Cannabis Conundrum—How to Extinguish Illegal Marijuana Businesses

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Notes:

THE CANNABIS CONUNDRUM

How to Extinguish Illegal Marijuana Businesses

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INTRODUCTION

Marijuana's legal status has changed markedly since California voters approved Proposition 215[1] in 1996 to provide medical marijuana users limited immunity from criminal prosecution. With the Legislature's adoption of the Medical Marijuana Program Act in 2003,[2] some risk-taking entrepreneurs sought to open medical marijuana dispensaries that engaged in storefront retail operations. The change in our state's marijuana laws has only accelerated since voters approved Proposition 64 in 2016,[3] which decriminalized adult recreational use of marijuana. Combined with 2017's Medicinal and Adult-Use Cannabis Regulation and Safety Act,[4] state law now imposes a dual licensing scheme that regulates and taxes marijuana businesses in an attempt to extinguish the black market in marijuana sales while "ensuring a regulatory structure that prevents access to minors, protects public safety, public health and the environment, as well as maintaining local control."[5]

Despite the new regulatory regime governing marijuana from cultivation through sale, the problem of illegal marijuana — now referred to by its Latin "cannabis" — dispensaries persists. In cities that ban cannabis businesses and in those that allow them, illegal cannabis retail operations continue to vex local officials. These businesses seek to profit by avoiding the cost of regulatory compliance and threatening the voters' intent under Proposition 64. Further, illegal cannabis businesses undermine a city's land use authority and police power and strain a city's budget.

This paper outlines a city's options for enforcing its cannabis business regulations or ban given the recent changes to state and local law. Cities have the following enforcement tools:

(1) administrative citations;

(2) civil injunctions either with (a) contempt proceedings to enforce violations or (b) criminal enforcement for violations;

(3) abatement warrants;

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[1] Proposition 215 is known as the Compassionate Use Act of 1996 and added section 11362.5 to the Health and Safety Code. (Prop. 215, § 1, approved Nov. 5, 1996.)

[2] Stats. 2003, ch. 875 (S.B. 420).

[3] Proposition 64 is known as the Control, Regulate and Tax Adult Use of Marijuana Act ("the Adult Use of Marijuana Act" or "AUMA"). (Prop. 64, § 1, approved Nov. 8, 2016.)

[4] Stats. 2017, ch. 27 (S.B. 94).

[5] *Id.* at § 1, subd. (g).

(4) criminal enforcement;

(5) unlawful detainer actions brought by landowners;

(6) state regulatory enforcement; and

(7) some combination of 1 through 6.

The effectiveness of these approaches varies, but our experience shows that pursuing just one option is normally ineffective in closing illegal cannabis businesses. Instead, a combination of different approaches is most effective.

LEGAL FRAMEWORK

A. State Law

Under the Medicinal and Adult-Use Cannabis Regulation and Safety Act ("MAUCRSA"), the Legislature created a comprehensive system to control and regulate the cultivation, distribution, transportation, storage, manufacturing, processing, and sale of medical and adult-use cannabis. Commercial cannabis activity is now permitted within the state subject to approval by the local jurisdiction. Commercial cannabis activity is defined as "cultivation, possession, manufacture, distribution, processing, storing, laboratory testing, packaging, labeling, transportation, delivery or sale of cannabis and cannabis products."[6]

MAUCRSA imposes civil penalties for unlicensed commercial cannabis activity "of up to three times the amount of the license fee for each violation, and the court may order the destruction of cannabis associated with that violation in accordance with Section 11479 of the Health and Safety Code."[7] This can be a substantial sum. License fees depend on the type of cannabis business and expected gross revenue.[8] Thus, a Type 10 retailer license fee is currently $7,500 for gross revenue between $750,000 and $1 million. The civil penalty would accordingly be $22,500 for each day a person operates an unlicensed retail facility. Notably, "[e]ach day of operation shall constitute a separate violation of this section."[9]

If a city attorney obtains civil penalties under MAUCRSA, "the penalty collected shall first be used to reimburse the city attorney or city prosecutor for the costs of bringing

[6] Bus. & Prof. Code, § 26001, subd. (k).
[7] Bus. & Prof. Code, § 26038, subd. (a).
[8] Cal. Code Regs., tit. 16, § 5014, subd. (c).
[9] Bus. & Prof. Code, § 26038, subd. (a).

the action for civil penalties, with the remainder, if any, to be deposited into the General Fund."[10]

The possession of cannabis for sale outside a licensed cannabis business remains a misdemeanor under Health and Safety Code sections 11359 and 11360, "except as otherwise provided by law." Giving away, transporting or offering to transport over 28.5 grams of cannabis is also a misdemeanor under Health and Safety Code section 11360.

MAUCRSA does not abrogate the defense a primary caregiver has when providing marijuana to a qualified medical marijuana patient.[11] Until January 2019, defendants could also assert a medical use defense to the collective or cooperative cultivation of medical cannabis. Thus, in a recent ruling, the First Appellate District reversed a conviction for the sale of marijuana where the defendant operated a medical marijuana dispensary in Livermore, which bans dispensaries. The defendant contended the trial court erred by denying him the ability to assert a medical marijuana defense. The court overturned his conviction, holding that the trial judge's ruling that barred him from raising a medical marijuana defense violated his constitutional right to present a defense.[12] However, the Health and Safety Code section that provided this defense was repealed effective January 9, 2019.[13]

B. Local Law

The California Supreme Court in *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729 recognized cities' land use authority under our Constitution to regulate and even ban medical marijuana businesses under the Compassionate Use Act and the Medical Marijuana Program Act.[14] Proposition 64 and MAUCRSA also reflect this fundamental principle that a local jurisdiction has constitutional authority over land use within its boundaries. Thus, Proposition 64 provides:

> This division shall not be interpreted to supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances to regulate businesses licensed under this division, including, but not limited to, local zoning and land use requirement … or to completely prohibit the

[10] Bus. & Prof. Code, § 26038, subd. (b).
[11] Health & Saf. Code, § 11362.765.
[12] *People v. Ahmed* (2018) 25 Cal.App.5th 136.
[13] Health & Saf. Code, § 11362.775, subd. (e); see also Bureau of Cannabis Control, Notice Regarding the Repeal of Health and Safety Code Section 11362.775, <https://www.bcc.ca.gov/about_us/documents/18-005_repeal_hscode.pdf> (as of Mar. 23, 2019).
[14] Cal. Const., art. XI, § 5 (charter cities) & § 7 (general law cities).

establishment or operation of one or more types of businesses licensed under this division within the local jurisdiction.[15]

MAUCRSA similarly added a subsection acknowledging cities' constitutional authority: "This division, or any regulations promulgated thereunder, shall not be deemed to limit the authority or remedies of a city, county, or city and county under any provision of law, including, but not limited to, Section 7 of Article XI of the California Constitution."[16] The statutory framework not only acknowledges cities' authority to regulate, it specifically requires the local jurisdiction's approval to operate lawfully under state law, i.e., it mandates the dual-licensing regime for commercial cannabis activity.[17]

MAUCRSA requires cities to provide their ordinance relating to commercial cannabis activity to the Bureau of Cannabis Control so it may ensure the license applicant may operate consistent with local law.[18] As a result, cities no longer rely on permissive zoning alone to prohibit cannabis businesses, as they long did with medical marijuana dispensaries.[19]

Whether a city bans all commercial cannabis activity or allows some or all of the license types available under state law, a city will find enforcement easier if its ordinance includes certain provisions. First, the ordinance should declare that any operation in violation of its regulations is a public nuisance subject to abatement. Second, the city's code should provide that it may abate such nuisances through any lawful means, and that no one remedy is exclusive. Nuisances may normally be abated through an administrative procedure provided by the municipal code, and through civil actions allowing for injunctive relief. Third, the ordinance should impose civil penalties for a violation as well as the cost of abatement including attorneys' fees. Finally, it should designate violations as misdemeanors subject to criminal action and the city's general penalty provisions.

Cities that allow some commercial cannabis activity require not only compliance with the zoning code, but also require business licenses to prevent a commercial cannabis use from potentially running with the land. Other cities also include their own public health permit.

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[15] Bus. & Prof. Code, § 26200, subd. (a)(1).

[16] Bus. & Prof. Code, § 26200, subd. (f); see also Health & Saf. Code, § 11362.83 (regulation of medicinal cannabis cooperatives and collectives).

[17] Bus. & Prof. Code, § 26032, subd. (a)(2) [commercial cannabis operation requires compliance with local law]; Bus. & Prof. Code, § 26060, subd. (b)(2) [same as to commercial cultivation].

[18] Bus. & Prof. Code, § 26055, subd. (f).

[19] E.g., *City of Monterey v. Carrnshimba* (2013) 215 Cal.App.4th 1068, 1091.

ENFORCEMENT OPTIONS

Cities have these enforcement options: (1) administrative citations; (2) civil injunctions either with (a) contempt proceedings to enforce violations or (b) criminal enforcement for violations; (4) abatement warrants; (5) criminal enforcement; (6) unlawful detainer actions brought by cooperative landowners; (7) state regulatory enforcement; and (8) some combination of 1 through 7.

1. Administrative Citations

Most cities have an administrative citation ordinance under Government Code section 53069.4 that allows the city to impose a fine for any violation of its municipal code. If it has adopted such an ordinance, it may enforce its restrictions on cannabis businesses by issuing administrative fines to any person operating a cannabis business in violation of those restrictions. In addition, each city should review their cannabis business regulations for specific administrative penalties it may issue under that ordinance.

The administrative fines a city may impose on infractions is relatively small: $100 for a first violation; $200 for a second violation within a year of the first citation; and $500 for each additional violation of the same ordinance within one year of the first violation.[20] Although the city's code probably provides that each day of non-compliance constitutes a separate offense, potentially allowing the city to fine a business $800 for three days' operation, the cost of staff time to issue the citations normally does not allow for such aggressive enforcement. In addition, any person cited has the right to an administrative appeal, which may then be appealed to the superior court as an administrative writ of mandate under Code of Civil Procedure section 1094.5.[21]

Under AB 2164, effective January 1, 2019, cities can amend their administrative citation ordinances to allow code enforcement to immediately impose administrative fines for unlawful cannabis cultivation.[22] AB 2164 is aimed at curbing grow operations in residential neighbors. Previously, cities could only impose administrative fines for violations of local ordinances pertaining to building, plumbing, electrical, or other similar structural or zoning issues that create no immediate danger to health or safety only after providing a reasonable time to cure the violations. Under AB 2164, cities that

[20] Gov. Code, § 36900, subd. (b). Cities may impose slightly higher fines for local building and safety code violations.

[21] Gov. Code, § 53069.4, subd. (b).

[22] Stats. 2018, ch. 316 (A.B. 2164), amending Gov. Code, § 53069.4.

amend their administrative citation ordinance may do so without providing a cure period, if the violation exists as a result of, or to facilitate, the cultivation of cannabis.[23]

Although administrative citations may be useful as an initial "shot across the bow" for a cannabis business, there are two primary drawbacks to their use. First, if the city's goal is to shut down a cannabis business quickly and cheaply, repetitive administrative citations are less efficient than other methods, discussed below. Cannabis businesses see the relatively minor penalties associated with citations as a "cost of doing business," and use the administrative appeals process as another opportunity to stall and deplete the city's resources and political will to pursue them. Second, the risk of losing an appeal, or losing on a factual issue, could result in res judicata in in other cases about the particular cannabis business. This would compel the city to seek writs of administrative mandate to overturn those findings. Nevertheless, circumstances may militate toward using administrative citations, particularly with other methods, that each city must consider for itself.

2. Civil Injunction Actions

A city's ordinance should declare that any violation of its cannabis business ordinance constitutes a public nuisance that may be summarily abated by the city under Code of Civil Procedure section 731 or any other remedy available to the city. Under this provision, the city may seek injunctive relief against illegally-operating cannabis businesses. It should also consider bringing the action in the name of the people of the State of California and include a claim for civil penalties under MAUCRSA to increase the cost of the business's wrongdoing. Depending on the ordinance's definition of persons responsible for an illegal cannabis business, the city may also pursue injunctive relief against the property owner, even if that person is not the business operator.

In our experience, courts are generally amenable to issuing preliminary injunctions based on the relatively favorable standard applicable to public nuisances.[24] Once issued, problems may arise when attempting to enforce an injunction. Cities have two primary means of enforcement: (1) civil contempt and (2) criminal prosecution.

a. Civil contempt

Where a cannabis business does not comply with an injunction, whether preliminary or permanent, the city may enforce the injunction through civil contempt proceedings. The city first needs to marshal evidence that the business continues to distribute cannabis in violation of the injunction, often through evidence gathered in

[23] Gov. Code, § 53069.4, subd. (a)(2)(B) & (C).
[24] *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 72.

undercover buy operations. Once the city demonstrates through admissible evidence a prima facie case of contempt, the court will issue an order to show cause for contempt under Code of Civil Procedure section 1209, subdivision (a)(5).

Some judges have been reluctant to enforce preliminary injunctions, which requires strict adherence to noticing and other procedural rules. This approach is often time-consuming and costly because it requires additional undercover purchases which may not demonstrate an absent operator has knowingly violated the injunction. In addition, the city is required to personally serve the order to show cause on the operator, which often requires a costly skip trace to locate the individual consciously avoiding service. As a result, civil contempt proceedings may be difficult to sustain, at least with certain judges.

b. Criminal violations

Cities may also criminally prosecute individuals who violate an injunction under Penal Code section 166, subdivision (a)(4), which makes a misdemeanor of any "[w]illful disobedience of the terms as written of any process or court order …, lawfully issued by any court, including orders pending trial." The police could therefore arrest an individual who violates a preliminary injunction (e.g., after witnessing the purchase of, or purchasing, cannabis in violation of the injunction) and the City Prosecutor could prosecute that individual for violating a court order.

Criminal enforcement is speedier than civil contempt, especially in courts where the city may have to wait months just to have the court issue an order to show cause. To the extent the injunction prohibits cannabis activity by those acting on behalf of an absent operator, it also allows law enforcement to arrest the bud tenders working in these businesses, proving another deterrent. The burden of proof in a civil contempt proceeding is the same as in a criminal enforcement action — beyond a reasonable doubt — so criminal enforcement is no more difficult to demonstrate. However, a defendant has no right to a jury trial in a contempt proceeding, whereas she would in most criminal matters. On balance, the criminal contempt sanction can be an effective tool against cannabis operators, employees, and property owners who continue to operate or allow the operation of a cannabis business in violation of a court-ordered injunction, though it requires a level of resources that may only be available to larger, more affluent cities.

3. Abatement Warrants

The City may also take administrative action by seeking inspection warrants under Code of Civil Procedure section 1822.50, which allows inspections for zoning violations. Inspection warrants are useful where the City's code enforcement staff

suspects building code violations. If building code violations are discovered during the inspection, the City can then obtain an abatement warrant under section 1822.50 to close the cannabis business. Abatement warrants may be quickly issued ex parte, but a court may be less willing to issue a warrant if the only violation relates to an unpermitted cannabis business, as opposed to a building code violation that more urgently threatens public health and safety. However, because of their ease and speed, this option can be fruitful especially if there are building code violations on the premises of any unlawful cannabis business. It may also be an effective tool when combined with administrative citations, particularly the increased fines a city may issue for building code violations under Government Code section 36900, subdivision (c).

4. Criminal Enforcement

Under Government Code section 36900, the City may prosecute any violation of its municipal code as a misdemeanor, including operating an unlawful cannabis business, provided such a violation is not an infraction under the city's ordinance. Previously, there was risk in doing so because Health and Safety Code section 11362.775 exempts qualified patients and caregivers from criminal liability for collectively or cooperatively cultivating cannabis for medicinal purposes. However, under MAUCRSA, this immunity from criminal liability expired January 9, 2019.[25]

Each city will need to review its cannabis regulations to determine the scope of criminal liability for its violation. A city may be able to prosecute unlawful commercial cannabis businesses for operating without a permit or for operating a permitted business in violation of the city's laws. The City Prosecutor may bring these misdemeanor violations as district attorneys' offices seldom have the resources to do so. The misdemeanor carries both jail time and/or financial penalties, but any defendant charged is entitled to counsel and a jury trial. Threats of jail time are often very effective in compelling operators to cease their unlawful activities, but again, criminal prosecution can be expensive, particularly for smaller cities.

5. Unlawful Detainer Actions

Although a city cannot mandate landlords successfully evict unlawful cannabis businesses,[26] it can use its enforcement options to compel landlords to prosecute such actions. Nearly all commercial leases contain provisions requiring compliance with local laws and the existence of a civil injunction can assist landlords in successfully

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[25] Health & Saf. Code, § 11362.775, subd. (e); see *supra* footnote 13.

[26] *Cook v. City of Buena Park* (2005) 126 Cal.App.4th 1 (City's ordinance invalid because it required landlord to succeed in unlawful detainer action against nuisance tenants without adequate due process before imposing fines).

prosecuting unlawful detainer actions against a cannabis business. Unlawful detainer actions have been successful and cost effective where the property owner has been cooperative and hired competent unlawful detainer counsel who can obtain a writ of possession based on noncompliance of local laws and the injunction prohibiting cannabis activities. Often, a city's first step should be to seek cooperation from landlords to initiate unlawful detainer actions, as this is the most cost-effective route. When doing so, seek eviction from all properties the tenant leases, otherwise a successful eviction from one unit will simply send the tenant to the other unit he or she may have leased.

Some property owners are reluctant to evict cannabis businesses because they often pay a premium to lease their location and the property owner may be reluctant to part with this income stream. A city may create an incentive for cooperation by ensuring its cannabis business regulations impose liability for violations on the landlords as well as the operators.

Where the cannabis business or its operator is also the property owner, this option is ineffective. In this case, a city may perform a title search to identify lienholders and provide them notice of the property owners' code violations. The lienholders may enforce deed covenants requiring the property not be used in violation of law and thereby avoid having abatement costs and attorneys' fees recorded as a judgment lien on the property.

6. State Regulatory Enforcement

Under MAUCRSA, the Bureau of Cannabis Control and the Department of Consumer Affairs' Division of Investigation – Cannabis Enforcement Unit have been performing regular enforcement efforts throughout the state against unlicensed cannabis retailers.[27] It often performs enforcement with local law enforcement, seizing the suspect's cannabis and cannabis products. State enforcement is likely a significant deterrent to unlawful behavior and could relieve a city of much of its enforcement cost. However, it is unclear what guides the Bureau's prosecutorial decisions, though it is likely driven by its ability to make the largest impact, focusing on large actors. Nevertheless, the Bureau provides a simple on-line portal for lodging complaints about unlicensed activity.[28] The city may consider notifying the Bureau when dealing with

[27] The California Department of Food and Agriculture CalCannabis Cultivation Licensing division deals with complaints about illegal cannabis cultivation and the California Department of Public Health Manufactured Cannabis Safety Branch oversees unlicensed commercial cannabis manufacturing.
[28] Bureau of Cannabis Control, File a Complaint, <https://aca5.accela.com/bcc/Cap/CapApplyDisclaimer.aspx?CAPType=Enforcement/Cannabis/Complaint/General%20Complaint&Module=Enforcement> (as of Mar. 26, 2019).

large or recalcitrant offenders and, in cities that allow some cannabis businesses, lawfully operating businesses should be informed of this opportunity. In our experience, the licensed businesses have the most to lose from unlicensed dispensaries and can therefore assist in achieving compliance.

CONCLUSION

Cities often find they achieve consistent success by obtaining civil injunctions against cannabis businesses operating in violation of local law and by enforcing those injunctions with contempt or through criminal misdemeanors under Penal Code section 166. To do so, the practitioner should ensure that any injunction the city obtains enjoins not only the named defendants, but also "anyone acting on behalf" of the defendant operators anywhere in the city. Cities should also seek assistance from landlords to initiate unlawful detainer actions against commercial cannabis tenants or include landlords in the civil injunction actions. This should provide cities with the speediest means of closing cannabis businesses without a substantial increase in cost.

If a city has the means, it should also look at working with law enforcement and the City Prosecutor to prosecute unlawful cannabis businesses as criminal misdemeanors. At the same time, cities should continue outreach to property owners so that they apply additional pressure on cannabis businesses through unlawful detainer actions. The choice among the enforcement options this paper discusses is one each city must make for itself depending on its municipal code, the nature of the offender, and the city's goals. However, often it requires more than one enforcement technique to finally extinguish illegal cannabis businesses.