Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2012-053585 10/14/2013

HONORABLE MICHAEL D. GORDON

CLERK OF THE COURT
M. MINKOW
Deputy

WHITE MOUNTAIN HEALTH CENTER INC JEFFREY S KAUFMAN

v.

COUNTY OF MARICOPA, et al. PETER MUTHIG

CHARLES A GRUBE
KEVIN D RAY

UNDER ADVISMENT RULING
GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND ORDER REQUIRING FURTHER BREIFING BY OCTOBER 31, 2013

Having taken under advisement Plaintiff's Motion for Summary Judgment, filed September 3, 2013, and County Defendants' Motion for Partial Summary Judgment Regarding County Zoning Ordinance, filed September 3, 2013, the Court now rules. After a review of the parties' stipulated statement of facts—and of related filings—the Court finds it demonstrates the absence of material fact. Accordingly, summary judgment is warranted. Furthermore, the Court finds that summary judgment is warranted in favor of Plaintiff as set forth below. The Court, however, will order further briefing on the effect of this Order and will consider amending or supplementing this Order.

The Court will not attempt to review, in detail, the history of the parties' dispute. It suffices to note that, at this stage of the proceedings, the parties ask the Court to address the propriety of an August 31, 2011 amendment to the Maricopa County Zoning Ordinances (MCZO). Specifically, by way of their summary judgment motions, each asks the Court to determine whether the amendment is reasonable under Arizona law.

The amendment referred to by the parties and now the Court as the "Second Text Amendment" is the second ideation of Maricopa County's ordinance enacted to address the Arizona Medical Marijuana Act ("AMMA"). The threshold question is how to measure reasonableness of the Second Text Amendment.

The analysis is straight forward. Arizona statutes expressly empower Maricopa County with the authority to adopt planning and zoning regulations. *See* Ariz. Rev. Stat. Ann. §§ 11-801 through 11-866 (2013); Title 11 of the Arizona Revised Statutes, Chap. 4 (2013). These zoning statutes provide the County with comprehensive regulatory powers through the enactment of ordinances. *Id*. The current version of the MZCO was enacted in 1969. This Court must give broad deference to the County when the exercise of the County's zoning powers is challenged. *See, e.g., Ranch 57 v. City of Yuma*, 731 P.2d 113 (Ariz. Ct. App. 1986). The Court may strike an ordinance only if it is patently unreasonable. *Id*. As noted by the Arizona Court of Appeals and emphasized by the County Defendants in this case, this Court may not act as a "super-zoning commission." *Id*. Thus, this Court must and will tread carefully.

A County, however, may not use its zoning powers to violate State law. *See, e.g., Rotter v. Coconino County*, 818 P.2d 704 (Ariz. S. Ct. 1991). Indeed, where there is a conflict between State law and a County ordinance, the two must be construed in a manner to give effect to both, if possible. *Id*. Where they cannot be harmonized, State law governs. *Id*. This principle is consistent with the rule of statutory interpretation that teaches that where two statutes govern the same subject matter, the more specific statute controls. *Fugate v. Town of Payson*, 791 P.2d 1092 (Ariz. Ct. App. 1990).

The Court now turns to the issue at hand. Under its zoning authority, the Maricopa County Board of Supervisors enacted the Second Text Amendment in its current form. The Second Text Amendment classifies a "Medical Marijuana Dispensary" as an industrial use 3 or IND-3. *See* MCZO, Ch. 201, pp.17-18 (2013).[1] The Second Text Amendment also modified IND-3 and now expressly states that "A building or premise shall be used only for industrial use not in conflict with any federal law, state law. . . ."

The effects of the Second Text Amendment are two-fold:

1. It categorically prohibits Medical Marijuana Dispensaries. This is because the conduct violates a federal law that is known as the Federal Controlled Substances

[1] Under the MCZO, there are three classifications of industrial uses referred to as "IND-1" through "IND-3." IND-3 is a residual category for all uses not otherwise set forth in IND-1 or IND-2.

Act (CSA). *See* 21 U.S.C. §§801-971 (2013); and

2. Even if a tortured reading of the Second Text Amendment permitted Medical Marijuana Dispensaries (e.g., a reading that Medical Marijuana Dispensaries did not violate the CSA), there can be no Medical Marijuana Dispensary in Community Health Analysis Area (CHAA) number 49 because there are no IND-3 properties available.

While Title 11 of the Arizona Statutes broadly empowers Maricopa County to enact reasonable regulations addressing the public's safety, health and welfare, the Court finds that AMMA expressly limited those broad zoning powers when dealing with the Medical Marijuana Dispensaries. The AMMA states:

> Cities, towns and counties may enact reasonable zoning regulations that limit the use of land for registered nonprofit medical marijuana dispensaries ***to specified areas in the manner provided in title 9, chapter 4, article 6.1, and title 11, chapter 6, article 2***.[2]

See Ariz. Rev. Stat. Ann. § 36-2801.06 (2013 (emphasis added).[3]

Thus, the AMMA, by its very terms, limits the County's almost unfettered zoning authority. Under the express terms of the AMMA, the County's regulatory reach may not extend beyond its ability to ensure that the Dispensaries operate in "specified areas." *Id*. A County zoning ordinance that poses a categorical prohibition of Medical Marijuana violates State law that limits its zoning jurisdiction. *Id*.

The Court has tried to harmonize the Second Text Amendment with the AMMA's statutory limitation on the County's authority to zone Medical Marijuana Dispensaries. *Compare* Ariz. Rev. Stat. Ann. §§ 11-801 through 11-866 (2013) *with* Ariz. Rev. Stat. Ann. § 36-2801.06 (2013); *see also Rotter v. Coconino County*. The only way it could harmonize the two would be to interpret the ordinance's federal-compliance command as implicitly carving out an exception for a Medical Marijuana Dispensary. Toward that end, the Court has reviewed the history of the Second Text Amendment in order to see if that could be an appropriate interpretation.

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[2] *See* Ariz. Rev. Stat. Ann. §§ 11-801 through 11-866 (2013).

[3] The limitation on the Counties' zoning jurisdiction does not leave open a hole. The AMMA delegates broad regulatory power to the Arizona Department of Health Services (ADHS). *See* Ariz. Rev. Stat. § 36-136(F) (2013) (providing that "[t]he director may make and amend rules necessary for the proper administration and enforcement of the laws relating to the public health.").

Naturally, the Second Text Amendment was preceded by the First Text Amendment. The First Text Amendment was the County Board of Supervisor's initial response to the passage of the AMMA. Enacted on December 28, 2010, the First Text Amendment zoned Medical-Marijuana Dispensaries for commercially zoned properties and with special-use permits.

The County Defendants suggest that there is little difference between the First Text Amendment and the Second Text Amendment with respect to language that limited the property's use for legal purposes. The Court disagrees. The First Text Amendment stated that its provisions should "not be construed as permitting any use or act which is otherwise prohibited by law." This language is a far cry from that imposed in the Second Text Amendment. The language is, in fact, interpretive only. The language obviates an argument that the ordinance permits a violation of law or provides a safe harbor to those who violate any laws, presumably including the CSA.

Under the circumstances, the Court could harmonize the interpretive language of the First Text Amendment with the AMMA. The passage of the First Text Amendment, after all, strongly suggests that the County Board of Supervisors intended to facilitate the implementation of the AMMA and not circumvent it. It was drafted within weeks of the AMMA's passage and well before the outcry from County officials who feared the AMMA would force County employees to violate Federal law. With the passage of the First Text Amendment, the Board of Supervisors appears to have rationally responded to the new State law and to have operated within the confines of its regulatory authority—under both Title 11 and under the newly enacted AMMA.

In sharp contrast to the First Text Amendment, the history of the Second Text suggests a transparent attempt to prevent the implementation of the AMMA in unincorporated County areas. The Board of Supervisors passed the Second Text Amendment approximately 2½ months after the Maricopa County Attorney opined that the implementation of the AMMA posed "an immediate threat of prosecution" to State and County Employees because he believed such conduct violated federal law. The Second Amendment closely followed a lawsuit filed in Federal Court seeking an injunction to prevent its implementation. It is no coincidence, therefore, that the Second Text Amendment added affirmative *federal-compliance* language as opposed to the interpretive language previously used in the First Text Amendment.

The contemporaneity between the Second Text Amendment, the County Attorney's opinion about regulators' risk of federal prosecution and the Federal lawsuit cannot be ignored. At least one Staff Report recommended revision to the First Text Amendment expressly because the Maricopa County Attorney opined that state regulators could be prosecuted for federal crimes. No one can seriously argue that the Second Text Amendment was anything less than an

attempt to exclude Medical Marijuana Dispensaries. The Board of Supervisors unequivocally ignored the AMMA's direction to confine the County's regulatory jurisdiction in a manner that only impacted "specified areas" for Medical Marijuana Dispensaries.

Under these circumstances, the Court cannot harmonize the Second Text Amendment with the AMMA. Therefore, the Court finds the Second Text Amendment to be unreasonable and it is STRICKEN.

At the oral argument on the extant motions, the Court queried the parties on the potential effect of striking the Second Text Amendment. The parties have provided additional briefing as requested but on very short notice. Neither of the parties' positions sufficiently addresses the principle raised *herein,* that is, the effect of striking the Second Text Amendment as unreasonable because it violates State law that limits the regulatory power of the County.[4]

Further briefing will be ordered.

IT IS ORDERED:

- GRANTING Plaintiff's Motion for Summary Judgment, filed September 3, 2013 as set forth *herein*;

- DENYING County Defendant's Motion for Partial Summary Judgment Regarding County Zoning Ordinance, filed September 3, 2013; and

- Directing that both parties submit a memorandum of the state of the MCZO and Medical Marijuana—as a result of this Order—no later than October 31, 2013 where upon the Court will make a decision whether to supplement or amend this Order.

- VACATING the Evidentiary Hearing set for October 21 and October 22, 2013.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated

[4] The County Defendants, without substantive explanation, state the obvious: Without substitution of some amendment (through revival or affirmative action), medical marijuana is an impermissible use. The Plaintiff argues that, under the automatic revival doctrine, the First Text Amendment is revived without explaining why the absence of a finding that the Second Text Amendment is unconstitutional is immaterial.

on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.