Beaverton
OREGON

City Attorney's Office

MEMORANDUM IN SUPPORT OF SB 1531
Senate Committee on Judiciary
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Introduction

This memorandum is offered in support of SB 1531, which affirms that a governing body of a city or county may regulate or restrict operation of a medical marijuana facility, prohibit registration of a medical marijuana facility, or regulate, restrict or prohibit the storing or dispensing of marijuana by a facility legally authorized to store or dispense marijuana under state law.

There's currently some confusion among lawyers and others regarding the legal authority of local governments to regulate medical marijuana facilities concurrently with the state. Enactment of SB 1531 would eliminate that confusion and would allow local communities to address local concerns regarding medical marijuana facilities.

Local Regulation of Business

Oregon cities and counties generally have the legal authority to license businesses for both regulatory and revenue purposes. A regulatory business license regulates the conduct of the

licensee. The licensee must meet certain minimum standards to obtain and maintain the license. If the standards are not met, the license may not be issued, or if already issued, may be suspended or revoked. Without a valid license, the licensee may not conduct business in the jurisdiction having authority to issue the license.

A revenue license is essentially an excise tax imposed on a business operating within the taxing jurisdiction. Once the licensee pays the license fee, there is no other obligation associated with the license, other than to renew the license at the end of its term (usually annually).

Beaverton requires most businesses doing business in the city to obtain a revenue business license (see Beaverton Code (BC) sections 7.01.010 through 7.01.065). The city currently issues a regulatory business license only to secondhand property dealers and payday lenders (as well, the city makes recommendations to the Oregon Liquor Control Commission (OLCC) in connection with issuing liquor licenses to local businesses, but the ultimate licensing decision is controlled by the OLCC, not the city).

Other cities take a similar approach to business licensing as Beaverton does. Most require a revenue business license for all businesses operating in the city and selectively require regulatory business licenses for specific types of businesses. The types of businesses other cities control by regulatory business licenses, beyond those already mentioned include:

- **Rental Housing**: regulations address compliance with fire, health and safety regulations to ensure habitable living conditions for the community;

- **Social Gaming**: regulations authorize the playing of social games in private businesses, clubs, or places of public accommodation; and

- **Taxi Service**: regulations set rates and service levels.

Local Concerns Regarding Medical Marijuana Facilities

More recently, cities have begun to consider whether and how to regulate medical marijuana dispensaries (also referred to as medical marijuana facilities). In the 2013 regular Oregon legislative session, the legislature enacted House Bill 3460 which creates a medical marijuana registration system and authorizes the use, possession and distribution of medical marijuana at facilities located in areas zoned for commercial, industrial, or mixed use.[1] The new law also includes further specific restrictions on the location of medical marijuana facilities related to proximity to schools attended by minors and to other medical marijuana facilities. The Oregon Health Authority will begin processing applications for registration of medical marijuana facilities on Monday, March 3, 2014.

The Federal Controlled Substances Act. One issue of concern with regard to medical marijuana is that, while medical marijuana may be legal to possess, grow and distribute under state law, it is illegal to possess, grow or distribute under any circumstances under federal law. The federal Controlled Substances Act prohibits the manufacture, dispensation, distribution and possession of various drugs, including marijuana.[2] The statute reflects Congress's determination that marijuana has no medical benefits (outside the confines of a government-

[1] HB 3460 as enacted may be found at Oregon Laws 2013, chapter 726.

[2] The federal Controlled Substances Act, 84 Stat. 1242, is codified at 21 U. S. C. § 801 et seq. The Act is the federal drug policy of the United States. The legislation creates five schedules with varying qualifications for a substance to be included in each. Marijuana is classified in Schedule I. Offenses and penalties are set out at 21 U.S.C. § 841.

approved research project). Whereas some other drugs can be dispensed and prescribed for medical use, the same is not true for marijuana.[3] Indeed, for purposes of the Controlled Substances Act, marijuana has "no currently accepted medical use."[4]

The Controlled Substances Act is one reason why the recently adopted Oregon Administrative Rules relating to the registration of medical marijuana facilities caution that "registration of a facility does not protect a person [responsible for a medical marijuana facility] or employees from possible criminal prosecution under federal law."[5] Decriminalization and regulation of medical marijuana at the state or local level notwithstanding, federal courts have ruled that the unambiguous federal prohibitions on medical marijuana use set forth in the Controlled Substance Act continue to apply in all jurisdictions.[6]

Excessive Cash on Premises. Regardless of one's views on the merits of medical marijuana, it is an immutable fact that the Controlled Substances Act currently prohibits the manufacture and distribution of marijuana. This fact affects how marijuana facilities operate. For example, banks, credit card companies and other financial institutions reportedly are reluctant to provide traditional financial services to marijuana businesses. The financial industry fears that if they provide services to marijuana businesses they may be found to have aided and abetted a criminal enterprise, possibly subjecting themselves to civil or criminal sanctions for violating prohibitions on money laundering, among other federal laws and regulations.[7]

Aaron Smith, executive director of the National Cannabis Industry Association in Washington, D.C., concurs with this assessment. He was reported in The New York Times as saying that the legal marijuana industry is largely shut out of the traditional banking system, resulting in much of the industry's business being conducted in cash. Mr. Smith estimates that legal marijuana sales in the United States could reach $3 billion this year.

US Attorney General Eric Holder has likewise expressed concern about the public safety component of having such large amounts of cash in retail marijuana outlets, saying that "there's a public safety component to this. Huge amounts of cash—substantial amounts of cash just kind of lying around with no place for it to be appropriately deposited."[8]

Anecdotal evidence suggests these public safety concerns are valid. Reports of robbery and burglary are not uncommon, and there have been cases of kidnapping, torture and murder of medical marijuana dispensary owners and employees as well. See, for example: "Three Minutes of Terror: Armed Robbery of Southeast Portland Marijuana Dispensary Captured on Video,"[9] "Four Charged with Kidnapping, Torturing Marijuana Dispensary Owner,"[10] and "Men Who Killed

[3] See 21 U. S. C. § 829, allowing for the prescription of controlled substances classified in schedules other than Schedule I.
[4] See 21 U. S. C. § 812(b)(1) (finding that marijuana and other Schedule I drugs and substances have "no currently accepted medical use in treatment in the United States").
[5] OAR 333-008-1000.
[6] *James v. City of Costa Mesa*, 700 F.3d 394, 405 (9th Cir.2012); *Sacramento Nonprofit Collective v. Holder*, 12-16710, 2014 WL 128998 (9th Cir. Jan. 15, 2014).
[7] Kovaleskijan, Serge F. "Banks Say No to Marijuana Money, Legal or Not." New York Times 12 Jan. 2014, sec. A: 1. 14 Jan. 2014. Web. 22 Jan. 2014. <http://www.nytimes.com/2014/01/12/us/banks-say-no-to-marijuana-money-legal-or-not.html?_r=0>.
[8] Gerstein, Josh. "Holder: Feds to set rules for banks and pot money." Poltico.com. Politico, 23 Jan 2014. Web. 24 Jan 2014. <http://politi.co/1ffUEGX>.
[9] Oregon Live 17 May 2013. <http://www.oregonlive.com/portland/index.ssf/2013/05/three_minutes_of_terror_armed.html>.
[10] CBSNews.com 11 Nov. 2013. < http://www.cbsnews.com/news/four-charged-with-kidnapping-torturing-marijuana-dispensary-owner>.

L.A. Marijuana Dispensary Worker Get Life in Prison."[11] In a substantial number of cases, criminal acts against medical marijuana dispensary owners and employees appear to be motivated by the presence of cash and/or marijuana on the dispensary premises.

To partly address this danger, the Attorney General recently announced the Justice Department is preparing to issue a legal memorandum to provide guidance for federal prosecutors and law enforcement officials on the enforcement of federal financial laws with regard to the marijuana industry.[12] It is important to note, however, that the type of legal memo being prepared would not be enforceable in court and would amount to less than the clear safe harbor many banks say they want before accepting money from marijuana businesses.[13]

The Justice Department issued a similar non-binding legal memorandum providing guidance on marijuana enforcement under the Controlled Substances Act to all federal attorneys last August.[14] The August 29, 2013, memorandum essentially provides that the U.S. Department of Justice will not interfere with marijuana businesses operating in compliance with state law as long as their activities do not result in: violence or drugged driving; the distribution of marijuana to minors; the diversion of marijuana to states where possession or distribution of marijuana is illegal; the trafficking of other illegal drugs; the diversion of revenue to criminal enterprises; or the possession, use or distribution of marijuana on federal property. The guidance is non-binding on future administrations, and is subject to change by the current administration as well.

Local Regulation of Medical Marijuana Facilities

Under these circumstances, a city may well consider regulating medical marijuana dispensaries to remove or reduce the risk the businesses pose to the public health, safety and welfare. These risks include that that the facilities inherently operate in violation of current federal law, their operations involve large amounts of cash, and their principal product (medical marijuana) is identical to ordinary marijuana, making the marijuana (and the cash on premises) a target or motive for criminal activity.

To regulate an activity, a city must have the legal authority to enact and enforce regulations concerning that activity. At present there is confusion over whether cities and counties have the legal authority to regulate medical marijuana facilities in Oregon. The debate may be resolved by enactment of Senate Bill 1531. The bill would explicitly grant cities and counties the authority to regulate medical marijuana facilities. Absent the enactment of SB 1531, it is possible that the debate over local control of medical marijuana facilities will be settled in the courts.

Many local government attorneys are of the opinion that whether SB 1531 is enacted or not, a court should rule that cities and counties share authority with the state to regulate medical marijuana facilities in Oregon. This opinion is not universally held, however; most notably it is not held by the Oregon Legislative Assembly's own legal counsel. One of the lawyers of the Legislative Counsel's office recently published a legal memorandum in which he concludes that "HB 3460 preempts most municipal laws specifically targeting medical marijuana facilities" and

[11] Los Angeles Times 10 January 2014. < http://www.latimes.com/local/lanow/la-me-ln-marijuana-dispensary-killers-prison-sentence-20140110,0,3890456.story#ixzz2rAqaszRK >.
[12] Gerstein, Josh. "Holder: Feds to set rules for banks and pot money." Poltico.com. Politico, 23 Jan 2014. < http://politi.co/1ffUEGX >.
[13] Gerstein, Josh. "Holder: Feds to set rules for banks and pot money." Poltico.com. Politico, 23 Jan 2014. < http://politi.co/1ffUEGX >.
[14] United States Department of Justice, Office of the Deputy Attorney General, James M. Cole. Memo: Guidance Regarding Marijuana Enforcement. 29 Aug. 2013. <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

that another law, Senate Bill (SB) 863 of the 2013 special session, "may present some barriers to municipal attempts to specifically target medical marijuana facilities." I for one respectfully disagree with this conclusion for the reasons outlined below.

City Home Rule and Preemption in Oregon

A city's authority to adopt ordinances is governed by provisions of the Oregon Constitution that provide "home rule" for cities and towns that adopt municipal charters. Under Article XI, section 2, of the Oregon Constitution,

> "[t]he Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon[.]"

The purpose of that provision is "to allow the people of the locality to decide upon the organization of their government and the scope of its powers under its charter without having to obtain statutory authorization from the legislature[.]"[15]

Most, if not all, cities in Oregon have adopted a municipal charter, so effectively every city in Oregon enjoys the home rule authority provided by Article XI, section 2, of the Oregon Constitution. As such, each city possesses authority to enact substantive policies, even in areas also regulated by state law, so long as the local enactment is not "incompatible" with state law:

> "In such cases, the first inquiry must be whether the local rule in truth is incompatible with the [state] legislative policy, either because both cannot operate concurrently or because the legislature meant its law to be exclusive. It is reasonable to interpret local enactments, if possible, to be intended to function consistently with state laws, and equally reasonable to assume that the legislature does not mean to displace local civil or administrative regulation of local conditions by statewide law unless that intention is apparent."[16]

In short, home rule cities are supposed to be free to carry on activities that relate to their communities. This includes local enactment of regulations, even if the state also is interested and is active in the area. Home rule authority is not without limit, though. The state may exclude local governments from regulating local activities or conditions if (1) the legislature clearly intends to preempt local control or (2) the state and local laws as enacted cannot operate concurrently.

Home Rule & HB 3460

When one considers these two home rule exceptions with regard to HB 3460 and the regulation of medical marijuana facilities, it is clear that HB 3460 does not meet the qualifications for the clear legislative intent exception to home rule. This is because, as the Legislative Counsel's Office has acknowledged, HB 3460 as enacted lacks any express preemption language.

No Express Preemption. In the area of noncriminal ordinances regulating local conditions, one may reasonably assume that the legislature does not mean to displace local ordinances unless

[15] *LaGrande/Astoria v. PERB*, 281 Or 137, 142 (1978), *aff'd on reh'g*, 284 Or 173 (1978).
[16] *Id*. at 148-49.

that intention is apparent.[17] The Legislative Assembly must unambiguously express its intention to preempt a home rule entity's civil or administrative ordinances.[18] If the state legislature's intention to preempt local legislation is not unambiguously expressed, courts routinely uphold local requirements compatible with compliance with state standards.[19]

Since HB 3460 does not unambiguously express an intention to prohibit local regulation of medical marijuana facilities, the new law does not meet the requirements of the first exception to home rule. Local civil or administrative regulation of medical marijuana facilities is not expressly or unambiguously prohibited by the enacted bill.

Federal Preemption of the Oregon Medical Marijuana Act. With regard to the second ground for preemption (relating to incompatibility based on an inability of state and local laws to operate concurrently), the preemption analysis relating to HB 3460 is complicated because of the federal Controlled Substances Act.

Local governments are subject to compliance with both federal and state law. The Legislative Counsel's Office has publically acknowledged this. A local government may invoke federal law to avoid compliance with state law if the federal law conflicts with and supersedes the state law. This is on account of the Supremacy Clause of the United States Constitution,

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.[20]

Similar to state law preemption, a federal law that conflicts with a state law will trump, or "preempt," that state law.[21] State laws that conflict with federal law are "without effect."[22] The Controlled Substances Act itself, at 21 USC 903, provides that if there is "a positive conflict between that provision of this subchapter and that state law so that the two cannot consistently stand together", then the conflicting state law is preempted and the federal law controls. The conflicting state law is "without effect."

The Oregon Supreme Court has already ruled that there is a "positive conflict" between certain provisions of the Oregon Medical Marijuana Act (which HB 3460 amends) and the federal Controlled Substances Act.[23] In *Emerald Steel Fabricators v. Bureau of Labor & Industries*, the Court held that the United States Constitution's Supremacy Clause requires courts to interpret Oregon's statutes consistently with the federal Controlled Substances Act, which explicitly prohibits marijuana use without regard to medicinal purpose. The Court ruled that the Controlled Substances Act preempts the portion of the Oregon Medical Marijuana Act that affirmatively authorizes the use of medical marijuana.[24] The remaining portions of the Act remain intact; for

[17] *See, e.g., State ex rel Haley v. City of Troutdale*, 281 Or. 203 (1978) (finding no manifest legislative intent to exclude local provisions which 'supplemented' the state building code).
[18] *Gunderson, LLC v. City of Portland*, 352 Or. 648, 660 (2012).
[19] Id. citing *State ex rel. Haley v. City of Troutdale*, 281 Or. 203, 211 (1978).
[20] US Constitution, Article VI, clause 2.
[21] *Altria Group v. Good*, 555 U.S. 70 (2008).
[22] *Maryland v. Louisiana*, 451 U. S. 725, 746 (1981).
[23] *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.,* 348 Or. 159 (2010).
[24] *Id*. at 178 (2010).

example, the affirmative defense ORS 475.319 provides to a person prosecuted under state law for possession or production of marijuana.

Since HB 3460 authorizes, under state law, the possession and distribution of medical marijuana at facilities located in areas zoned for commercial, industrial, or mixed use, a court would likely rule the Controlled Substances Act preempts those provisions of the Oregon Medical Marijuana Act that authorize such activity. The preempted provisions of state law would then be "without effect."

Since the Supremacy Clause of the United States Constitution invalidates portions of the Oregon Medical Marijuana Act that HB 3460 amends, the second home rule exception is inapplicable to the new law. A local civil or administrative ordinance that complies with federal law, rather than with provisions of state law that conflict with and are preempted by federal law, should not be found in conflict with state law, since the federally preempted state law is "without effect."

Based upon the applicable law of preemption in Oregon, it seems reasonable to conclude that a court would find a city has the legal authority to enact legislation affecting medical marijuana facilities. This is principally because HB 3460 does not unambiguously express an intention to prohibit local regulation of medical marijuana facilities and because local regulation of medical marijuana facilities can operate concurrently and not incompatibly with all duly enacted state laws.

Home Rule & SB 863

Senate Bill 863 was enacted during the 2013 special legislative session. The law relates to the "preemption of the local regulation of agriculture" and provides, with some exceptions not relevant to this discussion,

> [A] local government may not enact or enforce a local law or measure, including but not limited to an ordinance, regulation, control area or quarantine, to inhibit or prevent the production or use of agricultural seed, flower seed, nursery seed or vegetable seed or products of agricultural seed, flower seed, nursery seed or vegetable seed. The prohibition imposed by this subsection includes, but is not limited to, any local laws or measures for regulating the display, distribution, growing, harvesting, labeling, marketing, mixing, notification of use, planting, possession, processing, registration, storage, transportation or use of agricultural seed, flower seed, nursery seed or vegetable seed or products of agricultural seed, flower seed, nursery seed or vegetable seed.

The Legislative Counsel's office has opined that SB 863 "may present some barriers to municipal attempts to specifically target medical marijuana facilities." Legislative Counsel believes that medical marijuana falls within the statutory definition of "nursery stock" as defined in SB 863 and is therefore within the coverage of the new law.

Others disagree with the Legislative Counsel's interpretation of SB 863. Those who disagree generally contend that while SB 863 clearly contains an express preemption clause, the scope of that preemption is not as broad as Legislative Counsel currently suggests. The scope of SB 863's preemption cannot be read to include a prohibition on any local regulation of all things derived from seed. This would invalidate a host of common local ordinances and regulations, including weed abatement ordinances, tree preservation ordinances, and common land use and property development conditions relating to trees and vegetation. A more sensible interpretation

of the scope of the prohibition would be that it prohibits any local regulation having the primary purpose of inhibiting or preventing the production or use of a particular kind of seed or plant derived from a particular kind of seed, whatever the type of seed: heirloom, organic, conventional, genetically engineered, or otherwise.

Understood this way, SB 863 would come into play if a jurisdiction were to enact an ordinance prohibiting local medical marijuana facilities from selling genetically modified marijuana, but would not come into play if a local jurisdiction enacted an ordinance affecting local medical marijuana facilities for reasons unrelated to the type of seed the facility's marijuana plants come from.

The dispute regarding the scope of SB 863's preemption may be resolved legislatively or in the courts. Additionally, it is possible that administrative rules soon to be adopted by the Oregon Department of Agriculture may assist in understanding the scope of preemption. As matters exist at this time, a court most likely would not read the scope of SB 863's preemption as broadly as the Legislative Counsel's office currently does, but instead would limit the law's preemption to apply to local ordinances and regulations that have the primary purpose of inhibiting or preventing the production and use of particular types of seeds or plants, most notably ones that are genetically engineered in some fashion.

Examples of How Local Ordinances Can Address Local Concerns

If one agrees that cities are not preempted from enacting and enforcing regulations relating to medical marijuana facilities in Oregon, then a city could craft a civil or administrative ordinance to coordinate local emergency responder resources to better deal with some of the earlier identified local public health, safety and welfare concerns that medical marijuana dispensaries present to a community.

First Responders. The local regulation could take the form of a regulatory business license ordinance that would require medical marijuana facilities to register with a city and keep certain information on file with the city up to date. Such an ordinance would benefit the public in that it would create a database of information that would be helpful to first responders. This would be true even if the database of information the city held was a subset of the non-confidential information similarly held by the Oregon Health Authority, such as the name and location of medical marijuana facilities and contact information of the person responsible for each facility. This locally held information would be helpful, for example, if a local police agency could rely on its own database of information regarding medical marijuana facilities in its own jurisdiction rather than being limited to a database administered only by the Oregon Health Authority. The duplication in recordkeeping can rationally be justified because redundancy in informational resources improves the resiliency of local emergency services to respond in difficult situations, such as natural disasters, riots or power outages.[25] A reasonable application fee could be required to help off-set the cost of the new regulatory program.

Compliance with Federal Law. A separate issue to consider relates to whether a regulatory business license ordinance could provide that the local government will not issue a license to a medical marijuana facility if the facility operates in violation of federal law. Some local jurisdictions have provisions in their ordinances providing that a business license will not be issued to a person or organization whose business operates in violation of state, federal or local

[25] An analogous example: the Portland metropolitan area maintains a regional law enforcement database that is somewhat duplicative of the statewide database maintained by the State of Oregon. The local database is tailored to meet local concerns of the state's largest metropolitan area.

law. With regard to medical marijuana facilities, such a provision would effectively ban dispensaries from a jurisdiction until the federal drug policy sufficiently changed with regard to marijuana.

A court should uphold a local ordinance provision forbidding the issuance of a regulatory business requiring a medical marijuana facility in Oregon to be able to operate in compliance with federal law before a business license would be issued. A court would likely reason that the provisions of HB 3460, the Oregon Medical Marijuana Act and related administrative rules that affirmatively authorize the transfer or possession of medical marijuana are in actual conflict with provisions of the federal Controlled Substances Act prohibiting the distribution and possession of any sort of marijuana. By application of the Supremacy Clause and the Oregon Supreme Court's prior ruling in *Emerald Steel Fabricators*, this means that the provisions of state law actually conflicting with federal law would be of "without effect."

If the provisions of state law that affirmatively allow for the distribution and possession of medical marijuana are of no effect, then those provisions should not conflict with a local ordinance requiring a medical marijuana facility to operate in compliance with federal law. Since cities must uphold federal law, it is likely lawful for a city not to license medical marijuana facilities, at least for so long as marijuana remains a Schedule I drug under the Controlled Substances Act.

Conclusion

There's confusion regarding the existing authority of local governments to regulate medical marijuana facilities concurrently with the state. SB 1531 should be enacted to clarify that a governing body of a city or county may regulate or restrict operation of medical marijuana facility, prohibit registration of medical marijuana facility, or regulate, restrict or prohibit storing or dispensing of marijuana by a facility legally authorized to store or dispense marijuana under state law.

Submitted by:

Bill Kirby, City Attorney
503-526-2215
bkirby@beavertonoregon.gov