Latest Developments in Cannabis Regulation

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LOCAL POLICE POWER AUTHORITY AND THE STATE'S DECRIMINALIZATION OF PERSONAL CANNABIS CULTIVATION

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LOCAL POLICE POWER AUTHORITY AND THE STATE'S DECRIMINALIZATION OF PERSONAL CANNABIS CULTIVATION

OVERVIEW

The Medical and Adult-Use Cannabis Regulation and Safety Act ("MAUCRSA") (like its predecessor, the Adult Use of Marijuana Act ["AUMA"]) decriminalizes cannabis cultivation of up to six plants by individuals 21 years of age and older in their private residences and for their personal use. MAUCRSA provides, however, that "[a] city, county, or city and county may enact and enforce reasonable regulations to regulate" such activity. For that reason, cities throughout the State began considering and adopting ordinances using this express authorizing language and their police powers leading up to and after the passage of Proposition 64 in November 2016.

One of the first lawsuits to challenge local regulatory authority over personal cultivation since the passage of Proposition 64, is *Harris v. City of Fontana* (San Bernardino County Superior Court Case No. CIVDS 1710589). This paper provides an overview of the history of decriminalization of personal cannabis cultivation and a discussion of the legal challenges in the pending *Harris* litigation.

FEDERAL LAW

Any analysis of state and local regulatory authority should begin with a review of applicable federal law. (E.g., *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 926 ["No state law could completely legalize marijuana . . . because the drug remains illegal under federal law."]) Cannabis is an illegal Schedule I narcotic under the Federal Controlled Substances Act. (21 U.S.C. § 812.) Over the last several years, the federal government has issued various memoranda regarding enforcement of the federal law in states with purported legalized cannabis use, and signaled recently a policy shift towards stricter enforcement against cannabis-related activities. (Memorandum from Attorney General Jefferson B. Sessions, III Regarding Marijuana Enforcement, January 4, 2018.) Federal law provides for no medical use defense or exception. (*Gonzales v. Raich* (2005) 545 U.S. 1; *United States v. Oakland Cannabis Buyers' Coop*. (2001) 532 U.S. 483.) The federal government continues to enforce the Controlled Substances Act in California. (http://www.thecannifornian.com/cannabis-news/northern-california/us-seizes-marijuana-growing-houses-tied-china-based-criminals/)

STATE LAW

Despite the federal government's stance on cannabis, California has continued to regulate and allow cannabis-related activities by decriminalizing certain cannabis use and related activities. California's decriminalization of particular cannabis-related activities dates back to 1996, when California voters approved Proposition 215, which was codified as Health & Safety Code section 11362.5 *et seq.* and entitled the Compassionate Use Act of 1996 ("CUA"). The CUA decriminalized the use of cannabis for medical purposes. In 2003, the California Legislature adopted Senate Bill No. 420, entitled the Medical Marijuana Program ("MMP"), codified as Health and Safety Code section 11362.7 *et seq.*, which further permitted qualified patients and primary caregivers to associate collectively or cooperatively to cultivate cannabis for medical purposes without being subjected to criminal prosecution.

The California Supreme Court has held that neither the CUA nor the MMP preempts local land use authority regarding medical marijuana, leaving public agencies with the authority to "allow, restrict, limit, or entirely exclude facilities that distribute medical marijuana." (*City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729, 762 [*"City of Riverside*"].)

Accordingly, while California has continued to decriminalize additional cannabis-related activities, the state has also consistently acknowledged that such decriminalization is subject to local police power and land use regulatory authority.

Of course, local authorities retain their police power under the California Constitution, regardless of what action the State takes to decriminalize cannabis-related activities.

Moreover, cannabis remains a Schedule I controlled substance that constitutes contraband and is subject to seizure by the State. (Health & Saf. Code, § 11475 ["[c]ontrolled substances listed in Schedule I that are possessed, transferred, sold, or offered for sale in violation of this division are contraband and shall be seized and summarily forfeited to the state"]; Health & Saf. Code, § 11054(d)(13) [listing cannabis as a Schedule I controlled substance]; see also *People v. Wexler* (2014) 224 Cal.App.4th 712, 721.) Accordingly, while cannabis is colloquially "legalized", as a legal matter, it is "decriminalized" under State law and only within in particular parameters.

CALIFORNIA DECRIMINALIZES PERSONAL CULTIVATION OF CANNABIS, SUBJECT TO LOCAL REGULATION

On June 28, 2016, the Secretary of State announced that Proposition 64, the Adult of Marijuana Act, had obtained sufficient valid petitioner signatures to be include on the 2016 General Election ballot.

On November 8, 2016, California voters approved Proposition 64 with 57.13 percent voter approval statewide, and a slimmer margin of voter approval in San Bernardino County and in the City of Fontana – 52.5 and 53.5 percent, respectively.

On June 27, 2017, the Governor approved Senate Bill No. 94, MAUCRSA. MAUCRSA did not change the substance of the decriminalization of personal cultivation of cannabis.

As of November 2016, individuals 21 years of age and older can do any of the following without running afoul of state or local law:

- Carry, obtain, or give away (to other individuals 21 years of age or older) up to 28.5 grams of cannabis, or 8 grams of concentrated cannabis, or cannabis accessories. (Health & Saf. Code, §§ 11362.1, subds. (a)(1), (a)(2), (a)(5).)

- Cultivate indoors up to 6 plants for personal use, subject to local regulations. (Health & Saf. Code, §§ 113621.1, subd. (a)(3), 11362.2.)

- Consume cannabis or cannabis products. (Health & Saf. Code, § 11362.1, subd. (a)(4).)

Relevant here is the provision pertaining to personal cultivation. Under MAUCRSA, adults 21 years of age and older may cultivate cannabis for personal use – up to six plants within or on the grounds of a single private residence free from prosecution by state or local authorities:

> [I]t shall be lawful under state and local law, and shall not be a violation of state law or local law, for persons 21 years of age or older to . . . (3) Possess, plant, cultivate, harvest, dry, or process not more than six living cannabis plants and possess the cannabis produced by the plants.

(Health & Saf. Code, § 11362.1.)

Importantly, the decriminalization of personal cannabis is left subject to local regulation.

> (b) (1) A city, county, or city and county may enact and enforce reasonable regulations to regulate the actions and conduct in paragraph (3) of subdivision (a) of Section 11362.1.
> (b) (2) Notwithstanding paragraph (1), a city, county, or city and county shall not completely prohibit persons engaging in the actions and conduct under paragraph (3) of subdivision (a) of Section 11362.1 inside a private residence, or inside an accessory structure to a private residence located upon the grounds of a private residence that is fully enclosed and secure.

(Health & Saf. Code, § 11362.2, subd. (b).)

There are two restrictions placed on a local agency's ability to regulate, that (1) the regulations be reasonable and (2) the regulations not completely prohibit personal indoor cultivation.

In the wake of the passage of Proposition 64's passage, many local authorities adopted ordinances to regulate the personal indoor cultivation. These ordinances varied greatly – from amendments to roll back outdated restrictions that prohibited any cannabis cultivation (which would violate the mandates of Health and Safety Code section 11362.2, subdivision (b)(2)) to registration requirements, inspection requirements, and the like.

CITY OF FONTANA REGULATIONS

The City of Fontana, like other cities, was confronted with several options to regulate personal residential indoor cultivation of a schedule I narcotic.

Some of the health and safety concerns associated with such activities include security risks to occupants and adverse effects to the health and safety of the occupants (including structural damage to the building due to increased moisture and excessive mold growth which can occur and

can pose a risk of fire and electrocution, and chemical contamination within the structure due to the use of pesticides and fertilizers).

Several California cities reported that negative impacts of cannabis cultivation, processing and distribution uses, include offensive odors, illegal sales and distribution of cannabis, trespassing, theft, etc. Based on these potential public safety and nuisance risks, Fontana considered options to safeguard individuals engaging in this potentially risky endeavor and use. To that end, the City adopted its Residential Indoor Marijuana Cultivation ("RIMC") permitting scheme. The RIMC permitting scheme included a number of key components, including (1) a permit requirement; (2) an inspection requirement; (3) a fee requirement; and (4) a background check requirement.

In compliance with the two restrictions placed on a local agency's ability to regulate, the City regulations were as limited in nature but still achieve the City's public health, safety, and welfare goals while not completely prohibiting individual cannabis cultivation.

DRUG POLICY ALLIANCE CHALLENGES LOCAL REGULATION

In December 2016, the Drug Policy Alliance sent a letter to a number of cities challenging locally adopted ordinances. The Drug Policy Alliance letters outlined four broad challenges: (1) preventing categories of people from engaging in personal cultivation violates AUMA; (2) local permits or fees to engage in personal cultivation violates AUMA; (3) requiring a permit to engage in personal cultivation violates the Fifth Amendment to the U.S. Constitution; and (4) requiring a warrantless inspection of a private home violates the Fourth Amendment to the United State Constitution.

While the Drug Policy Alliance focused on what it considered to be impermissible local regulations, there was no indication of what the Alliance would consider to be a permissible regulation under Health and Safety Code section 11362.2. This lack of information raises the question of whether the Drug Policy Alliance thinks *any* personal cannabis cultivation regulations are reasonable.

MIKE HARRIS V. CITY OF FONTANA

On June 5, 2017, Mike Harris ("Petitioner") filed a petition for writ of mandate and a complaint for declaratory relief ("Petition") against the City of Fontana for its adoption of regulations related to personal indoor cultivation.

The Petition alleges eight causes of action: (1) preemption, (2) violation of the Fifth Amendment to the U.S. Constitution, (3) violation of the Fourth Amendment of the U.S. Constitution, (4) violation of Article I, section 1 of the California Constitution, (5) violation of Health and Safety Code section 11362.2, (6) violation of Penal Code sections 11076 and 11125, (7) declaratory relief, and (8) taxpayer action to prevent illegal expenditures of funds.

The eight causes action are duplicative of one another and can better be understood as challenges to the key provisions of the City's regulations: (1) permit requirement; (2) inspection requirement; (3) fee requirement; and (4) background check requirement.

- Permit Requirement. Due to the inherent risks in the activity and danger posed by unregulated cultivation, it is reasonable to require a permit prior to allowing indoor cultivation. The permit requirement allows the City to impose reasonable conditions to ameliorate the risks inherent to an indoor grow, including by prohibiting storage of explosive chemicals near cannabis and a requirement to secure cannabis such that unauthorized individuals do not gain access.
- Inspection Requirement. The only inspection authorized by the City's regulations is an inspection conducted with the applicant's consent. This inspection is no different from any other inspection preceding the issuance of a permit and is no different from any other building permit the City issues.
- Fee Requirement. The fee requirement is tied to the amount of staff time and resources that would be expended in reviewing and processing a permit application.
- Background Check Requirement. This requirement allows authorized personnel in the City's Police Department to examine an applicant's criminal background and to provide a recommendation to the City's Planning Department to approve or deny a permit for a person with a criminal history related to drug possession or sales.

Fontana is not alone in its adoption of residential indoor cannabis cultivation regulations, and what is reasonable in one community may not be reasonable in another. Close to 60 counties and 500 cities in California have been left to determine what it means to reasonably regulate in general and what it means specifically to regulate indoor cannabis cultivation.

The crux of Petitioner's challenge appears to be that the City's police power must yield to a claimed "right" to cultivate cannabis. There is no unqualified "right" to cultivate a schedule I narcotic – any activity that remains illegal under both federal and state law. What State law provides is limited decriminalization of cultivation by adults 21 years of age and older for their personal use if such cultivation complies with State law and local regulations. In other words, any use that does not comply with both State law and local regulations is illegal. And, of course from a federal law perspective, there is no legal protection – qualified or otherwise.

While the issue of personal indoor cultivation has not yet been addressed by appellate courts, courts have recognized local authorities' power to regulate cannabis activity under their police power authority. In *City of Riverside*, the California Supreme Court acknowledged as much in the context of land use regulations prohibiting medical cannabis dispensaries: "While some counties and cities might consider themselves well suited to accommodating medical marijuana dispensaries, conditions in other communities might lead to the reasonable decision that such facilities within their borders, even if carefully sited, well managed, and closely monitored, would present unacceptable local risks and burdens." (*City of Riverside*, 56 Cal.4th 729, 756.)

In *Maral v. City of Live Oak*, the Court of Appeal acknowledged that cannabis cultivation necessarily "ha[s] significant impacts or the potential for significant impacts on the City. These impacts included damage to buildings, dangerous electrical alterations and use, inadequate ventilation, increased robberies and other crime, and the nuisance of strong and noxious odors." (*Maral v. City of Live Oak* (2013) 221 Cal.App.4th 975, 978-979.)

Cities continue to monitor ongoing statutory and case law developments involving cannabis. The trial court hearing on the *Harris* case is scheduled for September 14, 2018.

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