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April 16, 2013

VIA HAND DELIVERY

Honorable Eugene M. Premo, Acting Presiding Justice
Honorable Miguel Márquez, Associate Justice
Honorable Nathan D. Mihara, Associate Justice
California Court of Appeal, Sixth Appellate District
333 West Santa Clara Street
San Jose, California 95113-1717

Re: **Request for Publication of *City of Monterey v. Carrnshimba, et al*. (6th Dist., No. H036475)**

To The Honorable Acting Presiding Justice and Associate Justices:

The City of Monterey, the League of California Cities (League), and the California State Association of Counties (CSAC) hereby respectfully request publication of the Court's opinion in *City of Monterey v. Carrnshimba*, Case No. H036475, pursuant to California Rules of Court, rule 8.1120(a).

The League is an association of 469 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The *Monterey* opinion meets the standards for publication set forth in California Rules of Court, rule 8.1105(c)(3), (4), (6) and (7), because the opinion:

- Explains and clarifies existing law with respect to cities' authority to determine whether or not to allow marijuana distribution facilities within their boundaries;
- Advances a clarification or construction of an ordinance;
- Involves a legal issue of continuing public interest; and
- Makes a significant contribution to case law by reviewing the development of statutory and case law concerning marijuana distribution facilities.

The *Monterey* Opinion Protects Local Agencies' Constitutionally-Derived Power To Regulate Zoning And Land Use, Including Through The Use Of Moratoria.

The *Monterey* opinion takes on special importance because, by correctly applying State law nuisance *per se* principles, it avoids an incorrect reading and overly-broad application of the Compassionate Use Act (CUA) and Medical Marijuana Program Act (MMP), which, in the case of the MMP, was narrowly drafted by the Legislature. Both the CUA and the MMP have been strictly construed by California's appellate courts. The opinion, by properly applying the law of nuisances *per se,* prevents the improper erosion of local governments' constitutionally-derived police power to enact and enforce land use regulations.

This Court turned to the language of the Monterey City Code and observed that it provided that "'any use of any land, building, or premise established, conducted, operated, or maintained contrary to the provisions of this ordinance shall be, and the same is hereby declared to be unlawful and a public nuisance.'" (Slip Op., p. 20, quoting City Code, § 38-222(A).) The Court noted that the code section regarding the C-2 Community Commercial District included fifty (50) examples of commercial use classifications, and that a dispensary was not listed among the examples. (*Ibid.*) The City Code empowered the Deputy City Manager of Plans and Public Works to "'determine whether a specific use shall be deemed to be within one or more use classifications or not within any use classification in this chapter.'" (*Ibid.*, quoting City Code, § 38-12.) The Deputy City Manager's decision could be appealed to the City Planning Commission. (*Ibid.*)

This Court observed that "appellants' challenges do not occur through the more conventional means of a mandamus proceeding or declaratory relief action." (*Id.*, p. 21.) The Court stated that the City effectively rejected Carrnshimba's appeal "by advising Carrnshimba 19 days after filing of the appeal that it would not be processed because of the City's adoption of the moratorium (Ordinance number 3441)." (*Id.*, p. 22.) Appellants failed to judicially challenge the City's denial of the administrative appeal or the Deputy City Manager's underlying decision that "appellants' operation of the premises as a Dispensary constituted an unpermitted use."

(*Ibid.*) They also did not "seek a code Amendment or variance authorizing the use of the premises as a Dispensary." (*Ibid.*) Appellants did not "employ the traditional method of mandamus to challenge the agency's land use decision." (*Id.*, p. 23.) Instead, they elected to operate the dispensary without permission. (*Ibid.*) The Court relied on *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153 (*Kruse*), particularly the defendants' decision in that case to operate illegally, and the court of appeal's determination that, having failed to exhaust their administrative remedies, appellants (like the defendants in *Kruse*) "should not be allowed to challenge—as a defense to the public nuisance claim—the City's determination that their use of the premises was not permissible." (*Id.*, p. 24.)

By its reliance on *Kruse*, this Court left little doubt that municipalities can declare conduct that constitutes a nuisance and then enforce such provisions of their codes accordingly. The discussion of exhaustion of administrative remedies, moreover, will prove useful in future zoning enforcement cases, whether or not marijuana is involved.

The *Monterey* Opinion Clarifies and Construes Common Terms Used in Local Municipal Codes with Reference to the State's Marijuana Laws.

The *Monterey* opinion reviews common municipal code classification terms "Personal Services," "Retail Sales," and "Pharmacies and Medical Supplies," and clarifies or construes why each one is not a use classification in which a marijuana dispensary fits. (Slip Op., pp. 24-28.) As each of the categories appear regularly in municipal codes, publication of the *Monterey* opinion will be helpful. For example, while recognizing that "the precise parameters of a Dispensary operating lawfully under California law remain undefined by case law or statute," this Court concluded that a dispensary did not fall within the ambit of "personal services," which the Court identified as "involving a person or persons providing labor of a manual or intellectual type in exchange for payment, such as mechanics, contractors, barbers, tailors, accountants, financial planners, or attorneys." (Slip Op., p. 26.)

This Court further concluded that dispensaries did not fit within the "retail sales" classification." Acknowledging that medical marijuana "is certainly a good or commodity," it nevertheless "stretches beyond its limits the meaning of a retail sale to include within that category the noncommercial circumstances under which a collective of patients and caregivers qualified under the CUA and MMP come together to cultivate medical marijuana." (*Id.*, p. 27.)

And the written or oral recommendation or approval of a physician set forth in Health and Safety Code, section 11362.5, subd. (d), "cannot reasonably be construed as constituting a prescription for medical marijuana, because, inter alia, nothing in the statute requires that the physician's recommendation or approval contain a date or indicate a specific quantity required for the patient." (Slip Op., p. 28, citing *People v. Windus* (2008) 175 Cal.App.4th 634, 642.)

"[M]ost fundamentally, a Dispensary is not 'licensed by the [State Board of Pharmacy]. . . ." This Court concluded that a dispensary "does not fall within the model under which a pharmacy or medical supply house conducts retail sales of prescription pharmaceuticals and medical supplies to customers[,]" and did not therefore "fit within that designated commercial use classification." (*Ibid.*)

The Court then explained why the case "closely parall[ed]" *City of Corona v. Naulls* (2008) 166 Cal.App.4th 418. (*Ibid.*) The Court stressed that defendants in *Naulls* had "failed to take the necessary steps to obtain city approval for their nonconforming operation before opening their doors for business, thereby violating Corona's municipal code; as such, the operation was a nuisance per se." (*Id.*, pp. 29-30.) Like Corona, Monterey's City Code "demonstrated 'an intent by the City to prohibit uses not expressly identified' (*Corona*, 166 Cal.App.4th at p. 432) or determined by the Deputy City Manager to come within a designated use classification." (Slip Op., pp. 30-31.) This Court stated that while this was not the basis for the trial court's grant of summary judgment in the City's favor, the ruling was "proper because appellants' Dispensary operation was not a permitted use under the pre-moratorium City Code." (*Id.*, p. 31.) The case thus adds to the body of law established by *Naulls*.

The *Monterey* Opinion Involves A Legal Issue Of Continuing Public Interest

The *Monterey* opinion expressly states that "the operation of [marijuana distribution facilities] under California's medical marijuana laws – specifically, in this case, the question of whether a dispensary is a permitted use under a particular zoning ordinance – are matters of continuing public interest." (Slip Op., p. 10.) The issue was significant enough for the Court to exercise its discretion to decide the case on the merits notwithstanding its mootness. Unless it is published, though, the *Monterey* opinion cannot have any effect other than on the parties to the case. If the case is significant enough to warrant decision on the merits, despite its mootness, then it stands to reason that the case should have wider application, as apparently intended.

The *Monterey* Opinion Contributes To The Case Law Regarding the State's Medical Marijuana Laws

In the summary of medical marijuana laws, the Court described the narrowness of the CUA: "a narrow measure with narrow ends." (Slip Op., p. 14, quoting *People v. Mentch* (2008) 45 Cal.4th 274, 286, fn. 7.) By setting forth five ways in which the CUA has been held *not* to offer a defense, the Court adds to the case law on this point.

Similarly, in its discussion of the MMP, the Court highlighted an issue in dispute, namely, whether the MMP itself contemplated dispensaries. (Slip Op., p. 16.) Whereas in *People v. Urziceanu* (2005) 132 Cal.App.4th 747, the court stated that the MMP did contemplate

the "formation and operation of medical marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana" (132 Cal.App.4th at p. 785), in both *People ex rel. Trutanich v. Joseph* (2012) 204 Cal.App.4th 1512, 1523 and *Kruse* at 1175, the courts stated that the MMP did not "cover dispensing or selling marijuana" (*Joseph, supra*) or made no "mention of Dispensaries or the licensing or location of them." (*Kruse, supra.*) This Court's view that the *Joseph/Kruse* conclusion may contradict the California Attorney General's Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use (Aug. 2008) and the Legislature's subsequent adoption of section 11362.768, demonstrates that the case law favors the interpretation that the MMP does not cover dispensing or selling marijuana. (See *Conejo Wellness Center, Inc. v. City of Agoura Hills*, __ Cal.App.4th __, 2013 Cal.App. LEXIS 248 (Mar. 29, 2013), at pp. *30, *36 ["The CUA . . . does not create a 'right' to cultivate, distribute, or otherwise obtain medical marijuana collectively. . . . The MMPA does not differ in kind from the CUA. . . .Nowhere does the language of its operative terms command or even expressly allow the existence of collectives or dispensaries. Its operative terms do not affirmatively create any right, constitutional or otherwise, to cultivate or distribute medical marijuana through collectives or dispensaries."]) In any event, ordering publication of the *Monterey* opinion will help to allow this issue to be resolved in the public forum of published case law.

Conclusion

The City, League, and CSAC respectfully submit that, for the above reasons, the *Monterey* opinion meets the standards for publication under California Rules of Court, rule 8.1105(c)(3), (4), (6), and (7), and provides much-needed guidance for cities and counties seeking to promote safe and orderly development and land use regulation. Accordingly, the *Monterey* opinion merits certification for publication in the Official Reports.

Respectfully,

Jeffrey V. Dunn
of BEST BEST & KRIEGER LLP

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PROOF OF SERVICE BY OVERNIGHT DELIVERY

I am a citizen of the United States and employed in Contra Costa County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 2001 N. Main Street, Suite 390, Walnut Creek, California 94596. On April 16, 2013, I deposited with United Postal Service Overnight Delivery, a true and correct copy of the within documents:

APRIL 16, 2013 LETTER REQUESTING PUBLICATION TO JUSTICES EUGENE M. PREMO, MIGUEL MARQUEZ, AND NATHAN D. MIHARA

in a sealed envelope, addressed as follows:

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Richard Rosen
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Hon. Lydia Villareal
Monterey County Superior Court
1200 Aguajito Rd.
Monterey, CA 93940

Supreme Court of California
350 McAllister Street
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***Via Electronic Submission on the Court of Appeal Website**

Christine M. Davi
City of Monterey
City Attorney's Office
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Monterey, CA 93940

Following ordinary business practices, the envelope was sealed and placed for collection by United Postal Service on this date, and would, in the ordinary course of business, be retrieved by United Postal Service for overnight delivery on this date.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on April 16, 2013, at Irvine, California.

Monica Brozowski