Dexter A. Johnson
LEGISLATIVE COUNSEL

900 COURT ST NE S101
SALEM, OREGON 97301-4065
(503) 986-1243
FAX: (503) 373-1043
www.oregonlegislature.gov/lc

STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

February 5, 2014

Senator Floyd Prozanski, Chair
Senate Committee on Judiciary
900 Court Street NE H272
Salem OR 97301

Re: Local Regulation of Medical Marijuana Facilities

Dear Senator Prozanski:

You have asked us whether ORS 475.314 preempts a local government from restricting or prohibiting the operation of a state-registered medical marijuana facility within the jurisdiction of the local government. We understand your question to arise from the announced intention of several local governments to deny business licenses to medical marijuana facilities on the grounds that operation of the facilities would violate the federal Controlled Substances Act (CSA), 21 U.S.C. 801 et seq.

We conclude that ORS 475.314 preempts most municipal laws specifically targeting medical marijuana facilities. We further conclude that while a municipality may not be required to violate federal law to comply with a conflicting state law, a municipality may not act contrary to state law merely because the municipality believes that the action will better carry out the purposes and objectives of federal law.

Before reviewing the specific provisions of the CSA and ORS 475.314, we believe that it is helpful to review and discuss the law concerning home rule and state preemption.

Article IV, section 1, Article VI, section 10, and Article XI, section 2, of the Oregon Constitution, act as limitations on state regulation of local charters and acts of incorporation. The provisions affirm the right of a municipality to select the form of municipal government and to exercise police power (regulate for the common health and welfare) within the municipality. See generally La Grande/Astoria v. Public Employes Benefit Board, 281 Or. 137, 576 P.2d 1204 (1978), adhered to on rehearing 284 Or. 173, 586 P.2d 765 (1978). The general rule for noncriminal matters is that a municipality may enact ordinances regarding matters that are primarily of local concern, provided that the ordinances do not conflict with state law.

If a matter is primarily of state concern, or is of both state and local concern, the matter becomes more complicated. A state law that addresses a concern with the structure or policies of a municipality must be justified by a need to safeguard the interests of the persons or entities affected by the procedures of the municipality. However, if a state law primarily addresses substantive social, economic or other regulatory objectives, the state law prevails over a contrary municipal policy concern. See La Grande/Astoria. State law is generally presumed to not displace a local law that regulates local conditions absent a clear intent to do so, but state

law will prevail over a conflicting local law even without a clear expression of intent to preempt the municipal law. Springfield Utility Board v. Emerald People's Utility District, 191 Or. App. 536, 84 P.3d 167 (2004), aff'd, 339 Or. 631, 125 P.3d 740 (2005).

ORS 475.314 requires the Oregon Health Authority to adopt rules establishing a registration system for facilities to dispense medical marijuana to cardholders registered as provided under the Oregon Medical Marijuana Act (OMMA) or to caregivers for those cardholders. The statute sets forth the registration qualifications that a facility and its operator must meet and requires the authority to issue a facility registration if the facility and operator qualify. ORS 475.314 lacks express preemption language. Preemption may, however, also occur when state law is so pervasive as to occupy a field. There is no uniform test for occupation preemption. Occupation of one aspect of a field may leave other aspects of the field open to local regulation, so determining the existence of preemption by occupation must rely on a case-by-case evaluation of the state law.

ORS 475.314 (1) requires the Oregon Health Authority to establish a registration system "to authorize the transfer" of usable marijuana and immature marijuana plants from a cardholder or caregiver to the person responsible for a medical marijuana facility and from a medical marijuana facility to a caregiver or cardholder. ORS 475.314 (3) sets out the qualifications that a medical marijuana facility must meet to obtain a state registration. ORS 475.314 (5) provides that if an application is properly submitted, the facility meets the subsection (3) qualifications and the person to be responsible for the facility passes a criminal background check, the authority "shall register the medical marijuana facility and issue the person responsible for the medical marijuana facility proof of registration." Taken together, the provisions do not provide for a local government to impose additional requirements for the issuance of a state registration or for a facility to also obtain a local registration. That limitation is insufficient by itself to indicate that the state intended to preempt all aspects of the field of medical marijuana facilities, so it is necessary to determine whether and to what extent the adoption of local laws regarding medical marijuana facilities might conflict with ORS 475.314.

Because conflict due to impossibility is rare, we focus on whether and to what extent a local law regarding a state-registered medical marijuana facility might stand as an obstacle to the accomplishment and execution of the full purpose and objectives of ORS 475.314. Having already described ORS 475.314, we believe it helpful to examine the legislative history of that statute to determine the purposes and objectives behind the law.

ORS 475.314 was introduced during the 2013 regular session of the Legislative Assembly as House Bill 3460. Multiple exhibits introduced for that bill suggest a few primary purposes and objectives. In no particular order, those purposes and objectives were to: (1) ensure that medical marijuana cardholders who are unable or unwilling to grow their own medical marijuana have access to a reliable source of medical marijuana; (2) ensure that medical marijuana obtained by cardholders is safe and of known quality; (3) discourage cardholder support of black-market marijuana sources; (4) supply law enforcement with information that would allow law enforcement to better distinguish lawful grow sites and suppliers from unlawful grow sites and suppliers; and (5) ensure a consistent and uniform approach throughout this state to law enforcement regarding medical marijuana facilities.

In light of the legislative history, we believe that a local law that prevents or materially restricts the operation of medical marijuana facilities would stand as an obstacle to the accomplishment and execution of the purposes and objectives of ORS 475.314 and would therefore be preempted. A local law that restricts medical marijuana facilities by imposing

different criteria from criteria affirmatively established in ORS 475.314 would also conflict with the purposes and objectives of the statute and therefore be preempted. It may be possible, though, for some types of local law to place a minor restriction on medical marijuana facilities that is sufficiently insignificant to avoid conflicting with the purposes and objectives of ORS 475.314. For instance, a local law that imposes special traffic control measures around medical marijuana facilities might not conflict with the purposes and objectives of the statute as long as the measures did not unduly interfere with the operation of the facilities.

As a final matter, we address the effect of state law and federal law conflict on the responsibilities of local government. It is common for state and local governments to engage in the enforcement of federal laws. However, the Tenth Amendment to the United States Constitution also stands for the proposition that the federal government may not require states or local jurisdictions to enforce federal laws. "It is well established that the federal government lacks constitutional authority to commandeer the policy-making or enforcement apparatus of the states by requiring them to enact or enforce a federal regulatory program." Willis v. Winters, 350 Or. 299, 313, 253 P.3d 1058, 1066 (2011) (citing Printz v. United States, 521 U.S. 898, 925-931, 117 S. Ct. 2365, 138 L.Ed.2d 914 (1997), and New York v. United States, 505 U.S. 144, 161-169, 112 S. Ct. 2408, 120 L.Ed.2d 120 (1992)). Therefore, while local governments are subject to compliance with both federal and state law, the enforcement of federal law by local government is a discretionary act.

Whether a local government may invoke federal law to avoid compliance with state law depends on whether the federal law conflicts with and supersedes the state law. The CSA does not expressly preempt state laws regulating controlled substances, nor does it occupy the field of controlled substances regulation. 21 U.S.C. 903. The CSA instead provides that state law is not preempted "unless there is a positive conflict" between the federal law provision and the state law "so that the two cannot consistently stand together." Id. Those words are the classic description of preemption by conflict. Conflict may exist either because it is impossible for a person to be in compliance with both the state law and the federal law or, much more commonly, where the state law stands as an obstacle to accomplishing and executing the full purposes and objectives of the federal law.

For purposes of this opinion, we limit our discussion to the theoretical impact of a state law and federal law conflict on local government. We expressly do not venture any examination for potential conflicts between ORS 475.314 and the CSA.

With regard to local governments, a state law will conflict with the purposes and objectives of a federal law if the state law requires a local government to take an action that is prohibited under federal law or prohibits the local government from performing an action required under the federal law. See, e.g., State v. Ehrensing, 255 Or. App. 402, 296 P.3d 1279 (2013) (holding that law enforcement was excused from complying with OMMA provision requiring return of seized medical marijuana where return would violate CSA prohibition on delivery of controlled substance). In examining whether a state law interferes with accomplishing and executing the full purposes and objectives of a federal law, both the purposes and objectives of the federal law and the effect of the state law must be precisely identified. If a municipality believes that compliance with a state law would require the municipality to take an action that would stand as an obstacle to accomplishing and executing the purposes and objectives of a federal law, the municipality should seek an adjudication of the matter. A municipality may not, however, take an action that is contrary to a state law merely because the municipality believes that the municipal action will better achieve the purposes and objectives of a federal law. See Willis v. Winters (law enforcement could not refuse to issue

concealed weapon permit to OMMA cardholder qualifying under state law on grounds that refusal would better achieve purposes of federal Gun Control Act).

Feel free to contact us with any other questions or concerns on this matter.

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Very truly yours,

DEXTER A. JOHNSON
Legislative Counsel

By
Mark B. Mayer
Deputy Legislative Counsel

cc: Bill Taylor, Administrator
Senate Committee on Judiciary