initiative that would have regulated and taxed dispensaries.[9] During the ballot initiative process, the City Attorney for Del Mar asked the U.S. Attorney for guidance. In response, U.S. Attorney Laura E. Duffy sent a letter which stated that:

> . . . enterprises engaged in the cultivation, manufacture and sale of marijuana directly violate federal law. Accordingly, individuals and organizations that participate in the unlawful cultivation and distribution of marijuana could be subject to civil and criminal remedies. State and City employees who conduct activities mandated by the Ordinance are not immune from liability under the CSA.[10]

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[6] David Ogden, *Memorandum for Selected United States Attorneys: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana,* United States Department of Justice, Office of the Deputy Attorney General. October 19, 2009.

[7] News Release, Oct. 7, 2011, Drug Enforcement Administration.
http://www.justice.gov/dea/pubs/pressrel/pr100711p.html

[8] Although depublished, and therefore not authority for the rules contained therein, it is worth noting that in *Pack v. Superior Court* (City of Long Beach), the court reviewed Long Beach's comprehensive permit scheme, concluded that it went beyond decriminalization and into authorization, in that the City determined which collectives were permissible, and collected fees, thus the permit scheme was preempted by federal law (disagreeing with three other cases). *Pack v. Superior Court*, formerly published at 199 Cal. App. 4th 1070 (2011), review dismissed August 22, 2012, S197169. In a footnote, the court cautioned that public officials ought to be aware of their potential criminal liability for aiding and abetting a violation of federal law by permitting marijuana activity. *See* 199 Cal. App. 4th 1070 n.27.

[9] The initiative, which was placed on the November 2012 general election ballot as Proposition H, the City of Del Mar Compassionate Use Dispensary Regulation and Taxation Ordinance, did not pass.

[10] Letter from Laura E. Duffy, United States Attorney, United States Department of Justice, Southern District of California, to Leslie Devaney, City Attorney, City of Del Mar, July 17, 2012.

In another example, the City of Chico, after thirty months of consideration, adopted an ordinance authorizing two medical marijuana cultivation facilities, but repealed that ordinance a few months later after receiving a letter and other information from U.S. Attorney Benjamin B. Wagner. That letter said:

> The Department is concerned about the proposed ordinance in the City of Chico, as it would authorize conduct contrary to federal law and threatens the federal government's efforts to regulate the possession, manufacturing, and trafficking of controlled substances. Individuals who elect to operate industrial marijuana cultivation facilities will be doing so in violation of federal law. Others who knowingly facilitate such industrial cultivation activities, including property owners, landlords, and financiers, should also know that their conduct violates federal law.[11]

Other letters to cities such as Oakland and Eureka are consistent with the letters to Del Mar and Chico. In light of this, there is an unquantifiable risk to public officials and employees of being exposed to civil and criminal sanctions by the Department of Justice.

Indeed, any placement of employees in a position where they may be subject to civil or criminal liability from the federal government may require meet and confer. While the direction of the City's work force and determination of what work is to be performed by employees are generally managerial prerogatives and not subject to bargaining, (Trustees of the California State University, PERB Dec. No. 1853-H (2006); Davis Joint Unified School District, PERB Dec. No. 393 (1984)), the City's managerial prerogative is not unlimited. Workplace safety issues are matters within the scope of representation. State of California (Department of Corrections), PERB Dec. No. 1381-S (2000). If a new City policy could impact the safety of employees, including creating a threat of personal civil or criminal liability, this Office will need to do a further analysis to determine whether the City should engage in meet and confer with its represented employees prior to a final decision on the policy.

On the other hand, we are not aware of any public officials or employees who have been or are being prosecuted for implementing local or state medical marijuana laws, and we further note that some local governments have had regulatory ordinances in place for some time, such as San Francisco and Alameda County.[12] States, such as New Jersey, have continued implementing their medical marijuana programs, even after receiving such letters.[13]

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[11] Letter from Benjamin B. Wagner, United States Attorney, Eastern District of California, United States Department of Justice, to Mayor Ann Schwab, City of Chico, July 1, 2011, (attached as Exhibit B to City Council Agenda Report, August 2, 2011.)

[12] San Francisco Health Code Article 33 (2005); Alameda County Gen. Code Ch. 6.108 (2005).

[13] Governor Chris Christie's comments on the resumption of New Jersey's medical marijuana program, July 19, 2011, article. http://www.newjerseynewsroom.com/state/gov-chris-christies-comments-of-the-resumption-of-new-jerseys-medical-marijuana-program

In an April 2012 letter to President Obama from lawmakers in five states, the lawmakers objected to the threats to state and municipal employees, noting that "hundreds of state and municipal employees" are currently involved in regulatory processes, and the prosecution of such employees would be unprecedented.[14] Others, such as the ACLU, argue that threats of prosecution against those in compliance with state law, including public employees implementing state or local law, is a departure from other representations made by the federal government, and that courts have rejected aiding and abetting or conspiracy theories as the basis for public employee liability.[15]

Although there may be arguments for the proposition that local officials and employees are not at risk or are at minimal risk from enforcement action by the federal government, or that there in fact is no legal culpability on the part of public employees, those arguments are of little comfort to the employee who is the test case. Until there is a legislative fix at the federal level, or until a court rules that compliance with state and local laws provide a safe harbor from federal prosecution, the risks to local officials and employees will remain.

III. POTENTIAL PASSAGE OF AN "EMERGENCY ORDINANCE"

The Council asked this Office to address whether the land use ordinance can be passed as an emergency measure. San Diego Charter section 295(e)[16] governs emergency ordinances and states such an ordinance provides "for the immediate preservation of the public peace, property, health, or safety, in which the emergency claimed is set forth and defined in the preamble thereto. . . . it is the intention of this Charter that the courts shall strictly construe compliance with such definition." This Office has previously advised that under our Charter, there must be a serious threat to the public health, safety, and general welfare, and that there must be facts to support those findings. 1995 City Att'y MOL 423 (95-47; July 25, 1995). Any consideration of an "emergency" ordinance must be done upon a well-developed factual record to support the Council's findings.

Urgency procedures under the California Government Code are limited to zoning actions that prohibit a particular use. Cal. Gov't Code § 65858. Thus, even if a zoning ordinance meets the Charter requirements for an emergency, any ordinance authorizing new uses must comply

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[14] Open letter from five elected lawmakers to federal government, April 2012. http://www.huffingtonpost.com/2012/04/02/lawmakers-in-5-states-tell-feds-medical-marijuana_n_1397811.html

[15] ACLU letter dated May 9, 2011, to Eric Holder, Attorney General of the United States, and letter dated August 2, 2012, to U.S. Attorney Laura E. Duffy. The ACLU cites to *Conant v. Walters*, 309 F.3d, 629 (9th Cir. 2002), *City of Garden Grove v. Superior Court,* 157 Cal. App, 4th 355 (2007), and *Qualified Patients Ass'n v. City of Anaheim,* 187 Cal. App. 4th 734 (2010), for the proposition that public employees are not exposed to liability under the federal Controlled Substances Act. As stated previously, state cases are not binding on the federal government, and *Conant* involved doctors recommending marijuana, not public employees processing permits. We note that Alex Kreit, an associate professor at Thomas Jefferson School of Law and former chair of the City of San Diego's Medical Marijuana Task Force, made similar arguments in "Obama's War on Marijuana Turns to Public Employees," August 6, 2012. http://www.voiceofsandiego.org/opinion/article_1b2706dc-dfc2-11e1-bfab-0019bb2963f4.html

[16] Charter section 295(e) replicates language from Charter section 17, which was repealed when the Charter sections making the strong Mayor form of government permanent, became effective.

with various procedures such as noticed public hearings. Cal. Gov't Code §§ 65804, 65854. Depending on what the proposed land use ordinance consists of, we remind the Council that there may be other analyses needed and procedures to be followed, such as consistency with the General Plan, and approval by the California Coastal Commission. *See* City Att'y Report 10-20, Rev. (May 27, 2010), p. 11, for a fuller discussion.

CONCLUSION

The California Supreme Court will soon issue its decision in the *City of Riverside* case, which may affect what the City can legally do, or what it chooses to do, or both. As such, the Council may want to consider waiting until the outcome of that case is known before adopting a new ordinance.

In light of the recent posture taken by the federal government towards medical marijuana dispensaries, the Council should carefully consider whether and how to allow medical marijuana dispensaries. At the direction of Council, the City Attorney's Office is available to work with staff to review any proposed land use ordinance that would lead to City staff processing permits for the medical marijuana dispensaries. If this is the direction of the Council, the existing regulations in SDMC Chapter 4, Article 2, Divisions 13 and 15 should also be referred to staff and the City Attorney's Office for review.

When our Office has an opportunity to review any proposed ordinance, we may have additional or different analyses and recommendations for the Mayor and Council.

JAN I. GOLDSMITH, City Attorney

By Mary T. Nuesca
Mary T. Nuesca
Chief Deputy City Attorney

MTN:cbs:jdf
Attachment
ML 2013-6

ATTACHMENT A

People v Colvin, 203 Cal. App. 4th 1029 (2012)

Defendant Colvin, a qualified patient, owned and operated two dispensaries in Los Angeles with over 5000 members, and was arrested when transporting marijuana between the two locations. The trial court found that Defendant was not entitled to present a defense under the MMP because the transportation had nothing to do with cultivation, which, according to the trial court, was the trigger entitling one to a defense under Health and Safety Code section 11362.775. Defendant's conviction for transporting marijuana was reversed. Defendant was entitled to present a defense to the charge of illegal transportation based on Health and Safety Code 11362.775. The appellate court viewed the triggering event as the operation of a legitimate medical marijuana cooperative, rather than the conduct of associating in order to collectively or cooperatively cultivates marijuana for medical purposes.

People ex rel. Trutanich v. Joseph, 204 Cal. App. 4th 1512 (2012)

The City of Los Angeles and Culver City obtained a permanent injunction against Defendant for violations of the Narcotics Abatement Law, the Public Nuisance Law, and The Unfair Competition Law[1]. Defendant was the owner of Organica, a dispensary with 1772 customer records, at which undercover law enforcement made multiple purchases of marijuana and other narcotics. The appellate court upheld the injunction, finding that the MMP does not immunize sales; it does not cover dispensing or selling marijuana. The MMP protects group activity to cultivate marijuana. Further, although the MMP allows reasonable compensation for services provided to a qualified patient, that reasonable compensation may be given only to a primary caregiver.

People v. Jackson, 210 Cal. App. 4th 525 (2012)

Defendant, with approximately five others, cultivated marijuana for themselves and 1600 other members of their collective. Defendant was charged and convicted with selling marijuana and possession for sales. The trial court ruled that Defendant was not entitled to offer a defense under the MMP because Defendant could not establish that he was operating for the purpose of collectively or cooperatively cultivating marijuana within the meaning of the MMP. The appellate court reversed, finding that Defendant was entitled to offer a defense under the MMP because the MMP requirement could be met: under the MMP the requirement to collectively associate to cultivate marijuana can be fulfilled by only a few persons engaged in cultivation while other members provide financial support.

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[1] Cal. Health and Safety Code 11570 *et seq.* Civil Code section 3479, and Business and Professions Code 17200 *et seq.*, respectively.

The Court however, emphasized that a collective or cooperative must be a "non-profit enterprise" *Id.* at 538, and considered the limits of the defense. The size of the enterprise, whether or not it is formally established under state law, financial records, accountability to the membership and the volume of business are all relevant to determining whether a defendant is entitled to a defense under the MMP. *Id.* at 538-39.

James v. City of Costa Mesa, 700 F.3d 394 (9th Cir. 2012)

Plaintiffs, severely disabled California residents, sued the cities of Costa Mesa and Lake Forest, alleging that the cities' closing of medical marijuana dispensaries violated the Americans with Disabilities Act (ADA). The Court held that doctor-recommended marijuana use permitted by state law, but prohibited by federal law, is an illegal use of drugs for purposes of the ADA.

Americans for Safe Access v. Drug Enforcement Administration, __ F. 3d __, 2013 WL 216052 (C.A.D.C.) Jan. 22, 2013

Plaintiffs appealed the United States Drug Enforcement Administration's (DEA) denial of their petition to initiate proceedings to reschedule marijuana under the federal Controlled Substances Act from Schedule I, the most restricted drug classification, to a lesser restrictive schedule. The DEA denied the petition, finding that there is no currently accepted medical use for marijuana and the limited existing clinical evidence did not warrant rescheduling. On appeal, the court ruled that DEA's denial was not "arbitrary and capricious," and deferred to the agency's interpretation of its regulations.

Browne v. County of Tehama, 2013 WL 441604 (Cal. App. 3d Dist.) Feb. 6, 2013

Plaintiffs, a group of qualified patients, challenged County's Ordinance regulating marijuana cultivation as unconstitutional, conflicting with the CUA and MMP. The court upheld the ordinance, noting that neither the CUA nor MMP granted an unfettered right to cultivate marijuana for medical purposes. Regulations governing cultivation amounts and location of medical marijuana on particular parcels of property are not preempted by either the CUA or MMP.