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State Law Does Not Preempt Local Regulation of Medical Marijuana Dispensaries

Information in this alert is useful to local governments, businesses and land use practitioners.

Local regulation of medical marijuana dispensaries has become an area of increased public concern. On September 22, 2009, the Second Appellate District published *City of Claremont v. Kruse* (B210084), where it affirmed the trial court's issuance of a permanent injunction preventing defendants (aptly named CANNABIS) from operating medical marijuana dispensaries within the City of Claremont ("City"). This decision is useful to local governments, businesses, and land use practitioners both in regard to its overview of medical marijuana regulation, and its analyses regarding nuisances *per se* and preemption of local moratoria.

In *Kruse*, defendants applied for a business permit and license to operate a medical marijuana dispensary after the City had informed defendants that such a use was not permitted under its planning and zoning regulations. The City Manager denied defendants' applications, and informed defendants that they could apply for a zoning code amendment to allow the use. That same day, however, defendants commenced operating a dispensary, never sought a zoning code amendment, and instead filed an administrative appeal of the City Manager's denial. While that appeal was pending, the City Council adopted a 45-day moratorium (later extended) prohibiting the establishment of medical marijuana facilities anywhere in the City.

After defendants refused to cease operation, the City issued numerous administrative citations, followed by a trial court action for an injunction to abate a public nuisance. The trial court determined that the state's medical marijuana laws (particularly the Compassionate Use Act of 1996) did not preempt the City from imposing the moratorium and that the moratorium was a valid exercise of the City's police power. The trial court also found that defendants' continued operation of the dispensary without a license was a nuisance *per se*.

The Second District affirmed. It first rejected defendants' arguments that a nuisance *per se* did not apply. Instead, the appellate court reiterated the rule that once a legislative body expressly declares an activity to be a nuisance, as here, then conducting that activity is a nuisance *per se*, regardless of whether the activity causes any harm. The appellate court determined that the City's municipal code makes it unlawful to transact business without first procuring a business license and tax certificate from the City, and that the proposed use was not allowed under the City's existing land use regulations.

The appellate court then rejected defendants' arguments that state law preempted the City's enactment of the moratorium on medical

marijuana dispensaries and its refusal to issue a business license and permit. The court held that neither the Compassionate Use Act nor the Medical Marijuana Program preempted the City's actions, either expressly or by implication, as neither addressed land use or licensing issues.

For further information about this decision or the scope of a local government's power to regulate uses via the nuisance *per se* doctrine, please contact us.
