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GOV-LAW CONNECTION

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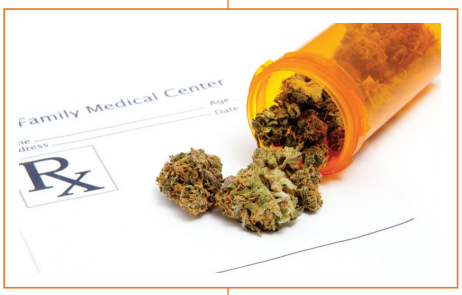
DISPENSING ADVICE: Requirements and Regulation of Medical Marijuana Facilities Among Oregon Cities and Counties

IN 1998, OREGON became one of the first states to legalize medical marijuana. The Oregon Medical Marijuana Program ("OMMP") is administered by the Oregon Health Authority ("OHA") and allows registered "cardholders" to legally consume marijuana for medical purposes. The law originally allowed cardholders to grow their own marijuana or obtain it from other registered growers if they were not able to grow it themselves. To help facilitate getting medical marijuana to cardholders, in recent years a number of medical marijuana facilities ("dispensaries") have opened across the state. These dispensaries obtain marijuana from registered growers and act as "retail" marketplaces for cardholders who find it difficult to otherwise obtain their medical marijuana.



Because the dispensaries are neither registered cardholders nor registered growers, their legal status has been the subject of much debate, and a local government's authority to regulate them has been unclear. In order to address the uncertain status of these dispensaries and to regulate them at the state level, earlier this year the Oregon Legislature passed HB 3460, which establishes uniform registration and licensing procedures, along with requiring medical marijuana dispensaries to register with the Oregon Health Authority after satisfying certain requirements. The governor signed the bill, and its substantive provisions go into effect on March 1, 2014. Additionally, in its special session in 2013, the Legislature enacted SB 863, clarifying that all regulation of agricultural activities is solely the province of the state. This bill is intended to preempt local governments from regulating genetically modified crops and products containing such crops. It is unclear at this time whether SB 863 would affect a local government's ability to regulate medical marijuana dispensaries.

Our clients have expressed concern about the impacts of allowing dispensaries in their communities, and want to better understand how local governments may further regulate such facilities. It should be noted that while HB 3460 does not explicitly *prohibit* local government from refusing to allow medical marijuana dispensaries within a jurisdiction, such attempts to ban dispensaries completely could give rise to a challenge that the prohibition is preempted by state law.

Nevertheless, local governments may still wish to further regulate these dispensaries beyond what is set forth in HB 3460. Case law supports the ability of a local jurisdiction to enhance state regulations at the local level, provided that the local regulation is not expressly preempted by the state and does not conflict with the state regulations. Naturally, the more burdensome the local regulation, the more likely it is to be challenged. This is especially so if the regulation has the effect of prohibiting what the state otherwise allows because the local requirements cannot be met (for example, requiring that dispensaries be located 50,000 feet from any school, when in fact no such location would qualify).

On November 5, 2013, just as this newsletter went to the press, the State Legislative Counsel's office issued an opinion outlining their view of the impact of the two bills. While we are still evaluating the merits of the opinion, it does conclude that the two bills will "preempt[] most municipal laws specifically targeting medical marijuana facilities." This opinion is not binding but will undoubtedly be cited as efforts to clarify the breadth of these laws continue.

In stark contrast, the California Supreme Court recently upheld municipalities' authority to regulate—and as we potentially even ban—marijuana dispensaries.

We will keep you posted as our analysis continues and as we intend to devise strategies that will likely pass muster in these areas.

QUESTIONS ABOUT THIS ARTICLE? Please contact Shane Abma at 503.226.7191.

from Pam's desk...

It is almost another new year with all of the opportunities and challenges that a brand new year offers. Although budget adjustments and implementing new law may be primary considerations for us, it will (as always) be important for us to keep our eyes open for other issues that will affect local government. In this edition of our newsletter, we hope to inform you about several such issues.

You won't want to miss our discussion of the impacts of the recent Oregon Supreme Court decision about firearms in public. An increasingly critical public concern, the Court recently weighed in by affirming that a Portland ordinance prohibiting loaded firearms in public is not an unconstitutional denial of the right to bear arms in self-defense

Another topic to watch in the coming months is how states are handling the question of medical marijuana dispensaries. The California Supreme Court ruled that localities have the authority to

OREGON SUPREME COURT UPHOLDS LOCAL GUN REGULATION

IN AUGUST, the Oregon Supreme Court issued its decision in *State v. Christian*, a case in which the Court confronted whether the City of Portland could constitutionally regulate the carrying of loaded firearms in public. The Court determined that the ordinance, which makes it unlawful for any person to "knowingly possess or carry a firearm, in or upon a public place, including while in a vehicle in a public place, having recklessly failed to remove all the ammunition from the firearm," did not violate either the United States or Oregon constitutional provisions that protect the right to bear arms.

The defendant in the case was arrested for carrying two loaded semi-automatic handguns in a backpack. He was charged with and convicted of violating a state law that prohibits carrying a concealed weapon without a permit, and the City's ordinance. The defendant challenged his conviction on the grounds that the two laws violated his constitutionally protected right to bear arms under the Second Amendment to the United States Constitution as well as Article I, section 27 of the Oregon Constitution.

The Oregon Supreme Court upheld the conviction by finding that the "right to bear arms" did not foreclose reasonable limitations enacted to protect public safety. The Court explained that "[t]he ordinance reflects a legislative determination that the risk of death or serious injury to members of the public moving about in public places is increased by the threat posed by individuals who recklessly fail to unload their firearms." The Court further relied upon the fact that the ordinance included several exemptions, including one for individuals who hold valid concealed carry permits, which meant that the law was not a complete ban on the carrying of weapons within the City. For these reasons, the Court concluded that the constitutional provisions protecting the right to bear arms did not preclude enforcement of the laws in question.

This case provides needed guidance to local jurisdictions who desire to regulate the carrying of loaded firearms within their jurisdiction. Under state law, local jurisdictions are generally preempted from regulating the sale or possession of guns. ORS 166.170 grants exclusive authority to the legislature "to regulate in any matter whatsoever the sale, acquisition, transfer, ownership, possession, storage, transportation or use of firearms or any element relating to firearms and components thereof, including ammunition," and expressly preempts counties, cities and special districts from "enact[ing] civil or criminal ordinances, including but not limited to zoning ordinances, to regulate, restrict or prohibit the sale, acquisition, transfer, ownership, possession, storage, transportation or use of firearms or any element relating to firearms and components thereof, including ammunition."

The state has, however, created a few exceptions to this broad preemption. ORS 166.172 grants cities the authority to regulate the discharge of firearms within city limits, provided that such regulations do not forbid certain activities such as discharging a firearm in the lawful defense of one's person or property or the discharge of a firearm at a shooting range. In addition, ORS 166.173 grants cities and counties the authority to regulate the possession of loaded firearms in public places, but such regulations may not apply to certain individuals including law enforcement officers and members of the military during the performance of official duties as well as persons licensed to carry concealed handguns. *State v. Christian* confirms that under the Oregon constitution local jurisdictions may, if desired, enact ordinances consistent with this authority granted by the state.

The issue is far from completely settled, however, under the federal constitution. Federal courts have issued conflicting opinions regarding the extent to which the Second Amendment precludes the regulation of the possession of guns in public places. Compare *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) (striking down regulation), with *Kachalsky v. Cacace*, 701 F.3d 81 (2nd Cir. 2012) (upholding regulation). Thus, local jurisdictions who enact laws under the authority granted to them by ORS 166.172 and 166.173 could face litigation in federal court brought by individuals seeking to invalidate such laws under the Second Amendment.

QUESTIONS ABOUT THIS ARTICLE?
Please contact Chad Jacobs at 503.226.7191.

FCC Signals New Rules on Wireless Facilities

IN A MOVE that is not surprising but nevertheless causes significant concern for local governments, on September 26, 2013, the Federal Communications Commission (FCC) issued a Notice of Intent to Pursue Rulemaking (NPRM) concerning the deployment of wireless infrastructure and services.

This NPRM comes after a previous FCC notice of inquiry in which the Commission sought to identify "impediments" to wireless and broadband deployment. In reaction to the implication that cities were an impediment, the League of Oregon Cities (LOC) and several municipalities in Oregon filed comments in response to that previous inquiry. Nevertheless, it appears the FCC was not convinced, as the same issues appear again in the NPRM.

The focus of the Notice, which is 86 pages in length, is clearly indicative of the FCC's intention to address four major aspects of local government's role in the siting of wireless communications facilities. Condensed for this article, the FCC intends to consider the following issues:

- Environmental and historic preservation regulations and their impact on the deployment of certain wireless communications systems;
- The scope of regulation applicable to temporary or emergency communications facilities;
- Further "interpretation" of Congress' enactment of Section 6409(a) of the "Middle Class Tax Relief and Job Creation Act of 2012" (the new provision that already requires approval of collocation applications that do not "substantially" increase the size of a facility); and
- Possibly more revisions to the "Shot Clock" rule which requires speedy decisions from local governments on applications for wireless facility siting.

The potential negative effects of this rulemaking on local government control of wireless permitting decisions are significant. It appears to us that, in the interest of enhancing the wireless industry's ability to quickly deploy new technologies, the NPRM signals the intention to remove even more control of permitting decisions from local governments.

As always, we will stay on top of this issue and will continue to keep you informed as developments unfold.

QUESTIONS ABOUT THIS ARTICLE?
Please contact Pam Beery at 503.226.7191.

WITH HB 2656, STATE MAKES ONLINE TRAVEL COMPANIES LIABLE FOR TRANSIENT LODGING TAXES

FOR THE LAST several years, local jurisdictions across the country have battled online travel companies (OTCs), claiming that the OTCs are in violation of the local jurisdiction's transient lodging tax ordinances. Cities and counties allege that the OTCs (Priceline, Travelocity, Expedia, Orbitz, etc.) are failing to collect transient lodgings taxes on the entire hotel transaction cost paid by the consumer (which includes the OTC's "service fee"), and are instead collecting taxes only the amount the OTC remits to the hotel. The two rates are sometimes characterized as the "retail" rate and the "wholesale" rate.

To illustrate, suppose Consumer A purchases a hotel from an OTC for $100, and the local hotel tax rate is 10%. Suppose further that the OTC charges a $15 "service fee" to facilitate this transaction. The question is then whether the taxes should be based on the "retail" rate (which is 10% of the *entire* hotel transaction cost of $115, inclusive of the service fee), or whether they should be based on the "wholesale" rate (which is 10% of the hotel costs, but not inclusive of the OTC's fees). Under the "retail" scenario, the taxes owed would be $11.50; under the "wholesale" rate, only $10.00.

In an effort to clarify which hotel transaction costs are subject to transient lodging taxes, the Oregon Legislature passed HB 2656, which took effect October 7, 2013. HB 2656 adds new definitions for "transient lodging provider," "transient lodging intermediary" and "transient lodging tax collector." *Transient lodging providers* are those that furnish the

– continued on page 4

completely ban dispensaries within their boundaries. Our other feature article examines HB 2656, the bill that requires a transient lodging provider and a transient lodging intermediary to collect and remit transient lodging taxes computed on total retail price, including all charges other than taxes, paid by person for occupancy of transient lodging.

In news about BEH, we are happy to announce the addition of a new associate to the firm's roster. We are proud to welcome him and hope that you will have the opportunity to meet Shane Abma soon. He comes to us with years of experience in litigation, municipal law and land use law. Having worked for the City of Portland, City Attorney's Office as well as the United States District Court, District of Oregon as a federal case mediator, he comes well-equipped to assist our clients with a variety of legal questions.

As we enter our 16th year serving local government clients in Oregon and Washington, we thank our clients for selecting us to represent your interests.

CITY OF REDMOND – DOWNTOWN JUMPSTART FORGIVABLE LOAN PROGRAM

CLIENT CORNER

OVER THE PAST SEVERAL YEARS, the City of Redmond and its Urban Renewal Agency have made a conscious and determined effort to transform the downtown area and develop a more vital and livable commercial center in the downtown district. The initial step in this process was to alleviate vehicle traffic by rerouting Highway 97. With support from ODOT, the City was able to accomplish this feat along with enhancing safety for non-motorized vehicle traffic. Subsequent steps included creating a pedestrian friendly downtown, developing a new city center park, and offering incentives to business owners for façade improvements to their storefronts.

The City's latest initiative utilizes a forgivable loan program called Downtown Jumpstart. The City's request for proposals asks for the development of an "anchor attraction" for the City's downtown core. The selected project will be awarded up to $500,000.00 to strengthen the district as a destination for shopping, dining and entertainment. Objectives of this program are to eliminate blighted buildings, promote economic development, stimulate investment, create jobs and generally make the district more family friendly.

Our hearty congratulations go out to Redmond for their vision and for implementing this ambitious and exciting program.

HAVE A SUBMISSION? Please contact Pam Beery at 503.226.7191.

For more frequent information updates, please visit our Northwest Government Law Blog:
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Travel Companies – continued from page 3

lodging (basically, hotels), while a *transient lodging intermediary* is a person "other than a transient lodging provider that facilitates the retail sale of the transient lodging" (basically, an OTC). Lastly, *transient lodging tax collectors* are either a transient lodging "provider" (hotel) or "intermediary" (OTC), depending on which one initiates the transaction with the consumer.

In addition, and most importantly for local jurisdictions, HB 2656 mandates that both state and local transient lodging taxes be computed on the "total retail price," which is defined as including "all charges other than taxes, paid by a person for occupancy of the transient lodging." Under the new law, cities and counties will need to ensure that the proper amount is being collected. The new law allows state and local government to determine this amount by reviewing, as necessary, the "books and records kept in the ordinary course of the transient lodging tax collector's business."

Additionally, local jurisdictions with transient lodging tax ordinances will need to determine a procedure by which to get payment from the OTCs for taxes collected. Unlike with hotels, most localities do not have current tax collecting relationships with OTCs. Thus, many may find it necessary to amend their codes to either (1) authorize the hotels to receive the taxes collected by the OTCs and then remit those to the local governing body, or (2) impose a tax filing requirement on the OTCs directly.

Local jurisdictions should use caution if amending their codes, however, to ensure that the changes are not deemed "new" hotel taxes or "increased tax rates" that would be subject to the state's restrictions on how that tax revenue is spent. ORS 320.350 mandates that at least 70% of all hotel tax revenue be spent on tourism-related activities if a jurisdiction increases its current hotel tax rate or creates a new hotel tax after July 1, 2003.

The saga is not over though. It should be noted that in early October the OTCs filed an action in Oregon Tax Court seeking a declaratory opinion that they are not, in fact, "transient lodging facilitators" because they do not charge "for the occupancy" of the room itself. They further allege that because the "retail rate" is defined to include only charges "for the occupancy" of the room, an OTC's "service fee" is not taxable. Finally, they also allege a constitutional Commerce Clause violation. The outcome of this action could affect how local jurisdictions choose to structure their transient lodging tax ordinances, and so it may be prudent to wait for court guidance before amending a local transient lodging tax ordinance.

QUESTIONS ABOUT THIS ARTICLE?
Please contact Shane Abma at 503.226.7191.

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